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Abuse-of-Dominance Provisions of Central and Eastern European Competition Laws: Have Fears of Over-Enforcement Been Borne Out?

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Fifteen years ago, when economic reformers were writing and enacting competition laws in the transition economies of Central and Eastern Europe, some critics warned that such laws, or too stringent enforcement of such laws, carried the danger of discouraging competitive behaviour and the development of markets. An examination of the enforcement experience with the abuse-of-dominance provisions of the laws of eleven countries over two separate time periods suggests that the feared evils have not materialized. Two patterns stand out in this enforcement experience: first, the number of findings of abuse of dominance has been very small in countries other than Poland, and second, a large and growing proportion of these findings of abuse have been in sectors that would in developed market economies be subject to economic regulation.

As the socialist governments of Central and Eastern European (CEE) countries were falling to the "velvet revolutions" of 1989, reformers and scholars in these countries faced a daunting task. Existing constitutional provisions and laws were either inappropriate for democratic, market economies or, if appropriate, had been more honoured in the breach than in the observance. Ministers and ministries in nominal control of particular facets of economy and society had in fact operated under detailed instructions from the communist party. New sets of market-friendly laws had to be written and enacted, new ministries and agencies created, new ministry and agency staffs trained in the science and art of encouraging and protecting, rather than suppressing, market forces.

Among the many other types of market-friendly laws proposed and enacted – contract law, bankruptcy law, land tenure law, and so on – were competition laws. Reformers and scholars in some countries (for example, Poland, Hungary, and the Soviet Union) had begun debating and drafting competition laws while socialism was still in place, while those in other countries began more or less from nothing – though in some cases (for example, Czechoslovakia and Lithuania) they began almost

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immediately after the fall of socialism. In these formidable tasks of drafting and enacting competition laws and creating and training the staffs of competition agencies, CEE reformers received technical assistance from a variety of competition agencies in other locations, especially those of the US, the European Union, and EU member countries.[1]

However, there was some controversy, especially in the US, regarding the importance and even the appropriateness of introducing competition legislation early in the transition from socialism to a market economy. Critics such as Paul Godek argued that market economies should be allowed to develop from the actions of profit-maximizing entrepreneurs free from government interference of the competition law variety:

> "The potential harm of misguided antitrust policy to newly emerging economies should not be discounted. . . . These countries will be fragile, both politically and economically, and it would not take much hindrance to stifle their development. Investors and entrepreneurs in such an environment do not need to labor under the scrutiny of antitrust bureaucrats."[2]

These critics argued in particular that the abuse-of-dominance provisions – the rest of the world's counterpart to the "monopolization" provisions of the Sherman Act in the US – of new competition laws in CEE (and other developing) countries could act as a Trojan Horse for the smuggling in of price controls and other dubious government harassment of successful enterprises:

> "Do those gentlemen advocate investigations of predatory pricing, price discrimination, vertical foreclosure, monopolization in the absence of mergers or collusion, and the rest of the excess baggage in our antitrust laws?"[3]

> "Antitrust agencies should be limited to enforce relatively specific *per se* law against horizontal price fixing and other nonambiguous forms of anticompetitive behavior. Being allowed broad prosecutorial discretion in ambiguous merger and nonmerger matters (particularly in vertical relationships and predation cases), the antitrust agency will find itself susceptible to the potentially anticompetitive rent seeking that it has a role to criticize."[4]

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[1] Kathleen E. McDermott, *Antitrust Outreach: U.S. Agencies Provide Competition Counseling to Eastern Europe*, Antitrust 6 (1991), 4–7; John Fingleton, Eleanor Fox, Damien Neven, and Paul Seabright, *Competition Policy and the Transformation of Central Europe*, Centre for Economic Policy Research, London, 1996.

[2] Paul Godek, *A Chicago-School Approach to Antitrust for Developing Economies*, Antitrust Bulletin 43 (1998), 261–274. See also Paul Godek, *Antitrust: One U.S. Export Eastern Europe Doesn't Need*, International Merger Law (September 1991).

[3] Paul Godek, *Protecting Eastern Europe from Antitrust*, Regulation (Fall 1992).

[4] Mark Williams, and Armando Rodriguez, *Antitrust and Liberalization in Developing Countries*, International Trade Journal 9 (1995), 495–518. See also Malcolm Coate, Rene Bustamante, and A.E. Rodriguez, *Antitrust in Latin America: Regulating Government and Business*, University of Miami Inter-American Law Review 24 (1992), 37–85:

> "The Latin American economies need not choose between the traditional market power and dominance approaches to antitrust policy. Instead, they can consider a hybrid policy that focuses only on the general problems of monopolies. This approach would avoid the pitfalls of a market-power-based policy in which the government attacks business practices or mergers based on speculative oligopoly theories of anti-competitive effect. Moreover, this approach would sidestep the problems associated with an over-inclusive definition of dominance, thereby limiting challenges of alleged predation, non-price horizontal restraints, and vertical restraints to those situations where enforcement is necessary to control monopoly power."

Indeed even some US enforcers and providers of technical assistance themselves cautioned against over-broad interpretations of the abuse-of-dominance provisions of the new laws:

> "In contrast to the thesis that emerging capitalist economies need clear and tough rules against cartel behavior, one must be fully aware of the dangers of expansive anti-monopoly rules. Anti-monopoly laws with broad provisions permitting intervention against dominant-firm behavior and "price gouging" pose the danger of chilling the very investment and entrepreneurship that emerging economies sorely need."[5]

> "Society suffers when antimonopoly laws and antimonopoly enforcement are either too lax or too stringent. If they are too lax, consumers pay higher prices, as, for example, competing firms merge or collude with impunity, and dominant firms effectively bar entry into their markets by erecting vertical restraints. If they are too stringent, consumers also pay higher prices, as, for example, those charged with enforcement stultify entrepreneurial initiative through their bureaucratic attempts to control prices and outputs, punish successful entrants into new markets for earning high profits or harming existing firms, and forbid firms that lack market power from extending their vertical scope of operations to its most efficient level."[6]

Now that almost every CEE country has a competition law, and that some have more than ten years of enforcement experience, it seems appropriate to ask whether the fears of over-enforcement have been borne out. Have the CEE competition agencies in fact acted as price controllers rather than as competition facilitators and protectors? Have they brought cases based on dubious or superficial or imaginative enforcement theories against firms whose only real sin was a large market share?

This article examines the enforcement experience of the CEE countries, focusing for the most part on one particular year early in the enforcement experience (usually 1996) and the most recent year for which information is widely available (2001). Unlike some previous studies that examine patterns and trends in the number of investigations opened,[7] the article focuses on decisions and rulings of the competition agencies that the law has been violated in a particular instance – that is, that a dominant position in a market has in fact been abused – on the theory that it is the agency decisions that an abuse has occurred that provide the best guidance to businesses as to what kind of behaviour is and is not permitted. The article then examines in greater detail some of the findings of abuse. One interesting test, for example, may be the extent of cases attacking predatory pricing. Such cases are one of the greatest fears of those concerned about over-enforcement, since predatory pricing cases attack enterprises for setting prices too low, and the remedy may be to raise prices.

Before proceeding, however, it may be useful to note one potentially important qualification concerning the fears of over-enforcement – and one that may also be examined in the case experience. No developed market economy in the world relies on

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[5] Robert Willig, *Anti-Monopoly Practices and Institutions*, in Christopher Clague and Gordon C. Rausser, (eds), *The Emergence of Market Economies in Eastern Europe*, Blackwell, Cambridge, MA, 1992.

[6] Russell Pittman, *Some Critical Provisions in the Antimonopoly Laws of Central and Eastern Europe*, The International Lawyer 26 (1992), 485–503.

[7] For example, Fingleton, *et al*, as note 1 above.

competition to protect customers from abusive behaviour in all sectors. Certain sectors with very high levels of fixed and sunk costs, typically sectors exhibiting strong demand externalities as well, have been treated as "natural monopolies" and have been either closely regulated by government agencies (as is typically the case in the US and the UK) or owned and operated by governments (the usual tradition in the rest of Western Europe and elsewhere). Even as portions of these sectors have been liberalized throughout the world in recent years,[8] government regulation of their core "grids" has usually remained.

A decade ago, Janusz Ordover, Paul Clyde, and I[9] noted that many CEE and other transition countries were setting up competition agencies but were not yet setting up agencies for regulating the behaviour of these "natural monopolies" in sectors like energy, telecommunications, and transport. The rationale behind this uniform choice of policy sequences was not and is not entirely clear. It was likely assumed that government-owned enterprises in these sectors would be privatised more slowly than those in sectors such as manufacturing, mining, and distribution, so that the government could protect consumers through its direct control rather than through regulation. It is possible that policy makers chose a German-style system of *ex post* competition law enforcement in public utility sectors over *ex ante* regulation, but there is no (apparent) evidence that a conscious choice of this type was made. More recently, probably partly in response to abusive behaviour and partly in response to the requirements of the European Community's *acquis communautaire*, most CEE countries have created sectoral regulatory agencies, particularly in the telecommunications and energy sectors.

In the early absence of such agencies, Ordover, Clyde, and I argued that the competition authorities were the only government bodies able to protect the citizenry from monopoly abuses, and that these authorities should act as "quasi-regulators" of these "natural monopoly" enterprises, using as their regulatory weapon the abuse-of-dominance provisions of the competition laws, until regulatory agencies were created to take their place.

There were strong criticisms of this recommendation, but they came mostly from the heads of the competition authorities themselves: these officials believed that getting the job of competition authority done right was challenge enough, and they did not want their staff to have any excuse for slipping into the bad old habits of assuming that

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[8] David M. Newbery, *Privatization, Restructuring, and Regulation of Network Utilities*, MIT Press, Cambridge, MA, 1999; Christian von Hirschhausen, *Modernizing Infrastructure in Transformation Economies: Paving the Way for European Enlargement*, Edward Elgar, Cheltenham, UK, 2002; Russell Pittman, *Vertical Restructuring (or Not) of the Infrastructure Sectors of Transition Economies*, Journal of Industry, Competition and Trade 3 (2003), 5–26.

[9] Janusz Ordover, and Russell Pittman, *Comments on 'Competition Policy During Transformation of a Centrally Planned Economy'*, in Barry Hawk, ed., *International Antitrust Law and Policy*, Annual Proceedings of the Fordham Corporate Law Institute, New York, 1993; Janusz Ordover, Russell Pittman, and Paul Clyde, *Competition Policy for Natural Monopolies in a Developing Market Economy*, Economics of Transition, 2 (1994), 317–344.

price controls were the answer to market power problems.[10] At the same time, as the agencies were faced with the reality of abuse actions by natural monopoly enterprises and the absence of any other government agencies with jurisdiction, they chose to take enforcement actions. As one agency noted in a report early on:

> "It is quite evident that a clear majority of administrative proceedings conducted in 1990-1993 against individual practices concerns the activities of enterprises operating in the position of a natural monopolist on the national or (most often) local market. In particular, these were producers and distributors of electric and heat energy, gas, providers of telecommunications and transport services, suppliers of water and removers of liquid wastes. Antimonopoly actions in this area were directed above all toward making natural monopolists cease imposing on their customers, especially consumers, undue performances [*sic*] to cover the development costs of the monopolist's enterprise and often the costs of its inefficiency. Many of these cases, however, are largely a consequence of the lack of a proper regulation of the legal position and activity of natural monopolists in conditions of the formation of the market economy."[11]

This author is not aware of responses to this recommendation of "backstop" or "last resort" regulation from the analysts who originally argued against the introduction of competition statutes on the basis of fears of over-enforcement. It is probably fair to assume that at least some of these analysts would concede at least some legitimate role for some regulation of some "natural monopoly" sectors, and thus to assume that abuse-of-dominance enforcement against enterprises that in most market economies would be subject to government price regulation may be broadly considered as less dangerous to the development of a market economy than such enforcement in other sectors.

I. The Data

The initial plan of the project was to examine the case experience of as many CEE countries as possible, for two years, 1996 and 2001. The hope was that this set of cases both would allow for examination of a reasonably large and representative group of cases and might reveal any time trend in CEE enforcement patterns. Every competition agency decision in which abuse of a dominant position was found was collected for eleven countries: Bulgaria, Croatia, the Czech Republic, Estonia, Hungary, Latvia, Lithuania, Poland, Romania, Slovakia, and Slovenia. I believe that there is little or no enforcement experience yet in the remaining CEE countries of Albania, Bosnia-Herzegovina, Macedonia, Moldavia, and the Federal Republic of Yugoslavia.

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[10] See, for example, Anna Fornalczyk, *Competition Policy During Transformation of a Centrally Planned Economy*, in Barry Hawk, ed., *International Antitrust Law and Policy*, Annual Proceedings of the Fordham Corporate Law Institute, New York, 1993. Note that this phenomenon supplies at least a few data points in contradiction to those members of the public choice school who work under the assumption that government bureaucrats always behave imperialistically.

[11] Polish Antimonopoly Office, *Competition Law and Policy in Poland (1990–1993)*, Warsaw, January 1994. At about the same time, the Slovak Antimonopoly Office was referring to the same problem in its annual report (for 1993): "It remains typical that in the Slovak economy, there are a great number of enterprises with monopolistic and dominant position. In general, this phenomenon is concentrated in Slovakia in the field of so called natural monopolies."

For eight of the eleven countries with significant enforcement experience – all of the original list except for Croatia, Poland, and Romania – the data include all decisions finding abuse in 1996 and 2001. For Croatia and Romania, 1997 was the first full year of enforcement, so cases from 1997 rather than 1996 are included along with cases from 2001. Some of these decisions are described fully in the annual reports of the various authorities, but many more required sustained discussions with staff members of these authorities and sometimes a good deal of research and compilation on their part.

The data for Poland presented problems not so directly solvable. The Polish Antimonopoly Office – which, as we will note below, has had far more abuse-of-dominance findings than any other authority in the sample – has nine regional offices, and each of these, plus the headquarters office, has the authority to issue rulings and decisions. For the year 2001, the international department of the Office was able to provide information on all rulings from all the offices, so the information here is complete. For the year 1996, the international department was able to report that there were 62 cases where abuse was found, but no further information had been compiled, and the task of assembling and then analysing case information from all nine-plus-one offices was beyond the resources of this project (and that department). So we have the number of rulings that abuse had taken place for 1996, but no further details on the cases.

To get the best idea possible of what those 62 cases might have looked like, I consulted an unpublished volume titled "Decisions of the Antimonopoly Office" that had been translated and assembled during the period of time when US technical advisors had been in residence in Warsaw, working with the Antimonopoly Office. The volume contains complete translations of 67 antimonopoly "decisions": 43 by the Antimonopoly Office itself, 22 by the Antimonopoly Court (the venue of first appeal for decisions of the Antimonopoly Office), and two by the Supreme Court. The dates of the decisions run from 1990 through 1994. There is no introduction to the volume, but two of the US advisors who were present in Warsaw at the time and the principal Polish translator of the decisions believe that this volume is a complete record of decisions for this time period. Thus I have used the characteristics of the abuse-of-dominance rulings of the Antimonopoly Office included in this volume – 21 in all – to make inferences concerning the more detailed characteristics of the 62 rulings made in 1996.

II. Findings

Table 1 shows the number of rulings that there was an abuse of a dominant position in the eleven countries under examination here for the years 1996 (except as noted) and 2001. The first notable point shown by the table is the very small number of abuse rulings in most countries. For the countries other than Poland, there were only 43 such decisions in 1996 and only twelve such decisions in 2001 – averages of 4.3 and 1.2 rulings of abuse per country in the respective years. In four countries, there was

only one finding of abuse in the first year in the sample, and in four countries as well – two the same, two different – there were no findings of abuse at all in 2001. By virtually any standard, these are small numbers of abuse rulings, and it is difficult to believe that businesses in these countries felt that their incentives for competing were stunted by this level of competition law enforcement activity.

TABLE 1. AGENCY FINDINGS OF ABUSE OF DOMINANCE, 1996 AND 2001

Country	Rulings of Abuse, 1996*	Rulings of Abuse, 2001
Bulgaria	1	6
Croatia	10	3
Czech Republic	13	1
Estonia	1	1
Hungary	10	2
Latvia	3	1
Lithuania	6	0
Poland	62	68
Romania	1	0
Slovakia	2	1
Slovenia	1	0
Total	**110**	**83**

*1997 for Croatia and Romania

The second finding that stands out is the declining trend in the number of findings of abuse from 1996 through 2001. Even with the slight increase in the number of such findings in Poland over this period, their total number falls by almost 25 percent. If we again examine all countries except Poland, the number of findings of abuse drops by over 70 percent, from 53 to fifteen. Declines are present as well in the number of abuse findings for eight of the countries individually. So not only is the total number of CEE agency findings that enterprises abused a dominant position *small*; it is also *declining* as the enforcement experience grows. Again, in ten of the eleven countries seen here, it is difficult to believe that abuse-of-dominance enforcement by the competition authorities is acting as a constraint on the ability of entrepreneurs to compete fairly.

The Polish case is of course the exception, and the reason for the stark difference with the other CEE countries is not obvious. It is certainly not a matter of low staff quality; on the contrary, the Polish Antimonopoly Office has been widely considered to have one of the best staffs among the CEE agencies over the years. One may speculate that one factor was the presence of a strong, activist founder and president of the Office, Professor Anna Fornalczyk, though here the obvious response is that the Hungarian authority had its own strong, activist founder and president, Professor Ferenc Vissi, and its experience is not much different from that of the other countries. One hypothesis that may bear further investigation is that the presence of a number of regional offices, each with enforcement autonomy, may act as a spur to the number of

investigations and findings of abuse. Poland is unique among the countries examined here in both the number of regional offices and the autonomy granted to them. One country not examined here, the Russian Federation, has also exhibited a large number of findings of abuse of dominance from its large number of regional offices.[12]

In any case we may note that of the eleven CEE countries examined here, the one with by far the highest number of abuse-of-dominance rulings over the years, Poland, is also the one with the highest rate of GDP growth for the period 1990-2002. I certainly do not argue that the former has caused the latter; at the same time, it would seem counterintuitive to argue that the region's highest rate of economic growth has been *harmed* by the region's most intensive abuse-of-dominance enforcement. It could also be the case that such a high level of enforcement activity is in response to, or jointly determined by, the high level of economic growth. For example, the Polish Antimonopoly Office may have been the only one in the region with confidence that it could not be blamed for the country's disappointing macroeconomic performance. Or it may be that the countries with the lowest levels of growth are also those with the lowest levels of transformation and privatisation, so that there are relatively fewer private enterprises in dominant positions.

Regarding the types of cases brought by the CEE competition agencies, two characterizations stand out from the data. The first would merit its own Table, except that the Table would mostly be a collection of zeros, and that concerns the frequency of findings of predatory pricing by these agencies. As noted earlier – and expressed by some of the commentators cited – predatory pricing cases were and are one area of special concern regarding over-enforcement of abuse-of-dominance provisions.[13] Even developed country competition agencies receive constant complaints from entrepreneurs that the prices charged by their competitors are so low that they must be predatory, and one imagines that it would be especially tempting to act on these complaints if most of them were from small, domestic companies regarding the pricing behaviour of large, multinational enterprises. In fact only nine of the 193 abuse findings in the sample are findings of predatory pricing, and seven of these are from in Poland in 2001. (The two exceptions are from the regulated local bus sector in Croatia in 1997.) As a possible trend – for Poland, at any rate – this may not inspire optimism, but as on overall observation for the 193 abuse findings from eleven countries in two separate years, it is an undeniably small number.

The second interesting pattern taken by the cases concerns the competition agencies as quasi-regulators in the absence of traditional economic regulatory bodies. As

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[12] Sarah Reynolds, *Barriers to Effective Enforcement of Competition Law in the Russian Federation*, presentation at the Roundtable Discussion on the Future of Antimonopoly Policy in the Russian Federation (Moscow, 17 November, 2003)

[13] See also Coate, Bustamante, and Rodriguez, as note 2 above:

"An active predation policy must carefully focus only on exclusionary tactics of would-be monopolists, rather than on the interactions associated with robust competition. This focus has particular importance in Latin America, where small firms may accuse their large rivals of predation when the large firms introduce new competitive tactics in response to shifts in the market economy. Given the unilateral nature of monopolization, distinguishing these predatory strategies from active competition is difficult."

noted earlier, in most CEE countries, competition agencies have been created far in advance of economic regulatory agencies; in fact in a few countries there remain no such regulatory agencies, and in others they even today have limited responsibilities or capabilities. The result is that the competition agencies have been the only government bodies with power to control the behaviour of "natural monopoly" sectors, and they have done so under the abuse-of-dominance provisions of their laws. Three case examples may make the experience clearer.[14]

A. HOBYT BRATISLAVA AND ZAPADOSLOVENSKE ENERGETICKE ZAVODY, S.P. BRATISLAVA ("ZSE")

In 1997, the local electricity distribution company for the city of Bratislava, Slovakia notified a commercial customer, Hobyt, that according to its records Hobyt had been incorrectly granted a low price for its electricity purchases in 1995 and 1996, and that based upon its quantity of purchases it should have paid a higher price – which it now owed. Hobyt refused to pay this *ex post* price increase, and ZSE notified Hobyt that its electric power supply would be cut off. Hobyt complained to the Slovak Antimonopoly Office, which ruled that ZSE was in a dominant position and that to threaten a cut off of supply in response to a contract dispute was an abuse of that dominant position.[15]

Note that this is the sort of dispute between a natural monopoly public utility and one of its customers that would be handled as a matter of course in developed market economies by a regulatory agency, perhaps even a local or municipal regulatory agency. With no such agencies present, the customer had no alternative to the antimonopoly authority as a government body to protect it, and the Slovak authority was able to do so using the abuse-of-dominance provisions of the Slovak competition law.

B. ESTONIAN COMPETITION BOARD VS. EESTI TELEPHON

In 2001, the Estonian telecommunications market was partially opened up to entry by private service providers, with the incumbent fixed wire monopolist ordered to provide interconnection to entrants providing international and domestic long distance service. The fixed wire incumbent, Eesti Telefon, responded by reclassifying and restructuring its tariffs in such a way that its overall tariffs and revenues would be dramatically increased. The competition authority investigated the new tariff structure and, after examining current company profitability, cost changes, and inflation, determined that there was no justification for such large tariff increases. It concluded

[14] See also Janos Volkai, *Breaking the Deadlock: How Should Transition Economy Competition Authorities Address Regulatory Evasion Cases in the Future?*, Discussion Paper, OECD, 2003.

[15] The case description is taken from the 1997 Annual Report of the Slovak Antimonopoly Office.

that Eesti Telephon was abusing its position of dominance on the market for local telephone services, and ordered the new tariff structure rescinded.[16]

This case, like the previous one, concerned matters that in developed market economies are entirely under the jurisdiction of economic regulatory bodies – in this case, the overall level and structure of user tariffs. By 2001, Estonia had a telecommunications regulatory body, the Estonian Communications Board, but its tariff jurisdiction was limited to interconnection charges, not user tariffs. Thus again there was no alternative regulatory body to the competition authority.

C. Slovak telecommunications

In 2000, the Slovak Antimonopoly Office began an investigation and proceeding in response to complaints concerning the terms of access provided by the incumbent fixed wire telecommunications monopolist, Slovak Telecommunications (ST), to competitors in upstream telecommunications markets. The Office ruled that ST was both a) charging a higher price for access to the local network to independent internet service providers (ISPs) than it charged to its own, vertically integrated ISP, and b) providing inferior access quality to the same independent ISPs, by "fitting a frequency filter to their leased local circuits, thus limiting the quality of data transfer" between the independent ISPs and their customers. However, ST appealed this decision to the Supreme Court, and the Supreme Court returned the decision to the Antimonopoly Office for more extensive justification of its findings, including a more formal consultation with the Slovak Telecommunication Office. The matter is ongoing at the time of writing.[17]

In this case the investigation is similar to investigations taking place in developed market economies, where under different governmental and legal structures either the telecommunications regulatory agency, or the competition agency, or both, may have jurisdiction over questions of discriminatory terms of access to the local telecommunications grid that may harm competition in vertically related markets.

Table 2 lists the sectors that have been considered here as traditionally regulated. To test the robustness of the results, I have classified some sectors as "borderline" regulated, so that we may consider the pattern with these sectors considered in either the regulated or unregulated category.

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[16] The case description is taken from the 2001 Annual Report of the Estonian Competition Board.

[17] The case description is taken from the 2001 Annual Report of the Slovak Antimonopoly Office. The Lithuanian Supreme Court recently upheld on appeal an abuse finding by the Competition Council of Lithuania against Lietuvos Telekomas for very similar behaviour: "Holding a dominant position in the fixed public telecommunications and communications network lease markets AB 'Lietuvos Telekomas' has passed a decision [to] block the lines leased to UAB 'Interprova' and about 30 other companies providing the Internet telephony services."

TABLE 2. REGULATED INDUSTRIES

Regulated Sectors	Borderline Regulated Sectors
Postal services	Air transport
Electricity	Medical and health services
Telecommunications	Funeral, cremation, and cemetery services
Internet services	Waste disposal
Natural gas distribution	Local bus transport
Banking and financial services	Insurance
Cable television	
Water transport	
Water supply	
Local heating services	

Tables 3 and 4 show the number of abuse findings in 1996 and 2001 that were in "regulated industries", first narrowly and then more broadly defined.

TABLE 3. NUMBER OF ABUSE FINDINGS IN REGULATED INDUSTRIES, 1996

Country	Abuse findings	Regulated (narrow)	Regulated (broad)
Bulgaria	1	1	1
Croatia	10	1	7
Czech Republic	13	6	8
Estonia	1	1	1
Hungary	10	6	7
Latvia	3	2	2
Lithuania	6	2	2
Poland	62	18	24
Romania	1	0	0
Slovakia	2	1	2
Slovenia	1	0	1
Total	110	40 (36.4%)	57 (51.8%)

TABLE 4. NUMBER OF ABUSE FINDINGS IN REGULATED INDUSTRIES, 2001

Country	Abuse findings	Regulated (narrow)	Regulated (broad)
Bulgaria	6	4	6
Croatia	3	0	2
Czech Republic	1	1	1
Estonia	1	1	1
Hungary	2	2	2
Latvia	1	0	0
Lithuania	0	0	0
Poland	68	35	58
Romania	0	0	0
Slovakia	1	0	0
Slovenia	0	0	0
Total	83	43 (51.8%)	70 (84.3%)

As with our first examination of the overall pattern of findings of abuse, there are two interesting patterns apparent in the data. The first is the very high share of abuse cases that are in sectors normally considered "regulated" in market economies – in both years, and under both a narrow and a broad definition of "regulated". Under even a narrow definition of regulated sectors, in 1996 more than an estimated one-third of abuse cases in CEE countries were brought in these sectors – evidence of an important role for the antimonopoly authorities in these countries as quasi-regulators in the absence of economic regulatory bodies, and evidence that even the small number of abuse-of-dominance findings observed is significantly inflated by the extra duties imposed upon competition authorities in these countries.[18] This proportion rises to about one-half under a broader definition of regulated sectors.

What may be more remarkable, however, is once again the intertemporal trend. The proportion of abuse-of-dominance findings that are accounted for by sectors that are traditionally considered regulated increases from 36 to 52 percent from 1996 to 2001 under the narrow definition and from 52 to a remarkable 84 percent under the broader definition. And again, while the Polish results dominate the totals, the results from other CEE countries are consistent with them: in 2001 in the CEE countries other than Poland, there were fifteen findings of an abuse of a dominant position; of these, eight and twelve were in regulated sectors, using respectively the narrow and broad definitions.[19]

III. Discussion

The data assembled here on patterns of abuse-of-dominance enforcement in eleven CEE countries – though notably and importantly excluding Russia – would seem to lead to several clear conclusions.

First of all, in ten of the eleven countries – all except Poland – the number of findings of abuse of a dominant position by competition authorities has been so small – and declining over time – that it is nearly impossible to believe that enforcers have discouraged aggressive, "hard" competition by entrepreneurs. The one country with a larger number of such findings, Poland, has been so relatively economically successful over the past decade that it seems at the least very doubtful that an over-aggressive competition law enforcer has stood in the way of faster growth.

Second, and again with the exception of Poland, there is very little evidence in this collection of case findings of competition agencies discouraging price cutting and aggressive market entry by bringing predatory pricing cases.

Third, a large and growing number of the findings of abuse of a dominant position in these eleven countries are in sectors that in developed market economies typically

[18] Recall, however, that the composition of the Polish cases in 1996 is not taken from the 1996 cases themselves but is estimated from the composition of cases in the 1990–1994 period.

[19] Sarah Reynolds, as note 12 above, finds similar patterns in the Russian abuse-of-dominance rulings.

operate subject to economic regulation. In these countries, economic regulatory agencies are typically either absent or just beginning their work, and the competition authorities have acted as backstop regulators, protecting the population from the worst of monopoly abuses.

Indeed it is difficult to examine these results without coming to a conclusion directly opposite to the fears expressed by the early critics: the competition agencies in the eleven CEE countries with significant enforcement experience have in fact enforced the provisions of their laws against abuse of a dominant position with strikingly low frequency. In seven of the eleven countries there have been fewer than ten abuse findings in the two years examined here. In four countries in 1996 or 1997 and in seven countries in 2001, there were either one or zero findings of abuse. And if the "regulatory" cases are subtracted, these case totals become correspondingly smaller.

Is it possible that there is simply little or no abuse of a dominant position taking place in (the "non-regulated" sectors of) these countries? Of course it is. It is also possible that the competition agencies in the CEE countries have trouble recruiting and retaining qualified staff, so that they are unable to successfully prosecute abusive behaviour by dominant enterprises, especially large, multinational enterprises. It is also possible that political or other extraneous considerations may affect enforcement decisions in particular CEE countries, so that staff members, managers, and/or decision makers scuttle prosecutions that would otherwise be successful.

One thing seems clear, however: the answer to the question posed at the beginning of the article. In ten and probably eleven CEE countries, it is exceedingly difficult to make the case that the competition authorities have sanctioned abuse of a dominant position with excessive frequency and so, through over-enforcement of these provisions of their laws, hampered the development of market economies. Indeed it seems – though this is beyond the topic of this article – much more likely that some abusive behaviour is taking place in these countries without sanction, and that the development of markets would likely be encouraged rather than hampered by more aggressive enforcement of the competition laws.