Russian and Polish Anti-Monopoly Legislation: Laws for Two Markets Compared

Geoffrey P. Burgess

Follow this and additional works at: http://scholarship.law.unc.edu/ncilj

Recommended Citation
Available at: http://scholarship.law.unc.edu/ncilj/vol18/iss1/5
Russian and Polish Anti-Monopoly Legislation: Laws for Two Markets Compared

Cover Page Footnote
International Law; Commercial Law; Law
COMMENT

Russian and Polish Anti-Monopoly Legislation: Laws for Two Markets Compared

I. Introduction

Eastern Europe and the former Soviet Union are presently in a period of restructuring. More particularly, Poland and Russia are in different stages of transition from a centralized, state economy to a market economy. Because the former command systems focused on concentrated and centralized production, many enterprises now occupy a dominant position in their respective markets. In order to remedy this imbalance and to move towards a decentralized market system, the Supreme Soviet of the Russian Federation and the Sejm of Poland have recently enacted legislation designed to limit monopolistic activity. Both laws establish powerful administrative agencies to act as anti-monopoly boards and to play a major part of the


2 On Competition, supra note 1, art. 3; On Counteracting Monopolistic Practices, supra note 1, art. 17. Hereinafter, these administrative agencies will be referred to collectively as the anti-monopoly boards. The Russian Committee is also empowered to license com-
scheme to transform the subject economies into free-market, less centrally controlled entities.\textsuperscript{3} In order to understand the role of these two laws, it serves to examine the economic situation of both countries.

Many commentators have noted that efficient markets can be created in Eastern Europe only through a combination of four mechanisms: (1) privatization; (2) elimination of the command economy including price controls; (3) de-monopolization; and (4) trade liberalization.\textsuperscript{4} These four approaches compliment each other by empowering private business and by encouraging individual initiative; yet, the order and pace in which these reforms are implemented for different sectors of the economy are the subject of much debate. Some argue that state monopolies must be privatized and broken apart before prices are lifted.\textsuperscript{5} Others contend that trade liberalization creates effective competition within the transforming state and


For general background discussion of the Polish program, see Anti-Monopoly Office, Business News from Poland, Aug. 31, 1990; Memorandum for Development Policy, Business News from Poland, Aug. 31, 1990.


acts to temper the rent-seeking behavior of monopolies. In this regard, Russia and Poland have taken rather different approaches.

A. Changes in the Russian Economy

The former Soviet command economy, in which all economic decisions concerning allocation were made by government ministries, has undergone major change in the last five to seven years. Since 1985, enterprises have acquired increasing authority to control their own destinies. Industry has become more highly centralized and firms now tend to be more affiliated with like entities, suppliers and consumers than even their counterparts in most Western countries. For example, one industrial ball-bearing plant now serves ninety-seven to ninety-eight percent of the domestic market.

There are many stated causes for the presence of industrial monopolies: the command economy, the ideological suppression of


7 DAVID DYKER, RESTRUCTURING THE SOVIET ECONOMY 181 (1992); Alexei Klishin, Economic Reform and Contract Law in the USSR, 28 COL. J. TRANSNAT'L L. 253 (1990) [hereinafter Klishin]. See also Peter Havlik, Gorbachev's 'Reform Course Confirmed, in ECONOMIC REFORMS IN EASTERN EUROPE AND THE SOVIET UNION 89-99 (Hubert Gabrisch ed., 1989).

8 See O gosudarstvennom predpriatii (ob'edinenii) [On the State Enterprise (Association)], IZVESTIA, July 1, 1987, at 1, translated in 39 CURRENT DIGEST OF THE SOVIET PRESS (Nos. 30-31) at 8 (1987). See also Klishin, supra note 7.

9 KROLL, supra note 5, at 3-4. Some estimate that 20,000 to 30,000 Soviet enterprises should be considered "monopolistic." Dmitri Maximov, Russia's Anti-monopoly Committee: A Monopoly on Fighting Monopoly, KOMMERSANT (No. 12), at 5 (1991), translated in SOVIET PRESS DIGEST, Mar. 25, 1991.

10 KROLL, supra note 5, at 5-6.

11 Id. at 5, 8.

12 Enterprises were not allowed to "shop" for quality goods, thus inefficient suppliers of low quality goods were not allowed to die off, as they would in a capitalist market. Id. at 22-24.
small-scale enterprises, the absence of standardization, "gigantism," "perpetual" demand, and the industrial mergers of the Brezhnev years. Yet, regardless of the cause, the presence of monopolies threatens the contemporary Russian economy by their ability to increase prices, target demand or otherwise seek economic rents at the ultimate expense of consumers. Unnecessary price increases now touch a particularly sensitive nerve in the ex-Soviet economy because inflation threatens to become one of the more destabilizing forces in the country. For these reasons it has been noted that:

[T]here is only one way to introduce meaningful competition into the Soviet economy, and that is by introducing a real market. A rigorous antitrust policy, including the breakup of monopolies and strict control of mergers and cartels, could prove effective in promoting competition, but only in conjunction with macroeconomic stabilization and the introduction of a market.

B. Poland's Economic Transformation

Like the former U.S.S.R., Poland directed the economy through administrative bodies and was inclined to create a centralized production. Scarcity problems, similar to those faced by Soviet enterprises, caused Polish industry to become largely vertically integrated. It is estimated that monopolists now produce seventy

---

13 Id. at 1.
14 If parts were easily interchangeable, enterprises could change suppliers without much effort. The fact that few industries are standardized explains the extent of vertical integration. Id. at 10-12.
15 For a long while, the Soviets equated size with efficiency, even though efficiency is a product/firm specific concept. Id. at 16-17.
16 Id. at 22-25.
21 Jeffrey Sachs & David Lipton, Poland's Economic Reform, 69 FOREIGN AFF. 47, at 49-52 (Summer 1990) [hereinafter Sachs & Lipton]; Langefeld & Blitzer, supra note 4, at 363; Fox & Ordover, supra note 17, at 3.
percent of the goods of the Polish economy and represent one quar-
ter of its total number of enterprises. Nevertheless, Poland has
advanced further towards reform than Russia, particularly with regard
to anti-monopoly enforcement. Consequently, the Polish experi-
ence provides an indication as to the problems the Russian govern-
ment may face.

Prior to 1990, distortions in the pricing systems of Poland ex-
isted for three main reasons: (1) monopolies; (2) subsidies; and (3)
import distortion. Poland’s “shock therapy,” beginning January 1,
1990, did much to alleviate the distortions created by the latter two
factors, although monopolies maintain the ability to distort sub-
stantially the Polish economy. Poland’s macroeconomic stabiliza-
tion efforts included fiscal austerity, phasing out of price controls
and subsidies, and beginning the process of privatization. Poland’s
pre-1990 reforms, along with the shock program of 1990, have re-
lieved much of the inflationary pressure in part by indexing wages at
a rate below the inflation rate and by tightening credit. Although
few Poles can afford them, goods that were once rare have reap-
peared on store shelves. Structurally, the Polish economy has be-
come more decentralized than its Russian counterpart, especially in
the area of agriculture and the most monopolistic structures re-
main in the economy are distribution systems.

This Comment compares the Russian and Polish anti-monopoly
laws in order to identify their weaknesses and to determine how each

23 Langefeld & Blitzer, supra note 4, at 377-79.
25 Paul Hare & Gordon Hughes, Competitiveness and Industrial Restructuring in Czecho-
26 Sachs & Lipton, supra note 21, at 47, 54-56.
27 Hare & Hughes, supra note 25, at 40-41; Sachs & Lipton, supra note 21, at 53.
28 Sachs & Lipton, supra note 21, at 53. By mid-1991, 500 of Poland’s estimated 7,800
discussion of the legal mechanics of the Polish privatization program, see Sachs & Lipton, supra note 21, at 55. Bogdan Mroz, Poland’s Economy in Transition to Private Ownership, 43 SOVIET STUD. 677 (1991).
29 Sachs & Lipton, supra note 21, at 54-56. Marek Kulczycki, Trade and Business Oppor-
175.
30 Wellisz, supra note 24, at 174.
32 Ironically, the agricultural distribution system is regarded as highly monopolistic.
Grzegorz Gorny, Interview with Anna Fornalczyk, President of the Anti-Monopoly Office; We Are Learning Our Alphabet, GAZETA INT’L, June 28, 1990.
may aid in the reform process. Different aspects of the countries' laws are compared, including their relative spheres of application, the types of monopolistic or collusive activity they regulate, the general exemptions from the laws and the scope of remedies that each of the anti-monopoly boards may seek. Each law has potential to help competition and consumers in Russia and Poland, but much still depends on the political support and willpower that each receive in enforcement.

II. A Comparison of the Russian and Polish Anti-Monopoly Laws

A. Relative Spheres of Application - The Who and the What

1. Scope of Application

The first articles of both the Russian and the Polish laws define the basic terms of each and its scope of application. The Russian law applies to all "relations in which economic subjects and bodies of power and administration, and individual public servants take part in the activity on the republican (RSFSR) and local commodities market" on the territory of the Russian Federation. The local commodities market is considered to include "[t]he sphere of commodity turnover within the boundaries of a republic, entering into the composition of the RSFSR, autonomous regions [oblast'], autonomous territories [krai], regions, [and] territories." The Russian law also includes in the definition of economic actors any juridical person taking part in these groups so that informal associations are covered even when they do not contain a governmental element. Finally, the law on competition confers on the government jurisdiction over foreign actors whose actions restrict competition within Russia.

The Polish law, on the other hand, covers all "arrangements" and practices of "economic subjects." An "arrangement" includes "[c]ontracts," "[a]greements," and "[r]esolutions or other acts passed by the unions of economic subjects." Thus, the law apparently applies to trade associations and to agreements which are not legally enforceable. However, the head of the Anti-Monopoly Office recently took the position that the actions of trade associations, such as an association of steelworks directors, are not "economic sub-

---

33 On Competition, supra note 1, arts. 2, 4. On Counteracting Monopolistic Practices, supra note 1, arts. 1, 2.
34 On Competition, supra note 1, art. 1(1). The Law consistently refers to the RSFSR (Russian Soviet Federated Socialist Republic). Since the adoption of the Law, the official name of the country has changed to the Russian Federation. See Burger, Yeltsin's Plan for Name Wins, N.Y. TIMES, Apr. 18, 1992, at 4.
35 On Competition, supra note 1, art. 4.
36 On Competition, supra note 1, art. 4.
37 See discussion of exemptions, infra Part II.C.
38 On Competition, supra note 1, art. 2.
39 On Counteracting Monopolistic Practices, supra note 1, arts. 2(3), 2(1).
40 On Counteracting Monopolistic Practices, supra note 1, art. 2(3).
ANTI-MONOPOLY LEGISLATION

jects,” and thus are not subject to the pro-competitive regulations.\footnote{NIK Detects Steel Cartel, GAZETA WYBORCZA, Nov. 14, 1991, at 5, translated in POLISH NEWS BULLETIN, Nov. 14, 1991.}

Several differences are apparent. Significantly, economic subjects under Polish law do not include governmental agencies, as does the Russian law. It is presumed that Polish agencies will cooperate with the Anti-Monopoly Office, while the Russian law anticipates some animosity between government bodies. Given that interaction between Soviet concerns and that conglomerates and associations grew and specialized government ministries developed throughout the 1970s, this inclusion is appropriate.\footnote{KROLL, supra note 5, at 17-20, 38-46.}

The second significant difference between the Russian and Polish provisions is that the Polish law does not precisely define what constitutes commodity markets. The text of the law occasionally distinguishes between the “home” and “local” markets without definition.\footnote{On Counteracting Monopolistic Practices, supra note 1, arts. 2(6)-2(7). Other provisions merely refer to “the market.” Id. arts. 4(1)(4), 4(2)(1), 5, 11 & 12(4). Still others refer to “market share.” Id. arts. 2(7) & 7(2).} The Polish Anti-Monopoly Office is expected to define the relative market. Thus, it is possible that the body could corner an enterprise by narrowing the market delineation in order to inflate the relative market share. The Russian law specifically defines markets according to the boundaries of governmental subdivisions. Given the size and federal nature of Russia, these divisions are appropriate. While the law on competition could be difficult to apply to particularly large regions or territories, such as the Yakut Autonomous Region, this problem is somewhat self-correcting since these regions usually have significantly smaller populations and economies.

2. “Dominant Market Position” and “Monopolistic Position”

The Russian law reflects a more laissez-faire approach to the definition of dominant market position. The Russian law considers firms with the ability to limit freedom of activity of other enterprises and firms with a level of market activity which “makes access to the market difficult for economic actors” to be in dominant market positions.\footnote{On Competition, supra note 1, art. 4.} The Anti-Monopoly Committee cannot consider a firm in dominant market position unless it has a market share of more than thirty-five percent.\footnote{Id.}

The Polish law states that firms which do “not encounter substantial competition on the home or local market” are in a dominant market position.\footnote{On Counteracting Monopolistic Practices, supra note 1, art. 2(7).} Additionally, it only creates a presumption that

\footnote{KROLL, supra note 5, at 17-20, 38-46.}
\footnote{On Counteracting Monopolistic Practices, supra note 1, arts. 2(6)-2(7). Other provisions merely refer to “the market.” Id. arts. 4(1)(4), 4(2)(1), 5, 11 & 12(4). Still others refer to “market share.” Id. arts. 2(7) & 7(2).}
\footnote{On Competition, supra note 1, art. 4.}
\footnote{Id.}
\footnote{On Counteracting Monopolistic Practices, supra note 1, art. 2(7).}
firms with a market share of thirty percent are so classified.\textsuperscript{47} Thus, the Polish Anti-Monopoly Office may specifically find that firms with smaller market shares are in dominant position. The percentage of the market, of course, depends upon the definition of the market under consideration - a demarcation which is left undefined by the Polish statute. The Polish law differs substantially from the Russian statute in that it further distinguishes enterprises in a "monopolistic position" from those merely occupying a dominant position.\textsuperscript{48} An economic subject is in a monopolistic position if it "does not encounter any competition on the home or local market."\textsuperscript{49}

The definitions of "dominant" and "monopolistic" market positions in the Polish law are troublesome.\textsuperscript{50} Economic actors offering a new product into the Polish market are effectively "punished" by the heightened scrutiny accompanying such classifications.\textsuperscript{51} The approach of the Russian law is more logical because it defines one as in the dominant position only when there is an adverse affect on competition. This narrower classification may serve as a buffer from inefficient application of the law and preserves the statute's stated goal of addressing barriers to market entry facing private business.

\textbf{B. Types of Regulated Monopolistic or Collusive Activity}\textsuperscript{52}

The Russian and Polish competition laws regulate four sets of economic actors: (1) single entities; (2) groups acting in concert (horizontal and vertical agreements); (3) organs of power and administration; and (4) merging entities.\textsuperscript{53}

\textit{1. Regulation of Single Entities}

Under the contestable theory of markets, a market is functioning

\textsuperscript{47} Id. art. 2(7). \textit{See Pittman, supra note 1, at 29.}

\textsuperscript{48} \textit{On Counteracting Monopolistic Practices, supra note 1, arts. 2(6)-(7).}

\textsuperscript{49} Id. art. 2(6) (emphasis added).

\textsuperscript{50} The Sejm Select Committee has proposed in amendments to the anti-monopoly statute that the term "monopolist" shall "be used to denote every firm whose share of the market exceeds 80 percent." \textit{War on Monopoly, GAZETA WYBORCZA, June 21, 1991, at 2, translated in POLIsH NEWS BULLETIN, June 21, 1991.}

\textsuperscript{51} In fact, as of early 1991, nineteen of the Anti-Monopoly Office's thirty-nine decisions have dealt with unequal bargaining power. Grzegorz Cydejko, \textit{Anti-Monopoly Office, WARSAW VOICE, Jan. 20, 1991.}

\textsuperscript{52} It should be noted that the enabling Article of the Polish statute requires that the Anti-Monopoly Office issue cease and desist orders prohibiting an arrangement in restraint of competition if it is a "significant restriction of competition . . . and yields no economic benefits . . ." \textit{On Counteracting Monopolistic Practices, supra note 1, art. 9.}

\textsuperscript{53} The Russian law also regulates creation and liquidation of economic entities. \textit{On Competition, supra note 1, art. 17. However, because no bankruptcy law yet exists in the USSR, and because the creation and registration of economic actors is regulated by many other statutes, neither are the subject of discussion here. The law also controls acquisition of the initial capitalization stock of joint-stock companies, and is not discussed here either. Id. art. 18.}
optimally when only natural, and not artificial, barriers to entry operate to exclude new participants. Thus, the goal of antitrust legislation should be to eliminate artificial barriers. Both the Russian and the Polish laws clearly prohibit such behavior.

The Russian law limits actions of single entities occupying dominant market position. It lists as limited any arrangement, such as restricting supplies, to increase prices or the inclusion of unconscionable contract terms in agreements with suppliers or distributors. It also prohibits "encroachment upon the interests of other economic actors" as well as the "withdrawal of goods from circulation with the goal of creating or supporting a shortage on the market, or increasing prices." In 1992, a series of Presidential Decrees were enacted which led to the creation of a state Registry of Industrial Amalgamations and Monopoly Manufacturers (the "Registry"). As a result of these decrees, enterprises appearing on the Registry may not increase prices or change the assortment of goods produced without prior government approval and must pay a large tax on excess profits. The Anti-Monopoly Committee may deny certain government privileges, such as suspending export licenses, for firms which do not comply with the restrictions. As of mid-1992, approximately seven percent of all Russian enterprises were placed in the Registry. The Registry marks a potentially dangerous setback for the reform effort, in

54 Artificial barriers include (private) collusive activity and (public) regulatory restrictions.
55 KROLL, supra note 5, at 20-22.
56 On Competition, supra note 1, art. 5. On Counteracting Monopolistic Practices, supra note 1, arts. 4, 5.
57 On Competition, supra note 1, art. 5.
58 Id.
60 Ye. Shestakov, How to Defeat Monopolies, Nedelya (No. 11), at 6 (1992), translated in SOVDATA DIALINE - BIZEkON NEWS, Mar. 20, 1992 [hereinafter Shestakov].
61 V. Belikov, A "Black List" of Monopolists Has Been Compiled in Moscow, Izvestia (No. 36), at 2 (1992), translated in SOVDATA DIALINE - BIZEkON NEWS, Feb. 12, 1992.
63 Approximately 2,000 national and tens of thousands of local enterprises have been entered in the Registry. Andrei Borodenkov, Monopoly or Life, Moscow News (No. 34) Aug. 19, 1992 (interview with Leonid Bochi).
64 Shestakov, supra note 60, at 6.
that it reintroduces state determination of prices by creating ceiling limitations on natural supply and demand movements.\textsuperscript{65}

The Polish law is structured much differently. Article 4 lists certain prohibited "monopolistic practices," such as "forcing onerous contract terms," "acquiring shares or stocks of companies . . . when such acquisition could lead to a significant weakening of competition," and "having the same person combine functions of director . . . in competing economic subjects when at least one of such subjects controls 10\% of the market." Yet, an economic entity need not occupy a dominant market position to violate this article; the prohibitions apply to all agreements and arrangements.\textsuperscript{66} Articles 5 and 7 also outlaw actions by individual firms occupying, respectively, dominant and monopolist market positions. Enterprises in a dominant position are prohibited from refusing to sell or refusing to purchase commodities in a manner which discriminates when there are no alternative supply sources. Similarly prohibited are actions considered dishonest such as selling below cost. Article 7 prohibits the limitation of production in order to increase prices or asking unreasonably high prices.

The Russian anti-monopoly law is more coherent than the Polish anti-monopoly law for two reasons. First, the Russian law clearly delineates between individual anti-competitive behavior and agreements between actors, thus avoiding the conceptual and economic problems of having the same language govern both. Second, the scope of the Polish law extends to actors who do not necessarily occupy a large position of the market. Article 4 applies to all actors and Article 5 can apply to any actor if the Anti-Monopoly Office makes a determination that they occupy a dominant market position.\textsuperscript{67}

2. Groups Acting in Concert

There are two types of economic arrangements that result in artificially high profits for an economic entity: horizontal arrangements and vertical arrangements. A horizontal arrangement involves two actors who operate at the same level of production or distribution for a given commodity. For example, two automobile distribu-

\textsuperscript{65} According to the newly appointed chair of the Anti-Monopoly Committee, Leonid Bochi, the list of enterprises was created pursuant to surveys. "[P]ractically all of them [the surveys] pointed to one and the same enterprises." Andrei Borodenkov, \textit{Monopoly or Life}, Moscow News, Aug. 19, 1992 (interview with Leonid Bochi).

\textsuperscript{66} Article 4 has recently been applied to correct for unequal bargaining power in the desperate housing sector. Such regulation, even though correcting a seemingly unjust situation, has the effect of discouraging business from entering lucrative markets in need of investment. \textit{See} Fox & Ordover, \textit{supra} note 17, at 29.

\textsuperscript{67} Recall that the Russian Anti-monopoly Committee may not classify enterprises with less than 35\% market share to be in dominant position. \textit{On Competition, supra} note 1, art. 4. Further, the Russian administration may not narrow market delineation in order to inflate the relative market share. \textit{Id.}
tors are considered to occupy the same rung on the production-to-sale ladder, whereas an automobile assembler and a distributor is an example of a vertical arrangement.

Both arrangements help the organizations involved by increasing their profit margins, but each does so in fundamentally different ways. A horizontal arrangement hurts competition because collusive actors can take advantage of their market dominance to raise prices on a captive set of consumers. A vertical arrangement may hurt competition by forcing onerous terms, or it may improve the quality of a commodity or service by providing a producer more control over what actually reaches the consumer. It is important that anti-monopoly laws clearly delineate between these two types of behavior because they present theoretically distinct problems. Since it directly affects prices, the horizontal relationship is potentially more detrimental to competition; therefore, it should be more vigorously pursued. Both types of behavior are regulated by these laws.

a. **Horizontal control**

Control of horizontal agreements is the most important aspect of antitrust legislation because these relationships are more likely to harm competition directly. Both the Russian and the Polish laws forbid collusive pricing and the division of markets. The Russian law does not enumerate that agreements to restrict production or other types of expressly forbidden activities by single actors are *per se* prohibited when done by agreement. It will probably be controlled, however, by the catch-all phrase. The Polish law, however, does specifically prohibit arrangements designed to restrict production and increase prices.

b. **Vertical control**

Both the Russian and the Polish laws control arrangements between firms in dominant market positions and their suppliers or distributors which restrain competition. The difference between the vertical and horizontal arrangement, however, is not clearly outlined.

---

68 Pittman, supra note 1, at 5; Adam Smith, An Inquiry Into the Nature and Causes of the Wealth of Nations I.x.c.27 (1776).

69 See On Competition, supra note 1, art. 6; On Counteracting Monopolistic Practices, supra note 1, arts. 4, 5, 7. See also Pittman, supra note 1, at 4-9.

70 Pittman, supra note 1, at 4-9.

71 On Competition, supra note 1, art. 6. On Counteracting Monopolistic Practices, supra note 1, arts. 4, 5.

72 On Competition, supra note 1, art. 6.

73 On Counteracting Monopolistic Practices, supra note 1, arts. 1(2)(3) & 5(4). The Polish law has separate provisions for economic subjects in "monopolistic position," who by definition cannot enter into horizontal arrangements. Thus Article 7 is inapplicable here.

74 On Competition, supra note 1, art. 6; On Counteracting Monopolistic Practices, supra note 1, arts. 4-5.
in the Polish law. Special emphasis is placed on contract terms which would otherwise not be part of the bargain had one party not been in the dominant market position. Tie-in arrangements and other methods could be seen as unfair exercises of power by those who are in dominant position, although they are not necessarily harmful. The biggest shortcoming may be catch-all phrases with respect to vertical arrangements present in both laws. Because vertical arrangements are not as inherently dangerous, rigorous regulation of them often may do more to distort the economy than to correct it.

3. Organs of Power and Administration

As discussed previously, only the Russian law regulates the powers of governmental actors. It prohibits organs of power and administration from restricting competition purposely by limiting the rights of economic actors to acquire and to sell commodities by establishing bans on the sale of goods from one region of Russia to another, by limiting the establishment of new economic actors, and by unequally taxing different organizations. The provisions of the Russian law take into account the indirect effect of taxation on organizational behavior, prohibit intra-republican goods transfer, and limit restrictions on new economic entities. It is important in the analysis of this law to realize that the government of a dismantling command economy can wield important influence affecting competition. The most significant upshot of these provisions is that they allow regulation of both a state-owned economic entity and its controlling ministry (organ of power and administration), before the state entity is privatized. Thus, sovereign immunity is a less significant barrier to the implementation of competitive market reform.

4. Merging Entities

The Russian law also regulates amalgamations and affiliations of economic actors. The statute empowers the Committee to monitor amalgamations and affiliations and requires that all such mergers in
management or action, or in their entirety, be approved by the Anti-Monopoly Committee. All economic actors must submit an application to the Anti-Monopoly Committee which has thirty days to render a decision on the affiliation or amalgamation. The Anti-Monopoly Committee has the right to disapprove any merger if the resulting enterprise would "lead to dominant market position and (or) actual limitation of competition." Information concerning the amalgamation or affiliation must be forwarded to the local office of the Anti-Monopoly Committee which must respond within thirty days. Any "amalgamation or affiliation of economic actors carried out in violation of the requirements of this article is invalid."

On this level, the Polish law is much broader in scope. It requires that any "intention to merge and transform economic subjects is amenable to notification of the Anti-Monopoly Office . . . when the subject could gain a dominant position on the market or when one of the parties establishing a new economic subject is in such a position." A transformation is considered to include any "new economic subject." Thus, unlike the Russian law, any change or division of an existing economic subject or establishment of a new enterprise is subject to review.

5. Other Powers

The Russian statute contains one provision unlike any in the Polish statute. Article 10 of the Russian law outlaws certain forms of unfair competition. It states that the spreading of false information, false advertising and infringing upon trademarks constitute unfair

---

85 Id. art. 17(2).
86 Id.
87 Id. art. 17(3).
88 Id. art. 17(2). Article 20 of the Russian law indicates that if the Anti-Monopoly Committee fails to render a decision within forty-five days from the time of filing of an application, the applicant has the right to petition any competent Provincial or District People's court or Provincial State Arbitration Panel in the manner described article 20. The Russian Anti-Monopoly Committee operates via a network of local and regional and local boards, which are now in the process of being established. S. Nikitin, For Businessmen of Russia, Rossiyskaya Gazeta (No. 227-228), at 7 (1991), translated in SOVData DIALINE - BizEkon News, Oct. 31, 1991. For a general discussion of the potential effectiveness of merger control in Russia, see KROLL, supra note 5, at 38-46, 69-70.

The Polish Anti-Monopoly Office has also established a network of regional offices to smooth local privatization projects. These offices are located in Warsaw, Gdansk, Cracow, Lublin, Lodz and Poznan. Anti-Monopoly Office and Privatization, BUSINESS NEWS FROM POLAND, Mar. 8, 1991.

89 On Competition, supra note 1, art. 17(6).
90 On Counteracting Monopolistic Practices, supra note 1, art. 11(1).
91 Id.
92 The Anti-Monopoly Office has devised a form of detailed questions concerning state enterprises applying for privatization through the Ministry of Ownership Transformation. The information is supposed to help the Anti-Monopoly Office ascertain whether it is possible to break up the enterprise. Anti-Monopoly Office and Privatization, BUSINESS NEWS FROM POLAND, Mar. 8, 1991.
competition. Why this provision appears in an antitrust statute is unclear, yet the Anti-Monopoly Committee of Russia has the power to enforce any and all of the law's provisions.\textsuperscript{93} The Russian Anti-Monopoly Committee also plays a significant part in coordinating other aspects of the Russian reform process. For example, the Anti-Monopoly Committee approves privatization plans\textsuperscript{94} and monitors the observance of the recent consumer protection laws.\textsuperscript{95}

C. Exemptions

1. Intellectual Property

Both the Russian and the Polish statutes state that their provisions do not apply to relations extending from the protection of "inventions, industrial prototypes, trademarks and copyrights. . ."\textsuperscript{96} or "inventions, trademarks, decorative patterns [and] the regulations of the Copyright Law."\textsuperscript{97} The Russian law suspends this exception when possessors of such rights use them to "restrict competition."\textsuperscript{98} The Polish law affirmatively states that license contracts are subject to the law's regulation.

These exemptions are problematic in that each of these rights exists to create exclusive intellectual property rights. An inventor should hold out for the highest price in order to reward himself or herself for the invention. The anti-monopoly boards could issue orders, and thus fines, for holders of such rights to stop restricting competition, but at the same time would effectively thwart the value of such intellectual properties. The ultimate effect of these provisions can only be determined by actual implementation of these laws.

2. Labor Contracts

The Polish law provides a further exception for labor contracts "concluded by employees and trade unions with their employers for the purpose of safeguarding the employees' rights."\textsuperscript{99} It is possible that the Russian law does regulate labor relations because its definition of "commodity" includes work and services.\textsuperscript{100} However, given the intrinsic strength of labor in Russia, it is hard to imagine that

---

\textsuperscript{93} On Competition, supra note 1, arts. 22-26.


\textsuperscript{96} On Competition, supra note 1, art. 2(2).

\textsuperscript{97} On Counteracting Monopolistic Practices, supra note 1, art. 3.

\textsuperscript{98} On Competition, supra note 1, art. 2(2).

\textsuperscript{99} On Counteracting Monopolistic Practices, supra note 1, art. 3.

\textsuperscript{100} On Competition, supra note 1, art. 4.
collective bargaining arrangements would be subject to antitrust scrutiny.

3. General Exemptions for Abuse of Dominant Market Position

Both the Russian and Polish laws allow the anti-monopoly boards to exempt economic actors who prove that their activities are economically beneficial.\(^{101}\) The Russian law provides that entities who maintain a dominant market position or engage in monopolistic practices are exempt if they can "prove" that their agreements or mergers: "(1) have facilitated or will facilitate a saturation of the commodities market, (2) [improve] the commodities' consumer qualities, or (3) increase ... their competitiveness, in particular on the foreign market."\(^{102}\) These exemptions are potentially very broad,\(^{103}\) as an economic actor may argue that dominant market position is necessary to amass profits or to produce money for research and development to improve the quality of consumer goods or to make distribution more efficient. Many international competitiveness pretexts are available.

In any event, the scope of these loopholes will primarily be determined by the actual implementation of the law, which may in turn depend upon the Anti-Monopoly Committee's political support. Given that much emphasis is likely to be focused on high prices in the initial stages of the transition to the free market,\(^{104}\) and observing that the law places the burden of proof on the economic actor to show that an exemption applies,\(^{105}\) it seems that this general exemption is unlikely to be invoked widely.

The Polish law provides for a different type of exemption. A "monopolistic practice"\(^{106}\) or an otherwise prohibited abuse of "dominant market position"\(^{107}\) is excused if it is "(1) necessary to conduct an economic activity and (2) [does] not induce a substantial

\(^{101}\) On Competition, supra note 1, art. 6(3). On Counteracting Monopolistic Practices, supra note 1, art. 6.

\(^{102}\) On Competition, supra note 1, art. 6(3).

\(^{103}\) Michael Murphy, The Russian Anti-Monopoly Law, S.E.E.J., Sept. 1991, at 9. They parallel the E.C.'s "rule of reason" exemption to many collusive situations, such as price fixing. See Fox & Ordover, supra note 17, at 12-15. United States law takes a much more absolute stance on certain economic arrangement, such as price fixing. KROLL, supra note 5, at 30. Yet, prior versions of the law exempted entire industrial sectors, such as telecommunications, electric power and construction, to which this law applies. KROLL, supra note 5, at 28-30; Fittman, supra note 1, at 10-11.


\(^{105}\) On Competition, supra note 1, art. 5.

\(^{106}\) On Counteracting Monopolistic Practices, supra note 1, art 4.

\(^{107}\) Id. art. 5.
limitation on competition." Although improving international competitiveness is not mentioned, an entity subject to regulation could argue that an activity would not take place in the home market if not produced there. In any event, the international trade exemption in the Russian law is much broader. Since there is a general desire in all transitional economies to protect "fledgling" domestic industry that has not had the time to restructure and be competitive with foreign imports, the Polish law is stronger than the Russian law in providing only a limited exception. Further, the Polish law seems more effective in that it provides no general exception for an entity in "monopolistic market position."

D. Scope of Remedies

Antitrust laws have two basic goals: protecting the consumer and protecting competition. The former may be a derivative of the latter, yet the difference is still important in many situations. The tell-tale sign of a difference in approach is the selection of remedies. Price controls are more often associated with consumer protection.

1. Price Controls

Controlling prices is not considered to be the best way of restor-

---

108 Id. art. 6. The language of Article 9 indicates that such exemption is at the discretion of the Anti-Monopoly Office.
109 This is logical given Poland's emphasis on reducing import barriers to spur competition among local producers. Competition Rather Than Tariff: Interview with Anna Fornalczyk, Head of Anti-Monopoly Office, POLISH NEWS BULLETIN, Dec. 17, 1991; Sachs & Lipton, supra note 21, at 54. But see Iwona Ryniewicz, Consumers Will Pay, POLISH NEWS BULLETIN, Aug. 16, 1991; Proposed Arrangements for Car Import Quota with Western Motor Companies, BBC SUMMARY OF WORLD EVENTS, Jan. 30, 1992, at EE/W0215/A/1.
110 Competition Rather Than Tariff: Interview with Anna Fornalczyk, Head of Anti-Monopoly Office, POLISH NEWS BULLETIN, Dec. 17, 1991. See generally Fox & Ordover, supra note 17, at 9-10, 30; Sachs & Lipton, supra note 21, at 60, 63-64.
111 See On Counteracting Monopolistic Practices, supra note 1, arts. 6-7.
112 Each law contains an appellate process. The Russian law provides that decisions rendered by or fines imposed by the Anti-Monopoly Committee are appealable to the Russian Supreme Court, the Higher Court of Arbitration, Provincial or District People's court or Provincial State Arbitration Panel by economic actors or bodies of power and administration. On Competition, supra note 1, art. 28. The Polish law provides that appeals may be made only to the Voivodship Court in Warsaw (Anti-Monopoly Court). On Counteracting Monopolistic Practices, supra note 1, art. 10(1).

The Polish law allows a private actor to petition the Anti-Monopoly Office to institute a proceeding. Id. art. 21(2). No parallel provision exists in the Russian text.
113 The laws allow price controls, but may still be more geared toward the protection of competition. On Competition, supra note 1, art. 1; On Counteracting Monopolistic Practices, supra note 1, arts. 9, 12. Michael Murphy, The Russian Anti-Monopoly Law, S.E.E.J., Sept. 1991, at 11. Langenfeld & Blitzer, supra note 4, at 352-55.
114 PITTMAN, supra note 1, at 31-32. The laws also empower the anti-monopoly boards to levy fines. On Competition, supra note 1, arts. 22, 25(1); On Counteracting Monopolistic Practices, supra note 1, arts. 15, 16. The Russian law allows forcible disgorgement of profits. On Competition, supra note 1, art. 22(1).
ing vigorous competition because the government is not the ideal agent to determine the "correct" market price. Such reasoning could lead the government onto the slippery slope leading back to the command economy and re-centralized pricing.\textsuperscript{115} Both laws are lacking in this respect.

The Russian law empowers the Anti-Monopoly Committee to issue orders to cease and desist violations.\textsuperscript{116} When an actor or actors engage in an activity which artificially raises prices or restricts supply, the anti-monopoly boards have the power to order lower prices or to order that production be increased or goods be distributed to obstructed areas. The creation of the Registry of Industrial Amalgamations and Monopoly Manufacturers is the first manifestation of this power to control prices.\textsuperscript{117} The introduction of the Registry and the subsequent price controls indicate a willingness on the part of the Russian Anti-Monopoly Committee to regulate prices.\textsuperscript{118}

The Polish law more explicitly allows for price controls,\textsuperscript{119} although it also has the power to issue cease and desist orders.\textsuperscript{120} Thus, the provisions of both laws, the Polish law in particular, are potentially counterproductive.\textsuperscript{121} The Polish law also allows for regulation of commodities dumping by prohibiting "dishonest actions" including "selling below costs of production in order to eliminate

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{115} See Langenfeld & Blitzer, supra note 4, at 356, 366-67; Pittman, supra note 1, at 51-32; Fox & Ordover, supra note 17, at 20-24.
\item \textsuperscript{116} On Competition, supra note 1, art. 22(1).
\item \textsuperscript{117} See discussion in Part II.B.1.
\item \textsuperscript{118} A Useful and Harmful Decree, Moskovsky Komsomolets (No. 39), at 3 (1992), translated in SovDATA Dialine - BizEkon News, Feb. 27, 1992.
\item \textsuperscript{119} On Countering Monopolistic Practices, supra note 1, art. 8(3); Fox & Ordover, supra note 17, at 21.
\item \textsuperscript{120} On Countering Monopolistic Practices, supra note 1, art. 8(1).
\item \textsuperscript{121} Two examples are noteworthy. FSO, Poland's only mid-size car manufacturer, raised the prices for their FSO-1500 model two times in the first half of 1990. On October 8, 1990 the Anti-Monopoly Office required the enterprise to lower the price. Business News from Poland, Oct. 12, 1990. Facing bankruptcy and the potential lay-off of 25,000 workers, the management decided that they would not adhere to the order. Leszek Imijewski, FSO Under Pressure; Monopoly on Junk, Warsaw Voice, Oct. 21, 1990. An appeal to the Anti-Monopoly Court was successful on December 18. Gazeta Wyborcza, Dec. 19, 1990, at 1, translated in Polish News Bulletin, Dec. 19, 1990. The court based its decision in part on the fact that the material input costs had risen dramatically through the year. Grzegorz Cydejko, Anti-Monopoly Office, Warsaw Voice, Jan. 20, 1991. The case is currently on appeal to the Polish Supreme Court. Langenfeld & Blitzer, supra note 4, at 382. This drama is important because it shows the potential abuse of the ability to control prices and because it highlights the utility of a timely appellate process.
\item More recently, Agricultural Minister Gabriel Janowski declared that the Anti-Monopoly Office would take a more active role in determining farm prices. BBC - Summary of World Broadcasts, Jan. 6, 1992, at EE/1270/B/1. Specifically, seventeen decisions have been issued to divide local grain processing enterprises; two of the seventeen have been carried out. Langenfeld & Blitzer, supra note 4, at 383.
\item Anna Fornalczyk, head of the Anti-Monopoly Office, has stated that she views price controls as a method of last resort. Grzegorz Gorny, Interview with Anna Fornalczyk, President of the Anti-Monopoly Office; We Are Learning Our Alphabet, Gazeta Int'L, June 28, 1990. Perhaps these instances are isolated.
\end{itemize}
\end{footnotesize}
competitors.”\textsuperscript{122} Dumping in the domestic market context is considered to succeed very rarely in excluding competition.\textsuperscript{123} Only when extremely high barriers to entry prohibit firms from entering a market would underselling goods impede competition. In this situation, the activity which caused the high barriers in the first place would already be governed by Article 5(1). Thus, it seems this section of the Polish statute serves the protectionist agenda better than the goal of competition.\textsuperscript{124}

2. “\textit{Trust-busting}”

An effective anti-monopoly law should include the ability to physically divide enterprises.\textsuperscript{125} Both laws get high marks on this account. The Russian law provides that entities may be forcibly divided into separate organizations.\textsuperscript{126} Such a solution may be carried out in not less than six months\textsuperscript{127} when: (1) the production, structural subdivisions or structural units can be territorially isolated; (2) there is no technological interdependence of production; and (3) spheres of production of specialized goods may be differentiated.\textsuperscript{128}

The Polish law similarly provides that “state enterprises, cooperatives and companies of commercial law having a dominant position on the market can be divided or liquidated, when they permanently limit competition or conditions of their existence [read, create market barriers].”\textsuperscript{129} Two aspects of this provision stand out. First, only a few types of economic subjects, as defined in Article 2, are subject to this provision. Second, the entities must actually have dominant or monopolistic market position. Thus, this remedy is not available to many of the activities and enterprises subject to Article 4. This limitation is appropriate for the reasons cited previously, that the Polish law threatens overbreadth in the types of arrangements that it regulates.\textsuperscript{130}

The Polish Anti-Monopoly Office has implemented its powers to break apart enterprises. After investigating local grain producers who held a monopoly for their services in their respective markets, the Office issued seventeen decisions to divide the enterprises. Two of the seventeen have been carried out.\textsuperscript{131} In general, the Polish

\textsuperscript{122} On Counteracting Monopolistic Practices, supra note 1, art. 5(5).
\textsuperscript{123} Fox & Ordover, supra note 17, at 25.
\textsuperscript{124} But see Sachs and Lipton, supra note 20, at 54.
\textsuperscript{125} Langenfeld & Blitzer, supra note 4, at 374; Fox & Ordover, supra note 17, at 6-7.
\textsuperscript{126} On Competition, supra note 1, art. 19.
\textsuperscript{127} Id. art. 19(3).
\textsuperscript{129} On Counteracting Monopolistic Practices, supra note 1, art. 12(1).
\textsuperscript{130} But see Fox & Ordover, supra note 17, at 34-35.
\textsuperscript{131} Langenfeld & Blitzer, supra note 4, at 383.
Anti-Monopoly Office has been quite active.\textsuperscript{132} Although some have argued that the ability to break up firms is moot due to the degree of industrial concentration,\textsuperscript{133} this power is important because dominant actors can be forced into a position of competition, and not regulated into acting as if they were in competition.\textsuperscript{134}

3. Other Powers of the Anti-Monopoly Boards

Both anti-monopoly boards are also charged with recommending legislation for the effective functioning of competitive markets.\textsuperscript{135} This authority is logical given that the boards have access to an array of information concerning economic actors.\textsuperscript{136} Russia has already passed consumer protection legislation, and will continue to help guide the transition to a free market.\textsuperscript{137} The Polish Anti-Monopoly Office has proposed many regulations including a \textit{pro forma} notification request for enterprise restructuring. This form helps clarify exactly what is needed to begin the privatization process.\textsuperscript{138}

III. Conclusions

Both the Russian Law on Competition and the Polish Law on Counteracting Monopolistic Practices could effectively enforce the conditions necessary for a healthy competitive market. Although each law makes progress towards forwarding the privatization movement, there are potential weaknesses to both laws, which may hinder the development of the free market reforms. Chiefly, these are:

1. Control of organs of power and administration is an effective weapon against political circumvention, assuming the Anti-Monopoly Committee act independently. The inability of the Polish Anti-Monopoly Office to regulate this area of activity may prove to its detriment;

2. The definition of "market" in which "market share" is to be measured is fairly clear in the Russian law, and left unspecified by the Polish law. Such omission creates the possibility for "market share inflation" and, thus, overregulation;

3. The Polish law regulates "monopolistic practices" of all eco-

\textsuperscript{132} Id. at 980-84.
\textsuperscript{133} KROLL, supra note 5, at 24-25; Hare & Hughes, supra note 25, at 40-41.
\textsuperscript{134} Fox & Ordover, supra note 17, at 31-41.
\textsuperscript{135} On Competition, supra note 1, arts. 11(2), 16; On Counteracting Monopolistic Practices, supra note 1, art. 19(6).
\textsuperscript{136} On Competition, supra note 1, art. 13; On Counteracting Monopolistic Practices, supra note 1, art. 20.
nomic subjects, even those which may not occupy a substantial market position, perhaps allowing detrimental overbreadth in coverage;

4. The Polish law does not clearly distinguish between rules governing individual behavior and those controlling agreements among economic actors. This weakness is not as important by comparison;

5. Only the Russian law differentiates between vertical and horizontal arrangements;

6. Both also have fairly large loopholes that give the anti-monopoly boards the power to grant broad exemptions;

7. The laws do permit price controls, and may be serious about it, since much emphasis is now placed on the legislation's ability to control inflation. Poland's limited experience attests to this possibility. Russia has expressed a willingness to use this power actively;

8. The Polish law contains the odd proviso limiting the resale of goods below cost. This may serve protectionist goals better than competition policy; and

9. Both laws are effective in that they allow the anti-monopoly boards to "trust-bust," to break up dominant firms if necessary.

No reasoned final judgment can be rendered until the relatively new laws gain some experience in implementation.\(^{139}\) Only time will tell.

GEOFFREY P. BURGESS

---
