1. INTRODUCTION

This comment will seek to consider the ramifications upon the Polish nation and economy of its failure to implement a significant number of European Union ("EU") directives. More generally, it will examine the effectiveness of the current compliance-based regulatory model employed by the EU to create the world's most competitive economy and whether the administrative homogeneity endorsed by the EU will be effective in promoting economic progress in light of the Polish case. In addition, the comparative advantages of possible legal and policy-based alternatives to the compliance-based directive model will be considered.

Section 2 is devoted to discussing the process of EU enlargement, specifically, the problems encountered in admitting ten new members, and the regulatory approach employed in order to ameliorate national differences. Section 3 looks specifically at Poland, which has failed to implement a significant number of directives, and the causes for and effects of these transpositional deficiencies in the short-term. Section 4 considers the long-term effects of these failures, arguing that Polish compliance with certain directives is essential to the achievement of long-term developmental goals while non-compliance with other measures may actually prove
beneficial and underscore problems in the European Union's current system of governance. Section 5 considers the implications of this analysis on the regulatory model and suggests that a more diversified approach is preferred to the current reliance on a largely compliance-based model.

2. EU ENLARGEMENT

2.1. Enlargement Considerations

At present, the EU is in a stage of radical evolution. The Union originally began as the European Coal and Steel Community in 1951 with just six countries—Germany, France, Italy, the Netherlands, Belgium, and Luxembourg, but, with the recent accession of ten Central European countries, the EU now boasts twenty-five members and stretches from Portugal to Poland. Numerically, the recent addition of ten nations marks the biggest expansion that the EU or its predecessor institutions has ever experienced. Moreover, and perhaps more importantly, the new additions to the EU are marked by significant social, political, and economic differences, as compared to the existing members. The new EU entrants are significantly poorer than existing members, with average GDP

1 See Treaty Establishing the European Coal and Steel Community (ECSC), Apr. 18, 1951, 261 U.N.T.S. 140.

2 Enlargement will be significant on a number of fronts—increasing the number of members by 66% to 25, increasing the land mass by 19% or 4 million square kilometers, and increasing the population by 20% to over 450 million inhabitants. See Anca Pusca, European Union: Challenges and Promises of a New Enlargement 73 (2004).

3 Anca Pusca notes three key differences between the most recent EU enlargement and previous expansions: (1) income levels in many of the newly admitted countries are considerably lower than that of existing members, (2) the new admittees only recently transitioned from a centrally planned to a market economy, and (3) the volume of EU legislation that these new members are having to adopt is far more extensive than in previous enlargements due to enhancements in the Single Market. See id. at 160. Differences between new and existing EU members are not limited to the economic realm but are also evidence in the social arena. See Adam Michnik, The Conversation with Leszek Kolakowski, GAZETA WYBORCZA [CONSTITUENT GAZETTE], Nov. 21-22, 1992 ("At the beginning was this idea: we are coming back to Europe.... But a moment later appeared the thesis that we had no reason to come back to Europe. First we were in it the whole time; secondly, this Europe is not so beautiful. Because Europe means relativism, godlessness, drugs, pornography, abortions, divorces, homosexuality—in one word—Babylon, Sodom and Gomorra.").
per person at only half that of existing member states. According to World Bank reports, it could take more than twenty years for the Central-Eastern European ("CEE") countries, including Poland, to reach the EU's average level of 1994 GDP per capita. These economic and social shortcomings have raised considerable concerns among existing and new members about the manner in which integration into the Union should proceed. As a single market based on free circulation and integrated activity, the EU is particularly vulnerable to the lingering problems that characterize its new members.

Consequently, the EU devoted considerable time and resources to negotiating the precise terms of entry with applicant nations, in the hope of controlling the manner and effect of accession on the new states as well as on the EU as a whole. Preparation began in

4 EU Gets Bigger, STRAITS TIMES (Singapore), May 1, 2004; see also U.S. Central Intelligence Agency, The World Factbook 2005, available at http://www.cia.gov/cia/publications/factbook/rankorder/2001rank.html (last visited Feb. 18, 2006) (indicating that the GDP of Poland in 2005 was only $468 billion, while that of the EU at the same time amounted to more than $12 trillion).

5 See WORLD BANK, WORLD DEVELOPMENT REPORT 1996: FROM PLAN TO MARKET 43 (1996) ("Most estimates based on actual conditions in Germany place the catch-up period for eastern Germany at between ten and twenty years; by implication, the catch-up period for the CEE countries and the NIS would be longer, because they lack eastern Germany's favorable initial conditions and rich 'big brother.'"); cf. A Club in Need of a New Vision, ECONOMIST, May 1-7, 2004 (referencing forecasts that indicate it will take Poland "59 years to catch up with the EU average of GDP per head").

6 The freedoms underpinning the EU are the freedom of establishment, freedom of services, and free movement of goods, services, and capital. Treaty Establishing the European Economic Community arts. 48-73, Mar. 25, 1957, 298 U.N.T.S. 3 [hereinafter EEC Treaty]. A European Commission White Paper explicitly stated the importance of legal and economic uniformity within a system characterized by such freedom. See Commission White Paper on Preparation of the Associated Countries of Central and Eastern Europe for Integration into the Internal Market of the Union, at 8-9, COM (1995) 163 final (May 3, 1995) [hereinafter White Paper] ("An internal market without frontiers relies on a high level of mutual confidence and on equivalence of regulatory approach. Any substantial failure to apply the common rules in any part of the internal market puts the rest of the system at risk and undermines its integrity.").

7 By most accounts, the negotiations and requirements involved in the most recent round of EU expansion were considerably more elaborate and stringent than those of any preceding expansion. Negotiations were preceded by an elaborate screening process designed to elucidate areas in which each candidate country already approximated EU norms and standards and those in which further convergence was required. Negotiations were then begun on the specific terms and conditions of entry as well as on transitional periods for conformity with the most expensive EU policies. The European Commission was assigned the task of monitoring candidate efforts at conformity and issuing annual reports on appli-
June 1993, when the European Council declared that all of the Central European nations that entered into Europe Agreements might ultimately join the European Union, provided that they satisfied three pre-conditions (the "Copenhagen criteria"): 1) stable institutions guaranteeing democracy and the rule of law, with full respect for fundamental human rights and the protection of minorities; 2) a functional market economy, with free market competition, and the ability to cope with competitive pressure and market forces within the Union; and 3) the ability and the administrative infrastructure necessary to fulfill all of the obligations of membership. 8

2.2. Establishing a Regulatory Framework

The EU followed up this mission statement by requiring CEE countries seeking EU membership to converge with and maintain the acquis communautaire, namely the whole body of political, institutional, and legislative achievements of the existing EU. 9 Acquis communautaire is not defined legally but rather is a term of art that originates from articles 2 and 3 of the EC Treaty. 10 The phrase encompasses not only the primary and secondary law of the EU, but also Court of Justice decisions and the EU’s institutional legal obligations. 11 Some scholars have argued that the acquis communautaire encompasses even the general policies of the EU and the administrative capacity to implement and enforce them. 12 The vast body of
acquis communautaire is comprised of a variety of specific legal and legislative measures, including EU regulations and directives.

Directives, although theoretically vague in nature, have become relatively specific in reality and proven instrumental in elucidating an accession program\textsuperscript{13} for new members and harmonizing divergences in the integrating markets.\textsuperscript{14} Article 189 of the Treaty Establishing the European Economic Community ("EEC Treaty") defines directives flexibly and provides that a "[d]irective shall bind any Member State to which they are addressed, as to the result to be achieved, while leaving to domestic agencies a competence as to form and means."\textsuperscript{15} Therefore, unlike regulations, directives require the formal support of the legislature of the implementing nation. Theoretically at least, the actual detail and method of implementation is to be left to the member state, so that its own domestic legislation can be amended as appropriate to achieve the goal of harmonization described in the directive. Essentially, "transposition of the directive into national laws and the choice of the 'most appropriate forms and methods' of administrative application were expected, with the European Commission and the European Court of Justice empowered with the right to judge and punish transgressors."\textsuperscript{16} As a result, directives now perform the bulk of

\textit{Harmonizing Polish Environmental law with EC Environmental Law, in REFORM IN CEE-COUNTRIES with REGARD TO EUROPEAN ENLARGEMENT 29, 30} (Michael Schmidt & Lothar Knopp eds., 2004) (arguing that the acquis communautaire may be construed to encompass both EU policies and their implementation).

\textsuperscript{13} In addition to directives, the \textit{White Paper} contained a detailed appendix of about 438 pages that was designed to serve as a strategic roadmap for candidate governments as they worked to align domestic legislation and practice with EU norms. Specifically, the Commission provided an overview of existing legislation and of key measures that needed to be implemented in applicant states to facilitate alignment. \textit{See White Paper, supra} note 6.

\textsuperscript{14} \textit{See Sofia Arana Landin, Abuse of Law Within the European Union, in LEGAL ASPECTS OF EUROPEAN INTEGRATION 81, 81} (Malgorzata Krol ed., 1999). In her article she writes:

Steps are being taken in order to harmonise up to a point different aspects of law within the Union. They sometimes take the form of Directives, others of Conventions but notwithstanding the form adopted, they have the purpose of being applied by Member States in order to achieve a certain harmonisation in specific matters that can be considered to be problematic for the common market.

\textit{Id}.

\textsuperscript{15} EEC Treaty art. 189.

\textsuperscript{16} FRANCESCO G. DUINA, HARMONIZING EUROPE 5 (1999); see also Isabella Martin, \textit{The Limitations to the Implementation of a Uniform Environmental Policy in the Published by Penn Law: Legal Scholarship Repository, 2014}
internal market regulation in the EU, and entrepreneurs must look to them to ensure legal compliance. In their specificity and their deep reach into the economies and administrative structures of member states, directives have gone beyond market harmonization to effect market re-regulation. Indeed, the Madrid European Council specifically required candidate countries to modify their administrative agencies and judicial structures to comply with directives through a showing not only of implementing legislation but also of the existence of a bureaucratic structure that supports application.

Re-regulation through directives represents an interesting departure from traditional EU administration, one designed to afford existing EU members a greater degree of control over the new member's assimilation into the existing EU entity. In general, the traditional EU approach to differing national regulatory schemes is based on the principal of mutual recognition, as developed by the European Court of Justice in cases such as Cassis de Dijon. Mutual recognition posits on an equivalence-based regulatory model, whereby a product, for instance, manufactured and tested according to one nation's regulations is deemed to satisfy and comply with the standards of a partner nation. The mutual recognition


17 See Francis G. Jacobs, General Editor's Foreword to SACHA PRECHAL, DIRECTIVES IN EC LAW, at vii (2d ed. 2005) (underscoring the increasing importance of EU directives on the legal and economic landscape of the EU).

18 See PRECHAL, supra note 17, at 3–4 (highlighting that despite the aim of directives to address a limited number of areas, they may nevertheless have the effect of expansive legislative acts).


20 Consider, for instance, sentiment among the Slovenian public that "Europe was run by nation states and [their] interests which at some points challenged the roots of Slovene sovereignty and its identity" in response to Italy's blockade of Europe Agreement negotiations with the country. Martin Brusis, Conclusions: European and National Identities in the Accession Countries – the Role of the European Union, in NATIONAL AND EUROPEAN IDENTITIES IN EU ENLARGEMENT 195, 205 (Petr Drulák ed., 2001) (discussing an accession country's suspicion with regard to EU measures designed to favor existing members).

21 See Case 120/78, Rewe-Zentral AG v. Bundesmonopolverwaltung für Branntwein, 1979 E.C.R. 649, 660–63 (striking down a German import prohibition and elucidating the idea of "mutual recognition").

22 See Paul Brenton, The Economic Impact of Enlargement on the European Econ-
model retains considerable autonomy for national governments, which are allowed to determine and apply domestic rules to products and industries so long as these are recognized by fellow states, meet basic communal requirements, and such recognition is reciprocated. The mutual recognition approach employed by existing EU member states demonstrates considerable trust and respect among the existing members and facilitates the development of a single free, yet unified, market.

In contrast, the imposition of the directive system on recent EU entrants, designed to harmonize accession state regulatory systems to existing EU standards, is based on a paradigm of compliance and convergence. Existing EU member states determine the prevailing norms, principles, and terms of membership and require that applicant states modify their regulatory frameworks to conform to these norms. Monitoring of this nature and the imposition of such highly specific advice did not occur in the case of previous enlargements. Compliance with directives imposes specific duties and perspectives.
requirements on national governments to alter domestic legislation and regulation to conform with externally imposed mandates. With regard to the CEE states, specific requirements were issued pertaining to the liberalization of trade and investment, the free movement of workers, the adoption of competition rules, and the adoption of many of the key legislative measures of the internal market. In fact, the recent applicants had to absorb altogether 80,000 pages of EU law by some estimates.27

Outside of the context of directives, the specificity of accession conditions is equally noticeable in Agenda 2000, where the Commission gave its opinion on the CEEs' applications for membership to the Union. Agenda 2000 develops the Copenhagen political and economic criteria into highly specific requirements with sub-conditions.28 For instance, economic convergence is evaluated according to whether the applicant relies on free market interplay to establish an equilibrium between demand and supply; whether prices and trade have been liberalized; whether significant barriers to market entry and exit have been eliminated; whether a system of property rights exists; and whether laws and contracts can be enforced.29 Beyond the specifics of Agenda 2000, conventional wisdom holds that accession depends on unilateral adjustments by candidate countries towards the adoption of the acquis communau-

Id. 27 See Stephen Mulvey, The EU Law that Rules Our Lives, BBC NEWS ONLINE, Nov. 27, 2003, http://news.bbc.co.uk/1/hi/world/europe/3241034.stm (last visited Feb. 2, 2006) (“Ten new EU member states have spent the last four years ploughing through 80,000 pages of EU law and turning most of it into domestic legislation.”).

28 See Christophe Hillion, The Copenhagen Criteria and Their Progeny, in EU ENLARGEMENT: A LEGAL APPROACH 1, 11-12 (Christophe Hillion ed., 2004) (discussing how Agenda 2000 spells out “in more specific terms” the other Copenhagen political and economic criteria”). Notably, during the Copenhagen deliberations, France proposed an even more detailed list of criteria, which were not included in the final communiqué. See PHEDON NICOLAIDES ET AL., A GUIDE TO THE ENLARGEMENT OF THE EUROPEAN UNION (II): A REVIEW OF THE PROCESS, NEGOTIATIONS, POLICY REFORMS AND ENFORCEMENT CAPACITY 14 (1999) (“The ‘French list’ of admission criteria included the following: (a) measurement of economic development (in terms of GDP/capita), (b) measurement of market economy (in terms of privately held assets), (c) quantifiable level of social protection, (d) control over public debt and inflation, (g) open economy, (h) modern fiscal system and (i) administrative capacity to implement EU law.”).

29 Hillion, supra note 28, at 12.

https://scholarship.law.upenn.edu/jil/vol27/iss1/4
However, in contrast to previous enlargements where the EU focused on obtaining post-accession adjustments from new members, the Union insisted that the bulk of compliance had to be performed prior to accession, imposing a very explicit conditionality on CEE membership.

The high-handed re-regulatory approach taken by the EU with regard to CEE countries suggests an element of disdain for and condescension towards local decisionmaking. In the words of one scholar, the “accession negotiations provide another example of how national European identities in the accession countries are shaped by the EU and its member states without much consideration about the impact of their policies on the EU’s image in the region.” More troublingly, directives are often less attuned to unique national considerations and popular preferences than domestic legislation, imposing specific requirements from above without sufficient consideration of individual and local issues. They also place a considerable and complex burden on both administrative agencies and individual entrepreneurs. In complying with a directive, a manufacturing company, for instance, will not only be forced to consider the directive pertaining to the product it is creating, but also the broader policy directives that may apply to its situation, European standards generated by the regulatory agency responsible for elucidating the directive, and the legislation employed by the local government to implement the directive.

Already, the EU’s high regulation density has produced governance problems.

Applicant and recently admitted member states remain in the process of adopting national legislation to conform to EU directives and regulations in accordance with their obligations under the Europe Agreements. However, the adoption of so much new legislation has proven to be an onerous task, both administratively and politically. Moreover, although CEE countries were required to conform their legislation to the EU model prior to accession and ar-

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30 See Helen Wallace, Can a Reformed European Union Bear the Weight of Enlargement?, in THE EUROPEAN UNION IN THE WAKE OF EASTERN ENLARGEMENT 23, 26 (Amy Verdun & Osvaldo Croci eds., 2005) (describing the conventional practitioners’ view on whether a reformed EU can bear the weight of enlargement).

31 Id.

32 Brusis, supra note 20, at 205.

33 See PRECHAL, supra note 17, at 3–4 (elaborating upon the functions of directives within the EC Treaty).

34 See Pusca, supra note 3, at 226.
Articles 38 and 39 of the Acts of Accession\(^{35}\) grant the European Commission power to force the new members to comply with their pre-accession commitments, full and comprehensive application of the *acquis communautaire* and EU directives has yet to occur.\(^{36}\) The governments of the new member states have demonstrated considerable political might and resilience in stymieing efforts at full implementation of unwelcome EU mandates, and textual transposition of directives into national law, without real application, has become commonplace.\(^{37}\) Recent studies indicate that a significant gap has developed between the normative level and day-to-day practice of EU directive adoption in CEE countries.\(^{38}\)

3. THE CASE OF POLISH ACCESSION

3.1. Polish Accession Shortcomings

Poland, in particular, has lagged behind other new members in adopting and implementing EU directives.\(^{39}\) As of September 2004, Poland had failed to implement two hundred fifty-seven, or one-sixth of the total number, EU directives regulating the single


\(^{36}\) Some scholars opine that an even more comprehensive strategy of safeguards is required to ensure compliance and implementation of directives. See Prechal, *supra* note 17, at 7 (“Without much exaggeration it can be said that there is a large area of ‘hidden failures’ by the Member States which the Commission is not able to deal with in the more systematic fashion which a successful strategy for safeguarding compliance would require.”).

\(^{37}\) See Duina, *supra* note 16, at 7 (stating that the adoption of EU directives in CEE countries remains superficial).

\(^{38}\) See Pusca, *supra* note 3, at 196.

market. In comparison, other accession countries, such as Lithuania, have no more than forty directives outstanding. Poland has failed to fully implement EC directives in a broad range of categories, including value added tax ("VAT") laws, telecommunications, municipal services, and foreign business. For instance, Poland's ban on the advertisement of alcohol (other than beer) violates articles 14 and 28 of the EU Treaty regarding the free movement of goods within the internal market due to its disproportionate effect on foreign distilleries located in other member states. Failure to comply with a directive is considered a breach of treaty that is indefensible. Recourse exists only in a declaration by the European Court of Justice ("ECJ") of the directive itself as invalid. Poland's failures could lead to a lawsuit against Poland in the ECJ. In fact, on December 14, 2005, the European Commission confirmed that it will sue Poland over its failure to implement a telecommunications directive that enables users to retain their telephone number when they switch operators. Poland had pledged to implement the directive by May 1, 2004, the date of its accession to the EU.

Moreover, implementation of EU directives, even where it has occurred, has been neither full nor without resistance. The case

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42 See Paul Fogo, Implementing EU Directives in Poland: Failure or Success?, WARSAW BUS. J., Nov. 29, 2004 (discussing implementation failures that result from conflicting Polish and EU laws).

43 Id.


45 Id.

46 Due to the phased character of the implementation process, non-compliance with obligations under article 249(3) can occur at different stages. See PRECHAL, supra note 16, at 6-7 (noting that violations may occur through non-transposition/inadequate transposition, non-application/inadequate application and non-enforcement/inadequate enforcement). Failure to implement a directive in due time or correctly will result in a charge of non-compliance as well.

For a state unilaterally to break... the equilibrium between advantages and obligations flowing from its adherence to the Community brings
of the EU directive on power plants represents a telling instance of Polish compliance problems.\textsuperscript{47} The directive, which is aimed at reducing acid deposition, stipulates emission standards for new combustion plants and instructs members to implement programs designed to reduce emissions from existing plants.\textsuperscript{48} Poland's stance with regard to the directive is ambivalent. On the one hand, its industrial plants may gain a competitive advantage from non-compliance with the directive, while, on the other hand, trans-border air pollution stemming from German plants afflicts northern and western parts of the nation.\textsuperscript{49} Although Poland stated that it would implement the directive before January 1, 2003, in its position paper to the EU, it also requested a different time frame, one ending in 1990, for determining "new plant" status.\textsuperscript{50} Currently, Poland has implemented the bulk of the directive as agreed, but has set a more liberal standard for emissions of dust from new plants and "new plant" status remains an open question.\textsuperscript{51}

3.2. Reasons for Non-Compliance

The reasons for non-compliance with EU directives are many and apply to a variety of industries and contexts.\textsuperscript{52} In general, into question the equality of Member States before Community [sic] brings into question the discriminations at the expense of their nationals . . . . This failure in the duty of solidarity accepted by Member States by the fact of their adherence to the Community strikes at the fundamental basis of the Community legal order.


\textsuperscript{48} Tokarski & Mayhew, supra note 47, at 24.

\textsuperscript{49} Id. at 25.

\textsuperscript{50} Id.

\textsuperscript{51} Id. at 24.

\textsuperscript{52} See GERDA FALKNER ET AL., COMPLYING WITH EUROPE: EU HARMONISATION AND SOFT LAW IN THE MEMBER STATES 13 (2005) (describing the reasons for non-compliance: opposition against specific contents or effects of a directive (because of protection of national institutions, economic costs of adaptation, ideological reasons); opposition against the EU decision mode (against qualified majority voting, against social partner agreements); opposition against national decision or any other rationale).
however, non-compliance with EU directives stems from deliberate local opposition to externally imposed measures, administrative shortcomings, financial incapacity, interpretational problems, or a problematic interrelationship with other political or legal considerations. Opposition to a directive therefore may be both active and passive, the former stemming from paralyzed public implementation, inefficient administration, or the misunderstanding of a directive, and the latter arising from activism on the part of private parties or resistance from the wider public.

Fiscal incapacity and budgetary overburdening seem to be the strongest motivations for non-compliance in the new member states. Implementation of many EU directives seems to be costly and counterproductive to new members such as Poland. Polish government official Danuta Hubner, for instance, guesses that adopting the worker-protection rules in the EU’s social chapter will cost 2-3% of GDP a year, while improving environmental conditions to comply with EU standards will cost 2% of GDP over the next ten to fifteen years. Moreover, although private and cooperative financing of investment may facilitate the adoption of some of the acquis, the most costly and broad-ranging directives will

transposition mode (parliaments, regions, or social partners feel being disregarded, inter- or intra-ministerial competence conflicts)).


54 See FALKNER ET AL., supra note 52, at 24-25 (delineating country related reasons for mal-transposition).

55 Estimates place compliance costs at billions of dollars. For instance, the outlay required to align Polish regulation of the chemical industry with the EU’s Registration, Evaluation, and Authorization of Chemicals (REACH) program is estimated at €360-600 million. European Commission Joint Research Centre, Implementation of REACH in the New European Member States 7 (Apr. 21, 2005), available at http://europa.eu.int/comm/enterprise/reach/docs/reach/ipts_summary.pdf; see also Polish Implementation Plans for EU Directives Relevant for the HELCOM Project on Hazardous Substances 3 (Sept. 10, 2001), available at http://sea.helcom.fi/dps/docs/documents/Project%20on%20Hazardous%20Substances/HazSub6/it_2_4_Polish_EU_impl_plans.PDF (“The investment activities required (summing up to the value of 1,060 mln EURO) are not possible to be completed in sharper timeframes not only for financial reasons but for technical and organisational as well.”).

56 See Poland Prepares for Europe, ECONOMIST, Sept. 20, 1997, at 23-25 (noting the high cost of implementation as well as other problems facing the Polish government in transposing EU directives).
likely be financed purely through public financing.\textsuperscript{57} The budgets of many new member states are already taxed with the high costs of reforms from their recent transition to free market economies and the restructuring of state industries, and the added strain of directive-induced expenditure is particularly acute.\textsuperscript{58} In addition to pure fiscal expenditure, directives impose burdens on legal and institutional mechanisms, entail enterprise costs, and may increase consumer prices.\textsuperscript{59} Already, confusion about regulations under the transposed EU Prospectus Directive has led to a decline in IPOs.\textsuperscript{60} The most burdensome requirements, those pertaining to agriculture and labor, entail lengthy transition periods and may elicit resistance from foreign investors as well as local entrepreneurs. At the local level, additional regulations, particularly those pertaining to the working environment, are perceived as undermining the competitive advantage of new member states.\textsuperscript{61} Local necessity is not a precondition to the requirement of implementation. Therefore, in certain instances, even if the EU measure represents little improvement over the current situation, its adoption is required regardless of the potential cost and marginal benefit that may ult-

\footnotesize{\textsuperscript{57} See generally Tokarski & Mayhew, supra note 47, at 13.}

\footnotesize{\textsuperscript{58} Id. at 23; see also PUSCA, supra note 3, at 182 ("Compared to other countries that have undergone transformation, the CEECs which have applied for membership of the EU are having to add one more dimension to the multiple and interdependent transformation process towards democratic systems, market-driven economies, administrative and juridical reform, and, last but not least, the profound change from closed to open societies... This additional dimension is, of course, the need to converge towards the Community acquis communitarian").}

\footnotesize{\textsuperscript{59} See generally Tokarski & Mayhew, supra note 47, at 15.}

\footnotesize{\textsuperscript{60} See Pulawy’s Successful IPO Gets Punished in Warsaw Sell-Off, EUROWEEK, Oct. 21, 2005, at 1 (noting that investor uncertainty about compliance with the market has slowed the number of companies coming to market).}

\footnotesize{\textsuperscript{61} See Charles Woolfson, Regulation of the Working Environment in the New Accession States of the Enlarged European Union, A Report to the European Trade Union Confederation/Trade Union Technical Bureau for Health and Safety 3 (Working Paper, Jan. 20-21, 2004), available at http://tutb.etuc.org/uk/dossiers/files/Woolfson-workingdocument.pdf ("[I]t is suggested that regulatory authorities in new CEE member states may be subject to ‘regulatory fatigue’ having completed the enormous task of legislative transposition, but facing the equally huge task of implementation with limited administrative resources and capacities. At a domestic political level, support among CEE business and political elites for European labour protection regulation, especially in the area of OHS, is limited."); see also Poland Prepares, supra note 56, at 24 ("The acquis communautaire... demands thousands of other refurbishments, some of which will hurt the competitiveness of an economy that needs growth above all.").}
Directives, as a result, are perceived not only as an unwanted burden on the national budget but also, and more importantly, as an unwelcome imposition on the national economy.

Misinterpretation of directives may compound administrative difficulties in implementation and further delay transposition into national law. As the product of lengthy negotiations between member states, directives are often characterized by ambiguous language that leaves room for diverse understandings, and may result in faulty implementation.

Noncompliance also may imply a more deliberate element, and can serve as a "means to protest against being outvoted or otherwise 'minoritised' in the EU's policy process, as 'opposition through the backdoor.'" Although integration into the EU has been touted as the best means by which Poland may develop its industrial and commercial base, integration into a supranational entity, governed by a 700-delegate parliament and an extensive administrative apparatus with control and input on national affairs ranging from work pension distributions to nutritional standards, has been greeted with considerable reluctance by many local populations.

The telecommunications directive in Poland Sued Over Non-Transposition of Telecoms Directive, supra note 44, presents one example of potentially superfluous compliance with an EU directive and begs the question whether the Polish government's failure to enact legislation enabling telecom users to retain their phone numbers after changing carriers merits a lawsuit in the European Court of Justice.


Falkner et al., supra note 53, at 453 (emphasis added).

It is important to remember that many member states and their populations view the EU as little more than a political and economic conglomerate between autonomous and sovereign nations. Local allegiances generally remain rooted firmly on the national level, and a broader identification of "European-ness" and European interest remains elusive. To quote Louise Weiss' opening speech before European Parliament:

The first is a problem of identity, not identity in the sense of similarity, but identity understood as a deep perception of the self. The insufficient participation of the European electorate in the agreement that created us proves just how urgently this needs to be resolved. It is impossible to conceive of a Europe without Europeans ... The community's institutions have made European sugar-beets, butter, cheese, wines, meats, and even pigs. They haven't made European men. These European men existed in the Middle Ages, the Renaissance, the Enlightenment, and even in the 19th century. They must be made again ... .

Henrik Richard Lesaar, Semper Idem? The Relationship of European and National
The increasing role of international organizations in the "daily affairs" of nation-states and growing bureaucracies and legal requirements is seen as adding simply another level of administrative annoyance and relentless proceduralization to the existing government superstructure. Critics underscore that admission into the conglomerate is not complemented by an exit option and that once a nation has acceded to all of the demands of the larger entity, it must face the consequences with few, if any, alternatives. As experienced from below, the dominant sense produced by integration is a loss in the degree of control exercised locally and the sense of autonomy over a society's future. Often this loss of control is met with resistance from local populations, who resent the supplanting of domestically developed legal and social norms with external regulations. Thus, the question of EU integration

Identities, in NATIONAL AND EUROPEAN IDENTITIES IN EU ENLARGEMENT, supra note 20, at 179, 184

See ELI LOUKA, CONFLICTING INTEGRATION: THE ENVIRONMENTAL LAW OF THE EUROPEAN UNION 2 (2004) ("Relentless proceduralization could become a stumbling block to compliance as states and their subjects may at one point give up or even revolt.").

See, e.g., Raymond J. Friel, Secession from the European Union: Checking out of the Proverbial 'Cockroach Motel', 27 FORDHAM INT'L L. J 590, 590 (2004) ("One of the most fundamental questions, yet also one of the most ignored within the EU, is whether the EU is the archetypal cockroach motel: a motel where you can check in, but not out.").

See DUINA, supra note 16, at 1. Duina notes the following:

Transnational markets challenge the institutions of member states in very specific and tangible ways. By introducing rules and regulations that member states are expected to ratify or adopt, they pose a direct challenge to existing national legal systems. National legal systems are, however, much more than a set of abstract rules: they are the answers that members of society have surmised, at times of specific political and economic conditions, to deal with the difficulties of social life. They hence reflect deeply rooted, collective values and beliefs, interpretations of problems, issues, and life.

Id.

Duina continues:

While their representatives have committed themselves to the principles of the new agreements, domestic legislators and policy-makers have found it difficult to impose on society the spirit and application of principles that overrun long-standing norms and traditionally powerful groups that have grown out of particular legal environments. Systematically and consciously, they have failed to ratify or properly import basic legal concepts, belatedly miscommunicating goals and objectives or outright ignoring the new rules.
for Poland and other CEE countries becomes not one of whether but of how to integrate—with national governments expected to champion local interests. National governments are called upon to counteract external infringements on traditional national autonomies and act "as guardians of the status quo, as the shield protecting national legal-administrative traditions and interest groups from radical demands descending from the EU," a call that has been taken up by certain politicians. Noncompliance represents an effective means of accomplishing this end and an alternative mode of resistance by local governments whose political agenda has been thwarted at the supranational level. In the technological terms of one scholar, "where a national government is unsuccessful in ‘uploading’ its own preferences at the EU level as the template for the joint measure or standard, it will try to resist during the ‘downloading’ process, i.e., later in the implementing stage."

Id. at 2.

Kreminski suggests that:

For most Poles, the problem [of] integrating into Europe is not the question of joining or not. There is rather a question of how to do it, and what does this decision mean to me, as a person, or for my social category, or my professional group, or my region. Undoubtedly, a very practical perspective is dominant. But, the national identity issue [sic] is... [used] as a weapon in the struggle, concerning some practical solutions, and defending some social interests....

Ireneusz Krzeminski, The National Identity and European Consciousness of Poles, in NATIONAL AND EUROPEAN IDENTITIES IN EU ENLARGEMENT, supra note 20, at 57, 67


Jacques Chirac stated that the IGC should

be limited to the institutional aspects, in other words, be preparing for the opening-up, enlargement of the EU, which, as everyone realizes, requires the institutions to be modified. But at the same time... the enlargement mustn’t overshadow aspects closer to home, those which more directly affect the Europeans, i.e., specifically... everything relating to the fight against unemployment and for jobs.

Geoffrey Edwards, Reforming the Union’s Institutional Framework, in EU ENLARGEMENT, supra note 28, at 23, 32.

See Falkner et al., supra note 53, at 453 (citing Tanja Borzel, Pace-Setting, Foot-Dragging, Fence-Sitting: Member State Response to Europeanization, 40 JOURNAL OF COMMON MARKET STUDIES 193, 193-214 (2002) (describing European integration as a two-dimensional process of developing norms)).

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3.3. Current Effects of Non-Transposition

Despite the specter of proceedings before the ECJ or sanctions, Poland’s failure to adopt a significant number of EU directives appears, at least superficially, to have had little impact on its national economic performance or EU standing. The Polish growth rate has reached an impressive 6% in the aftermath of EU accession.\(^{74}\) By contrast, Western European countries are projected to grow by 2.5% per annum, and real GDP growth in Germany averaged 1.4% over the past ten years.\(^{75}\) The Polish private sector currently produces more than 60% of GDP, inflation has dropped from 249% in 1990 to 14.5%,\(^{76}\) and the 2004 budget deficit amounted to only 4.8% of GDP.\(^{77}\) This rapid pace of development will help boost the purchasing power of the national currency, which reached around 50% of the Organisation for Economic Co-operation and Development (“OECD”) average in 2005.\(^{78}\) Poland also proved to be the fastest growing exporter among all EU countries with 26% growth rate in 2004 and exports amounting to $35.3 billion.\(^{79}\)

Due to current EU members’ inefficient labor markets, GDP per capita lags behind the United States, for instance, by 25%.\(^{80}\) Perversely, Poland’s rapid growth rates offer the possibility of healthy new markets for Western European companies and have even registered discomfort among current EU members about competition from CEEs.\(^{81}\) On the one hand, European integration was sought


\(^{76}\) Poland Prepares for Europe, supra note 56, at 24.

\(^{77}\) ECONOMIST INTELLIGENCE UNIT, POLAND: COUNTRY REPORT JUNE 2005, at 32 (2005)


\(^{81}\) See, e.g., Richard Bernstein, Poland’s Plea to Europe: Can We All Get Along?,
to facilitate long-term prosperity, reinvigorate the common market, and increase efficiency. On the other hand, many Western Europeans are worried about the competitive pressures that the accession of fast-growing CEE countries might produce. Specifically, Western European leaders fear that cheap Polish exports could undercut local products in price, that financial flows to the new member states could absorb much-needed investment capital, and that the mass migration of low-wage workers from CEE countries could raise EU unemployment. When Ludwig Georg Braun, the head of the German chambers of commerce, recently advised his members to invest in Central Europe rather than "wait for better policies" in Germany, he was denounced as unpatriotic by German Chancellor Gerhard Schröder. Schröder's fears are neither unique nor wholly unfounded; as many as five Japanese companies are considering investments in Poland. These Japanese firms are mostly interested in the automotive sector but they are also interested in investing in electronics, energy, and the trade and services sectors. Poland's most significant advantages in attracting foreign investment are highly qualified personnel and relatively low wage costs. Notable for its strong growth profile, investor-friendly climate, flexible reform agenda, and low-wage labor population, Poland is emerging as a troublingly successful rival to its Western European counterparts.

Not only is growth occurring despite transposition shortfalls,
but Poland stands to receive €993 million more than it contributes to the EU this year. 87 The European Commission has ruled that there should be no change in Poland's status as a "Member State with a derogation," when it comes to adopting the euro. 88 The European Investment Bank, the EU's long-term financing institution, even held its regional summit in Warsaw in October 2004 and offered delegates brochures aimed at fostering investment in new EU member states. 89 Indeed, according to some, "[t]he quip making the rounds of Warsaw in these days of European crisis is that joining the European Union was good for Poland, but it does not seem to have been very good for the European Union." 90 In light of the nation's current success without full adoption of many directives, questions emerge about the efficacy of the EU directive system and whether it is even in Poland's best interests to implement the remainder of Brussels' strategies. 91

4. THE DIRECTIVE SYSTEM ANALYZED

4.1. Non-Tranposition and Potential Long-Term Developmental Problems

Despite current indications that Poland need not implement many EU directives to succeed economically, Poland would be well-served to execute some of the Union's policy measures, as underlying problems have begun to emerge, which suggest that the current level of development may not be sustainable without implementation of the directives or, at least, would be facilitated by their incorporation into national policy. Economic integration is

90 Bernstein, supra note 81, at A10.
91 In many ways, EU directives have become sacrosanct, and criticism of either them or the compliance model is generally dismissed as nationalistic and contrary to economic modernization. See Krzempinski, supra note 70, at 65–66 (citing a tendency to dismiss criticism of the compliance model as nationalistic and arguing that such dismissals deplete the discourse on regulatory differentiation). This paper seeks to address both the advantages of the compliance model and its possible shortcomings.
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generally believed to promote welfare, increase efficiency, and stimulate growth. Uniformity and integration of international markets makes trade in goods and services easier and capital more mobile internationally. "Conformity with EU and international standards is critical for the [CEE countries] for improving their competitiveness and gaining market access to the more industrialised countries." Thus, the extension of EU market regulations to Poland, through compliance with certain directives, will significantly simplify and markedly improve the investment and trade conditions for domestic enterprises and international third parties.

Already, Poland has experienced developmental setbacks in the context of foreign investment, a crucial element in sustaining current growth. While Poland has excelled in absolute dollars, on a per capita basis, it trails neighbors like the Czech Republic and Hungary. Anecdotally, although the aforementioned five Japa-

92 See Philippe Maystadt, EU Enlargement: Opportunities and Challenges, in THE EUROPEAN UNION AND CENTRAL AND EASTERN EUROPEAN COUNTRIES 25 (Jules Stuyck et al., eds., 2002) ("As Eastern Europe gets closer to EU membership, integration will become stronger, especially in the financial sphere."); Daniel Gros, Health Not Wealth: Enlarging the EMU, in THE ENLARGED EUROPEAN UNION: DIVERSITY AND ADAPTATION 141, 146 (Peter Mair & Jan Zielonka eds., 2002) ("The public discussion in the EU-15 about the budgetary cost of enlargement sometimes obscures the fact that enlargement should bring economic benefits.").

93 See Gros, supra note 92, at 7 (describing the benefits associated with economic integration).

94 Siemon Smid, Intellectual Property Law Uniformity in the CEECs and the EU: Conformity Issues and an Overview, in INTELLECTUAL PROPERTY RIGHTS IN CENTRAL AND EASTERN EUROPE 72, 73 (Elmar Altvater & Kazimierza Prunskiene, eds., 1998).

95 See Krzeminski, supra note 70, at 93 (advocating the implementation of EU regulations in CEE countries).

96 Attracting and retaining foreign direct investment (FDI) has become a crucial strategy for many developing countries. FDI is thought to bolster domestic capital, productivity, and employment. In addition, in the case of Poland, it often serves to balance the current-account deficit, as it did in 2004. See Marta Bengoa Calvo & Blanca Sanchez-Robles, Foreign Direct Investment, Economic Freedom and Growth: New Evidence from Latin-America 17-18 (Universidad de Cantabria, Economics Working Paper No. 4/03, 2002) (concluding that FDI and growth correlated positively on a consistent basis in developing Latin American countries); Arturo Ramos, Foreign Direct Investment as a Catalyst for Human Accumulation Capital 2 (unpublished MALD Thesis, Fletcher School, Tufts University, 2001) (hypothesizing that "foreign direct investment also introduces a factor of accelerated technological change..."); see also POLAND: COUNTRY PROFILE, supra note 74, at 32 ("The rapid pace of economic growth in 1995 and 1996 led to a widening current-account deficit, and monetary policy was tightened in 1996-1997 in order to reduce inflationary pressures and limit the growth of the external deficit.").

97 See POLAND: COUNTRY PROFILE, supra note 74, at 46 ("As a result of the

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nese car manufacturers present an opportunity, Poland has recently lost large investments from Toyota, Peugeot, and Hyundai that went to other Eastern European nations. A convoluted regulatory structure, a weak intellectual property protection regime, and a inferior infrastructure, offset the attractiveness of the Polish labor market and motivate manufacturers to locate their means of production elsewhere. The Czech Republic and Hungary’s more uniform and stable legal regimens, in greater conformity with EU mandates and comparable workforces, ultimately present a more attractive forum than Poland for foreign manufacturers. Poland’s failure to implement EU directives pertaining to competition, intellectual property, and other regulatory regimes, therefore has already resulted in lost investment opportunities and a failure to capitalize on the possible benefits of accession. So too, noncompliance with regard to EU competition law directives has resulted in continuously high degrees of state involvement in the economy. The sluggish nature of Polish privatization efforts over the past three years—state-owned enterprises still account for nearly eighteen percent, compared with an average for industrial countries of seven percent—has exacerbated the foreign investment problem and may further impede continued growth. 


99 See Dan Deluca, Case Study: FDI in Poland, INITIATIVE FOR POLICY DIALOGUE, available at http://www2.gsb.columbia.edu/ipd/j_fdi-poland.html (last visited Feb. 19, 2006) (describing economic factors that may have lead to a recent downturn in FDI inflows to Poland).

100 See OECD, ECONOMIC SURVEYS: POLAND 54 (2004) (“Overall, in period 1994–2002 Poland has achieved an average rate of annual growth of FDI inflows of 17 per cent which was lower than in Czech Republic (57 per cent) or Slovakia (86 per cent) and Hungary (25 per cent).”); see also European Commission, Comprehensive Monitoring Report on Poland’s Preparations for Membership 6 (2003) available at http://europa.eu.int/comm/enlargement/report_2003/pdf/cmr_pl_final.pdf (last visited Feb. 19, 2006) (“Privatisation considerably slowed down in the past two years and the pace of privatisation in the first months of this year has been disappointing.”); Elizabeth C. Dunn, PRIVATIZING POLAND: BABY FOOD, BIG BUSINESS, AND THE REMAKING OF LABOR 15 (2004) (considering the impact the recent
Implementation of EU directives pertaining to competition law, intellectual property, agriculture, and the environment would ameliorate some of these problems. Moreover, in each of these areas, Poland would benefit, financially or socially, from administrative homogeneity with Western Europe. The acquis in these sectors provide a framework for useful conformity with international standards and should be implemented more fully by the Polish government. Indeed, comprehensive EU regulation may serve as a blessing, rather than a curse, to Polish long-term developmental interests in some cases. As one Warsaw-based commentator notes—"[all] the intrusive regulation that most angers the Brits [is] exactly what we need in Poland." Further structural changes are required to improve the economy's competitiveness and establish foundations for sustainable development even after current competitive advantages are exhausted. Certain EU directives, if adopted propitiously, may serve to facilitate investment and industrial modernization, which in turn, will help bridge the GDP gap between Poland and current EU member states.

Moreover, EU directives may prove useful not only in the long-term through their imposition of uniformity, but also in the short-term by expediting the implementation of much needed domestic reforms. From a political standpoint, directives emanating from Brussels are useful for promoting controversial domestic reform, in that they enable national governments to point to external bodies as mandating and bearing responsibility for the implementation of much needed changes that nevertheless may not enjoy local support. In the case of environmental and agricultural directives, in particular, external pressure may instigate necessary domestic reform that has not occurred because it involves significant short-


term capital outlays.

That said, directives are neither infallible nor often tailored to local realities, and more flexible and varied legislative instruments are needed to produce solutions and regulations that are effective in all member states.\textsuperscript{103} Especially in the EU, "[g]iven heterogeneous policy legacies in the member states as well as the diverse preferences of national governments and other domestic actors, one-size-fits-all solutions are neither politically feasible nor normatively desirable."\textsuperscript{104} In addition, certain directives and accession conditions are biased so as to protect the interests of existing EU members over recent entrants.\textsuperscript{105} Poland, therefore, has done well to demonstrate reluctance in implementing certain acquis, which appear to be particularly contrary to local realities and needs. In particular, the Polish government has been correct in its reluctance to fully implement directives pertaining to migration and financial services, which are misguided with regard to their conception of the Polish case and should be transposed only to the extent they reflect the national situation, or modified accordingly. Additionally, Poland's willingness to challenge the EU's Common Agricultural Policy (CAP) may induce much needed reform in a long-standing and calcified EU policy. Thus, in its most optimistic incarnation, Poland's disjointed compliance with EU directives may create pressure for institutional reform in the EU and have a positive impact on issues in which it has an interest.\textsuperscript{106}

4.1.1. Competition law directives

Competition law is one area where the EU mandates and direc-

\textsuperscript{103} See id. at 1 (contending that "one-size-fits-all" solutions will create inapposite results for the EU's future).

\textsuperscript{104} FALKNER ET AL., supra note 52, at 1.

\textsuperscript{105} See Wallace, supra note 30, at 27-28. Wallace notes that 

[T]ypically in agriculture and in some industrial sectors the EU-led conditions have delayed the moment at which a recruit's industry might be able to become competitive. Take the example of pharmaceuticals. Here the Spanish industry did not achieve full market access until 1995 because it was too effective in terms of price competition, not because it was not up to scratch.

\textit{Id.}

\textsuperscript{106} See Peter A. Poole, EUROPE UNITS: THE EU'S EASTERN ENLARGEMENT 56 (2003) (arguing that Poland may have a significant impact on the EU's future policy development, in part due to its strong ties to the United States and its qualification for many EU subsidies).

https://scholarship.law.upenn.edu/jil/vol27/iss1/4
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Recent EU directives require recent entrants to implement necessary reform. Article 3(1)(g) of the EC Treaty specifically stipulates that competition within internal markets should not be distorted. Article 87(1) of the Treaty also prohibits state aid to individual enterprises in an effort to ensure fair competition within an open market. This emphasis on freedom of competition is reflected in the Europe Agreements as well. For instance, article 68 of the Europe Agreement between Poland and the EU specifically states that a requisite to integration for Poland is to shape its present and future policy as complementary to the EU’s policies. In particular, “Poland shall use its best endeavours to ensure that future legislation is compatible with Community legislation.” The White Paper, delineating accession requirements, further elaborated on this mandate by requiring applicant states to adopt competition rules that mimic those of the EU: “[An] obligation of approximation was considered indispensable because there could be no extension of Community law to them as is the case for Member States. Such an approximation is therefore necessary *inter alia* to ensure that economic operators can be sure to act on a level playing field, and in order to prepare the CEECs’ economies for future membership.” According to this provision, Polish domestic law was required to not only comply with, but essentially emulate, EU competition law. Poland was encouraged to revise its competition legislation to EU standards in four general areas: cartel and anti-competitive agreement prohibition, merger control, state aid, and with regard to state monopolies. In addition, Poland is required to “progressively adjust any State monopolies of a commercial

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107 See EC Treaty art. 3 (“For the purposes set out in Article 2, the activities of the Community shall include, as provided in this Treaty and in accordance with the timetable set out therein . . . a system ensuring that competition in the internal market is not distorted . . .”).

108 Id. art. 87(1).


110 Id. at n. 17 (citing European Commission White Paper: Preparation of the Associated Countries of Central and Eastern Europe for Integration onto the Internal Market of the Union, Brussels, 03.05.1995 COM(95) 163 Final).

character so as to ensure that... no discrimination... regarding the conditions under which goods are procured and marketed exists between nationals of the Member States and of Poland." 112 Suggestions have also been offered regarding the creation of a national competition authority. 113

Hitherto, competition law has been weak by design in several CEE countries, and the state remains significantly involved in many aspects of national enterprise. 114 Although Poland was the first Central European economy to enact post-communist competition law, Poland continues to lack strong laws aimed at combating unfair competition and has rather convoluted regulations pertaining to the merging of undertakings. 115 Polish compliance with EU directives pertaining to competition has been questionable and superficial. Not only does Poland continue to lead CEE countries in percentage of state-owned enterprises, 116 but significant industries, including the railroad system, 117 the vodka-making industry, 118 pharmaceuticals, 119 and power production, 120 continue to be partly or wholly state-owned. Although a handful of upcoming privatizations have been announced, 121 significant reforms, particularly in

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113 See Emmert, supra note 111, at 654 ("[E]ach Member State should have a national competition authority.").
114 See Geradin & Henry, supra note 109, at 17 ("[T]he adoption of competition rules was a much easier task than their respective enforcement [given the] Commission’s annual reports recurring criticisms relating to the weaknesses of the enforcement mechanisms set up by the authorities of the candidate countries... .")
115 Id. at 9, n.35 (Poland was the first Central European Economy to introduce a competition law after Communism fell... .").
116 See OECD, supra note 100 (suggesting partial sale of the many state-owned enterprises in order to ameliorate the overall investment climate).
117 See Huffing and Puffing, THE ECONOMIST, May 28, 2005, at 63 (noting that PKP, the state-owned rail system, was once known as a state within a state).
118 See What’s New in Your Industry?, BUS. E. EUROPE, Apr. 25, 2005 at 9 (pointing out that the government has a majority stake in leading vodka maker Polmos Bialystok).
119 See Poland, EMERGING EUR. MONITOR: CENTRAL EUROPE, Dec. 2004, 4-5 (discussing the recent unveiling of plans to privatize state-owned Pharmaceutical Holding).
120 See Privatisation’s Small Step, COUNTRY MONITOR, Dec. 5, 2005, at 4 (describing recent talks between government officials and Endesa SA of Spain to sell 85% of Dolna Odra, a group of three coal-fired power stations).
121 See What’s new In Your Industry?, supra note 118; Radek Ignatowicz, After https://scholarship.law.upenn.edu/jil/vol27/iss1/4
the areas of transportation and energy are still needed. In addition to lingering state ownership, competition in certain sectors has not been fully liberalized, and enforcement problems limit the government's ability to monitor competition among private parties. Institutional weaknesses in the form of inexperienced enforcement personnel and staff have been exacerbated by poorly drafted laws which are either home-grown and esoteric or imported wholesale from foreign jurisdictions and inapplicable to Polish industry. Antitrust enforcement is also extremely lax, and nearly all of the mergers submitted to authorities have been cleared by them.

Effective competition law is essential to developing economies, as it ensures the existence of a flexible and dynamic private sector, which in turn, is integral to sustained growth. Economies with greater competition have diversified market activity which correlates with higher rates of growth in per capita GDP and better enables them to withstand economic shocks in the event of a downturn. Arguably, "domestic and internal competition provides the incentives that unleash entrepreneurship and technological progress." Application of classical economics theory to the Pol-

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the EU — What Next?, GLOBAL INVESTOR, Dec. 2004-Jan. 2005, at 67-68 (highlighting the recent privatization of PKO BP and the government's announcement that the privatization process would be accelerated significantly in the coming years). See also Poland: More Policy Jitters . . . , EMERGING MARKETS MONITOR, Nov. 28, 2005, at 17 (describing the recent privatization of gas monopoly PGNiG and calls to re-nationalize the enterprise). But see Pulawy’s Successful IPO Gets Punished in Warsaw Sell-Off, EUROWEEK, Oct. 21, 2005, at 1 (noting that the precipitous decline in prices following the fertilizer company’s privatization and IPO could discourage further privatization in the near future).


123 See Geradin & Henry, supra note 109, at 30 (explaining that while Poland’s competition laws have evolved, there still remains much inefficiency).

124 See id. at 18 ("[T]he high rate of merger clearances is linked to a slack attitude on the competition authorities’ part in the enforcement of merger control.").


126 See Singh, supra note 125, at 7-8 (referencing the 1991 World Bank Report
ish situation suggests that the harmonization of competition law and the privatization of remaining inefficient state-owned enterprises will hasten modernization and increase productivity and efficiency in sectors, such as industrial manufacturing, that have remained stagnant despite recent increases in growth. One of Poland's major and continuing derogations with EU competition policy is its use of state aid to prop up lagging industries, such as coal. Compliance with the EU requirement that member-state aid must be proportionate to the cost of services and cannot impede cross-border trade would remedy Poland's misguided protectionism of inefficient industries. In addition, Poland's current weak competition law will stymie continued development by exacerbating existing entry barriers for foreign investment and concentrating dominant market share, which may be difficult to reallocate, with a conglomerate of government-assisted corporations. Greater Polish compliance and enforcement of articles 81 and 82, Regulation 139/2004, and Directive 96/92/EC (through, for

that provided the intellectual basis for the Washington Consensus).

In particular, Poland would do well to comply with its commitment to privatize and restructure the steel industry by 2006. See Janne Kankanen, Accession Negotiations Brought to Successful Conclusion, COMPETITION POLICY NEWSLETTER (European Commission, Brussels, Belgium), Spring 2003, at 26-28 (mentioning CEE commitments to ongoing reforms in competition laws).


See Council Regulation 139/2004, art. 81-82, 2004 O.J. (L 24) 1 (giving the Community the objective of instituting "a system ensuring that the internal market is not distorted ... in accordance with the principle of an open market econ-
instance, more thorough scrutiny of proposed mergers) would reduce market-share concentrations and lessen entry barriers for potentially competitive domestic and foreign enterprises. Similarly, the adjustment of the Polish corporate taxation structure to conform with that of the EU would simplify accounting requirements and stimulate investment.  

4.1.2. Intellectual property directives

As with competition, a superficial impression of CEE compliance with EU directives in the field of intellectual property is belied by more in-depth scrutiny. Polish non-compliance generally occurs in the realm of implementation, and innovators can expect little protection from a relatively thinly staffed Patent Office, which, rather than the judiciary, is largely responsible for enforcement of patent claims. In addition, certain shortfalls in the adaptation of EU directives into Polish law mean that the latter are slightly less precise, comprehensive, and reliable than the former.

But, Polish non-compliance in the realm of intellectual property has gone beyond passive implementation and adaptation failures to active refusal to transpose certain provisions. Specifically, the

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133 Poland aggressively negotiated with the EU and obtained a transition period up to 2013 for the implementation of the Interest and Royalties Directive, which allows the interest expense deduction for inbound investments. As a result, Poland’s corporate taxation scheme continues to differ from that of the EU. See Eva Doyle & Daniel Prager, Central and Eastern Europe: How M&A is Developing in Central & Eastern Europe, INTERNATIONAL TAX REVIEW, July 2005, at 8-13 (describing ongoing CEE trends in corporate taxation that pertain to mergers and acquisitions).

134 See Smid, supra note 94, at 75 (“The first impression one receives from the overview of compliance with international agreements is that the CEECs have largely met the requirements for integration into the EU. But a more in-depth survey reveals the incompleteness of intellectual property rights protection in the CEECs.”).

135 See id. at 73 (mentioning that across the EU, “intellectual property protection rules (mainly patents, trademarks and designs) have, until the last few years, lagged behind the other main Community policies.”).

136 See Janusz Szwaja, The Co-ordination of Polish Product Symbol Rights with EU Norms, in INTELLECTUAL PROPERTY RIGHTS IN CENTRAL AND EASTERN EUROPE, supra note 94, at 126 (“In roughly comparing Polish regulation with that of the European Union, it is noticed that the latter seems to be more developed and detailed in subject than the relevant Polish provisions.”).
Polish Government has refused to adopt a new directive pertinent to patents for software technology. In March 2003, the EU’s competitiveness council agreed on a proposal for a European community patent, pertaining to software, which would be applicable to member and accession states.\(^{137}\) The law would provide a company with community-wide protection for its computer-implemented inventions through a single patent and reduce the cost and bureaucratic hassle of registering the innovation in the EU.\(^{138}\) During a Cabinet session on November 16, 2004, the Polish government announced that it would not support the measure or administer the EU directive that implements the law.\(^{139}\) The government opined that computer programs or any fragments thereof should simply not be patented.\(^{140}\) As a result of Poland’s refusal to support or comply with the measure, the EU was forced to table the legislation and offer a compromise provision.\(^{141}\)

Poland’s opposition to the software patent offers an instance where the country was correct to balk against EU legal mandates and has earned its leaders considerable praise.\(^{142}\) Several commentators have argued that the EU measure was an instrument promulgated by powerful software lobbies who sought to secure their power and a monopoly on computer-implemented inventions in the European market.\(^{143}\) The European Association of Craft, Small, and Medium-Sized Enterprises ("UEAPME"), for instance, registered its opposition to the directive as a measure that "would reinforce monopolisation in the software sector and act as a barrier to


\(^{138}\) Id.


\(^{140}\) Id.

\(^{141}\) See Clash Over Software Patents, BUS. EUR., Mar. 16-31, 2005, at 10-11 (discussing Poland’s opposition to the idea of harmonizing national patent measures and the political debate that it produced).

\(^{142}\) See Jim Rapoza, Poland’s Patent Pause, eWEEK, Feb. 14, 2005, at 52 ("[T]he reason I want to cheer and thank Poland is because of its efforts in the war against software patents.").

\(^{143}\) See id. ("Poland delayed the process enough that software patent opponents could lobby their representatives to vote against software patents."). See also Clash Over Software Patents, supra note 141, at 10 (describing the power effect of lobbyists in pressuring the European Parliament to amend its original proposal).
innovation by SMEs.\textsuperscript{144} It and other groups hailed Poland’s opposition to the measure as a heroic stance against domination of the software industry by corporate monoliths and for innovation by new and developing entrepreneurs.

While Poland’s opposition to the software patent directive was arguably laudable, the country’s reluctance to implement EU intellectual property directives is not limited to the realm of computer technology and not always praiseworthy. Indeed, Poland’s shortcomings in implementation have resulted in several hotly contested disputes between international drug manufacturers and domestic purveyors of generic substitutes. Polish manufacturers, and, to an extent, Poland’s government, heavily favor domestic production of generic drugs, while the EU’s intellectual property standards offer pharmaceutical innovators strong protection and limit copycat manufacture. Thus far, Polish manufacture and distribution of domestically engineered copies of name-brand drugs has been unrestrained, and generic drugs account for two-thirds of all prescriptions dispensed in Poland.\textsuperscript{145} The conflict between EU requirements and Polish standards has come to a head with a generic version of Viagra, named Maxigra, which Pfizer is attempting to keep from Polish shelves.\textsuperscript{146} Eli Lilly, in a similar move, has recently brought suit against Polish generic drug company Adamed for infringement of its patent on Zyprexa.\textsuperscript{147}

In declining to adequately implement EU directives pertaining to intellectual property, the Polish government is misguidedly prioritizing short-term over long-term interests and those of domestic producers over foreign investors. The advantages of a strong intellectual property regime extend beyond the realm of pharmaceuticals and pertain to development more generally. Specifically, as one commentator notes, “[c]ertainty in the perfection, enforcement,

\textsuperscript{144} Clash Over Software Patents, supra note 141, at 11.

\textsuperscript{145} See Screwing the Brand Names, ECONOMIST, Sept. 18, 2004 at 67-68 (noting the proliferation of generic drugs in Poland and the conflict with EU standards that this is creating).

\textsuperscript{146} See Legal Battle Looms Over Polish Imitation of Viagra, ASSOCIATED PRESS, Oct. 6, 2004. In light of a recent decision holding Pfizer’s patent on Viagra invalid, on the grounds that it did not disclose sufficient information about its active ingredient to determine novelty, the company’s actions against Polish generic manufacturers may prove unsuccessful. See Thwarting Counterfeiting Takes Special Processing Savvy, MODERN PLASTICS WORLDWIDE, Apr. 1, 2005 (presenting the case in favor of strong intellectual property protection and anti-counterfeiting operations).

\textsuperscript{147} See Screwing the Brand Names, supra note 145, at 68.
transfer and economic benefits of rights in technology are critical to any decision-maker contemplating investment in the U.S. and abroad."\textsuperscript{148} So too, Edwin Mansfield found in a survey of U.S.-based firms that the strength of a country's intellectual property protection regime had a substantial impact on corporate investment decisions.\textsuperscript{149} Strong protection of intellectual property interests is an important precursor of corporate investment in foreign production facilities, which boast top-notch technological knowledge and require highly skilled labor. Thus, the structure of a nation's intellectual property rights regime not only influences investment behavior in general, but also investment in human capital and research and development.\textsuperscript{150} These advances in technology and labor skill often spill over from one industrial sector to others and can be leveraged by a developing country to improve its domestic production capabilities.\textsuperscript{151} A strong intellectual property rights regime also makes sense on a macroeconomic level, as it doubles growth potential by creating an incentive structure for innovation and distributing knowledge across industries.\textsuperscript{152}

Thus, if Poland is interested in increasing FDI inflows and technology transfer, the country must strengthen its commitment to the universal scheme of intellectual property rights endorsed by the EU.\textsuperscript{153} More consistent implementation of EU intellectual property rights would further encourage foreign investors and contribute to Poland's economic development.

\textsuperscript{148} Michael D. White, Considerations for Protection of Technology Created in Eastern Europe, in INTELLECTUAL PROPERTY RIGHTS IN CENTRAL AND EASTERN EUROPE, supra note 94, at 17, 19; see also Nikolaus Thumm, INTELLECTUAL PROPERTY RIGHTS: NATIONAL SYSTEMS AND HARMONISATION IN EUROPE 2 (2000) ("For international firms the maintenance and protection of their technological assets is essential.").

\textsuperscript{149} See Edwin Mansfield, Intellectual Property Protection, Foreign Direct Investment, and Technology Transfer, at vii (International Finance Corporation Discussion Paper No. 19, 1994), available at http://www.bvindecopi.gob.pe/ colec/emansfield2.pdf. ("[W]e find that the strength or weakness of a country's system of intellectual property protection seems to have a substantial effect, particularly in high-technology industries, on the kinds of technology transferred by many U.S. firms to that country. Also, this factor seems to influence the composition and extent of U.S. direct investment there . . . ").

\textsuperscript{150} See Thumm, supra note 148, at 131 (discussing the economic effects of intellectual property rights).

\textsuperscript{151} See DOES FOREIGN DIRECT INVESTMENT PROMOTE DEVELOPMENT? xi (Theodore H. Moran et al. eds., 2005) ("New data from industry surveys document many examples of positive spillovers (or externalities)—that is, benefits to the host economy beyond what can be captured by the foreign investors themselves.").

\textsuperscript{152} See id. at 130 (identifying intellectual property rights as a mechanism for economic growth).

\textsuperscript{153} See Dwight H. Perkins et al., THE ECONOMICS OF DEVELOPMENT 93 (5th ed. 2001) (elucidating factors relevant to stimulate investment in developing econo-
property directives will enhancement Poland’s attractiveness to technologically advanced foreign manufacturers and make them more likely to direct investment monies and locate production facilities in the country. The resulting increase in FDI may prove essential to enhancing Polish R&D capabilities and in bolstering the country’s standing in telecommunications, software development, and other technologically sophisticated industries. The intellectual property regime endorsed by the EU favors market access over the protection of proprietary information that may block such access, and therefore offers a suitable equilibrium for Poland. Enforce-ment of EU directives should prove sufficient to protect Polish domestic manufacturing interests on the one hand, while enabling foreign investment on the other hand.

4.1.3. Environmental directives

Another area in which EU directives have expedited much-needed domestic change, but where much still remains to be done, is the field of environmental protection in Poland. As was the case with most other Soviet bloc countries, the post-Communist Polish government inherited an environment that had been ravaged by industrial pollutants. Neglect of environmental matters, biased industrial and agricultural policies, and wasteful handling of natural resources all combined to wreak considerable damage on the Polish landscape. In 1991, Poland designated five official ecological disaster areas. The most egregious of these was in Poland’s Ka-

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towice district, which comprises only about 2.1% of the country, but accounted for as much as 20%-25% of the country's total emissions of sulfur dioxide, nitrous oxides, and dust.157 The region was known as "the Black Triangle" and was "home to the largest basin of brown coal in Europe."158 The emission of large amounts of pollutants in the region has produced severe acid rain and resulted in significant health problems among the population.159 The death rate for men in Katowice between the ages of 30 and 59 exceeded the national average by 40%, children are usually born underweight, and the occurrence of birth defects in the region was up to 60% higher than Poland's average.160 The situation was not limited to Katowice, however, as a 1990 report found that 65% of Poland's river water was so contaminated that it corroded equipment when used in industry, about half of Poland's lakes had been damaged by acid rain, and 95% of the country's river water was considered undrinkable.161

The environmental ravage proved problematic with regard to Polish accession to the EU. Not only was the Polish environment in an inferior state compared to its Western neighbors, but more importantly, EU environmental standards are considerably higher than traditional domestic Polish mandates. Moreover, Poland's environmental sector was extremely understaffed due to low salaries and a half-hearted commitment to monitoring infrastructure in the air and water sectors.162 As one commentator notes, "[a]n EC directive demanding the centralized, uniform application of new principles of air pollution control ask[s] in effect for an administrative revolution".163 In addition, estimates placed the cost of compliance with EU environmental directives at €110 billion, an exorbi-

158 Id.
159 Id. The city of Cracow also has the highest infant mortality rate in Poland at 26 per 1,000 children. Poland's Environment, NEW INTERNATIONALIST, Mar. 1986, available at http://www.newint.org/issue157/facts.htm (last visited Feb. 19, 2006) (detailing Polish environmental successes and failures).
160 Greennature.com, supra note 157.
161 See Environmental Conditions and Crises, supra note 156 (revealing the spreading pestilence of pollution throughout Poland).
163 See DUINA, supra note 16 at 2.
tant amount for cash-strapped Poland. Negotiations between the EU and Poland over environmental directives were heated, largely due to the considerable financial expenditures that compliance would involve. Ultimately, a compromise was reached whereby Poland was required to strive towards EU environmental standards through compliance with directives. However, the number of environmental requirements imposed was reduced modestly and implementation timetables were extended to as late as 2012 in certain areas.

The main regulation harmonizing Polish and EU law is the Environmental Protection Law Act of April 27, 2001. The Act approximates EU legislative measures with regard to public access to environmental information, waste management concerns, environmental protection liability, and environmental impact analyses and assessments, among other issues. The Act also implements Directive 96/61, the EU’s Integrated Pollution Prevention and Control (IPPC) Directive, which requires all member states to limit all emissions of gases, dust and sewage using “best available” tech-

164 See Sciberras, supra note 162, at 15 (citing the extreme cost of compliance with EU environmental policies).

165 Id.

166 Poland obtained nine transitional periods for the implementation of environmental directives. As explained by Jerzy Sommer:

[Poland was] allow[ed] to implement the following directives after the term of accession: 99/33/EC relating to a reduction in the sulphur content of certain liquid fuels (4 years term), 94/63/EC on the control of volatile organic compound (VOC) emissions resulting from the storage of petrol and its distribution from terminals to service station (3 years term), 94/62/EC on packaging and packaging waste (5 years term), 99/31/EC on landfill waste (10 years term), 259/93/EEC on supervision and control of shipments of waste within, into and out of the European Community (5 years term), 91/271.EEC concerning urban waste water treatment (5 and 10 years term depending on the size of the agglomeration), 76/464/EEC on pollution caused by certain dangerous substances discharged into the aquatic environment of the Community (5 years term for certain substances), 96/61/EC concerning integrated pollution prevention and control (8 years term for existing plants), 97/43/ Euroatom on health of individuals against the dangers of ionising protection in relation to medical exposure (4 years term).

Sommer, supra note 12, at 37.

167 See Jan Boć & Konrad Nowacki, The Harmonization of Polish Environmental Protection Law with European Union Law, in REFORM IN CEE COUNTRIES WITH REGARD TO EUROPEAN ENLARGEMENT, supra note 12, at 21, 25 (describing legislative measures that were enacted to achieve harmonization).

168 Id.
The IPPC directive is geared to prevent so-called "eco-dumping," whereby states transfer low-cost, polluting technologies to regions that cannot defend against them. The IPPC directive and three other widely divergent measures may prove instrumental in producing improvements in the Polish environment. The Emissions Trading Directive seeks to meet European climate change obligations by applying a greenhouse gas reduction and trading scheme. The Waste Electrical and Electronic Equipment and Restriction of Use of Certain Hazardous Substances Directives target the problem of disposal of hazardous and potentially recyclable wastes arising from commonly and extensively used electrical and electronic equipment.

Poland's adoption of various EU directives represents a significant expansion of environmental protection policy. Of the twenty-seven environmental measures required by the EU, only seven previously existed in Poland. To the extent that the aforementioned measures are being complied with, the directives have already succeeded in improving the Polish environmental landscape. Polish compliance with EU directives has resulted in a significant reduction in the emission of air pollutants, with sulfur dioxide emissions falling by 53% and nitrous dioxide emissions declining by 35%. Total greenhouse gas emissions have also declined consistently over the past few years. Waste legislation has been strengthened, while water metering, leakage reduction, and water abstraction charges have reduced the levels of water pollution.

Much remains to be done, however, and Poland continues to have the dubious distinction as having emission intensities of major pollutants per unit of GDP that are among the highest in the

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172 Sommer, supra note 12, at 37.


175 Vardi & Zeno-Zencovich, supra note 169, at 236-38.
OECD.\textsuperscript{176} Poland has been relatively slow in implementing the IPPC Directive, and, as of August 2003, still had to issue approximately 2,300 permits to comply fully with the directive.\textsuperscript{177} Even with help from the Danish EPA, Polish compliance with the directive has been slow and incomplete.\textsuperscript{178} In addition, although almost 80\% of the overall volume of waste water in Poland undergoes treatment, not all of it is treated in compliance with the Water Framework Directive.\textsuperscript{179} More generally, Polish administrative capacity with regard to enforcement of EU environmental directives is substantially less than originally promised.\textsuperscript{180} Full compliance with EU directives will be financially prohibitive, amounting to an estimated annual expenditure of €22-55 billion for the next ten years.\textsuperscript{181}

Poland should seek to minimize the public outlay by implementing an incentive structure designed to promote private sector efforts at improved environmental compliance. The Polish government has already implemented a facility-specific, compliance determination option, which gives tariff reductions to power plants that are certified as compliant with EU environmental requirements—a policy aimed at encouraging swift adherence to EU mandates.\textsuperscript{182} That said, research indicates that market-based instruments, such as taxes and tradable permits, and target emissions are only moderately effective at limiting pollution. Optimum environmental policy relies on a mixed strategy of "command-and-
control" measures and economic incentives,\textsuperscript{183} and, in strengthening compliance with EU environmental directives, the Polish government would do well to employ this approach.

4.1.4. Agricultural directives

The agricultural sector presents the preeminent example of a field where EU mandates and Polish policies both may benefit from integration pressures and reform requirements. EU-mandated financial outlays targeted at agricultural modernization should not be viewed as integration costs but rather as measures undertaken in the best interest of Poland.\textsuperscript{184}

Polish political leaders would do well to seize the opportunity provided by EU accession to implement much needed economic reform in the endemically problematic agriculture sector. The Polish agricultural industry is very large but also highly outdated and inefficient. Whereas the farm sector employs around 5\% of the population in existing EU member states, the proportion of agricultural workers is approximately 25\% in Poland.\textsuperscript{185} Agricultural plots are small and yields are low, while the horse and cart have yet to give way to the tractor in many regions.\textsuperscript{186} Agricultural efficiency is on average 45\% lower than in the EU,\textsuperscript{187} and "[a]t least a quarter of Poland’s milk is produced by almost 1 million individual farms, holding only 1 to 3 cows, while 50\% of the milk is produced by farms in the 3 to 9 cow category."\textsuperscript{188} In response to this


\textsuperscript{184} See Office of the Committee on Eur. Integration of Poland, The Balance of Costs and Benefits of Poland’s Accession to the European Union: Presentation of the Results of Studies Performed by Polish Research Centers, Apr. 2003, at 8.

\textsuperscript{185} Hilary Ingham & Mike Ingham, How Big is the Problem of Polish Agriculture?, 56 EUR.-ASIA STUDIES 213, 215 (2004).

\textsuperscript{186} See id. at 231 (identifying the key components of the Polish agricultural sector that require restructuring and suggesting policy remedies).


https://scholarship.law.upenn.edu/jil/vol27/iss1/4
situation, the EU has agreed to provide Polish farmers with direct subsidies at a ratio of 25% of that which is currently received by EU farmers. However, in offering these funds, the European Commission has said that Poland needs to make "major efforts" in its farm sector and expressed "serious concerns" about the country's veterinary standards. The European Commission has accepted a Polish sectoral plan aimed at modernizing the agricultural sector and fostering rural development through 2006. The stated priorities of the program include the improvement of agricultural efficiency, profitability and hygiene, the improvement of rural housing conditions, the consolidation of farms and agricultural structures to maximize production, and the provision of technological assistance in the form of modern agricultural instruments.

Potentially, the receipt of EU agricultural subsidies may ameliorate problems of agricultural efficiency, but the assistance must be accompanied by extensive reform of the agricultural sector in order to produce long-term improvements. However, the implementation of needed agricultural reform has been stymied, and in the past, the EU has chided Poland for its lack of progress in the area of agricultural structural reform, criticizing the government's preference for palliative solutions over long-term restructuring. Despite wide agreement about the necessity of agricultural reform, little progress occurred throughout the 1990s.

On the other hand, economic forces may facilitate some of the structural reforms that the government does not seem to have the political clout to effect. Already, EU entry has had an impact on agricultural prices, and the removal of barriers to Polish food exports has led to a notable increase in agricultural sales abroad.

189 See Q&A: The EU's Farm Deal, BBC NEWS, Oct. 25, 2002 (noting that the staggered subsidies represent a compromise between Poland and the EU). The negotiations that produced this compromise and the calls for reform of the Common Agricultural Policy that they inspired are discussed in infra Section 4.2.4.

190 See A Nervous New Arrival on the European Union's Block, ECONOMIST, Aug. 28, 2003 (discussing the various agricultural reforms needed to bring Poland into conformity with EU standards and rejuvenate the agrarian sector).


192 See European Commission, supra note 39, at 28 (describing Poland's myopic agricultural policies).

193 See POLAND: COUNTRY PROFILE, supra note 74, at 35 (noting that agriculture remains a troubling sector of the Polish economy).

194 See id. at 35-36 (explaining the relationship between Poland's less inhibited agricultural trade and its exporting market).
With prices in most EU countries higher than those in Poland, domestic food prices and foreign agricultural exports have increased and served as a boon to farmers' generally substandard incomes. In addition, EU CAP regulations and subsidies favor big farms and may stimulate self-motivated agricultural consolidation among Polish farmers. The convergence of wages between the EU and Poland will also promote labor mobility and will ameliorate the problem of overemployment in the agricultural sector.

Policy measures funded by EU subsidies and aimed at modernizing agricultural methods would accelerate these advances enormously. Although Poland is not yet in full compliance with EU agricultural directives and acquis, the "Ministry of Agriculture and its agencies [have proven] to be quick learners of CAP mechanisms and [have improved] their policy-enforcing capabilities." In addition to these enforcement efforts, the government should direct public funds at advancing the technological resources available to farms and agricultural workers, with a focus on modernizing facilities and tools. Polish authorities should employ EU funds to further encourage agricultural consolidation and promote agricultural economies of scale, in order to better compete with products in foreign markets.

4.2. Effective Noncompliance

While it would appear that Poland, despite its current economic success, would profit from fully implementing certain EU directives, the nation's noncompliance with certain directives has and will continue to serve it well in the long term. In particular, EU directives aimed at further reforming the financial sector and stymieing civilian migration misconceive underlying realities in recently admitted EU nations. Poland's lackadaisical implementa-

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195 See id. at 35 (revealing the effects of increased prices upon Polish farming industry).
196 See Enlargement Poser for EU Dairy Policy, supra note 188 (referencing the WTO's Agenda 2000's policy adjustments regarding farm subsidies).
198 Id. at 650.
tion of these directives has served it well and suggests that opposition to directives "through the back door" may create a de facto dialogue between new member nations and administrators in Brussels. Moreover, the failure of these directives to adequately conceptualize the state of affairs in recently admitted EU member nations suggests that a multifaceted regulatory model may be preferable to the current reliance on externally imposed and mandatory directives.\textsuperscript{200} So too, the controversy surrounding extension of the CAP and farm subsidies to Poland indicates that current EU policy and legislation requires considerable reform, and that new member states may be useful catalysts of much-needed change. In the words of one scholar, the policy interchange between the EU and CEE member states "displays the complex relationship between [the] four themes of risk, reform, resistance and revival."\textsuperscript{201}

4.2.1. Financial services directive

EU directives aimed at increasing harmonization of the regulatory framework of the financial services industry have proven successful in integrating the market for unsecured interbank loans and deposits and facilitating the settlement of cross-border transactions, thereby improving the market situation in Poland considerably.\textsuperscript{202} At the same time, the compliance model employed to affect this integration is problematic and does not account for the different financial situations present in recently admitted nations. In particular, markets in existing EU member states are considerably more heterogeneous than those in new member nations and are characterized by much more vibrant national debt markets due to high government deficits in the past.\textsuperscript{203} These factors, and the at-

\textsuperscript{200} See Boć & Nowacki, supra note 167, at 25 ("It is worth bearing in mind that the universally acclaimed wisdom that what works well should not be improved has in this case no praxeological application, mainly because the need to accept the ideas, concepts, principles, basic legal forms of operation, definitions and even terminology of European legislation is now beyond argument.")

\textsuperscript{201} Ulrich Sedelmeier, Eastern Enlargement: Risk, Rationality and Role-Compliance, in THE POLITICS OF EUROPEAN UNION ENLARGEMENT 120 (Frank Shimmelfennig & Ulrich Sedelmeier eds., 2005).


\textsuperscript{203} See Christian Thimann, Financial Sectors in EU Accession Countries: Issues
tendant regulatory requirements, are not applicable to the markets of newly admitted EU members.

In addition, foreign ownership of the banking sector in accession countries stands at above 65% as compared to only approximately 20% in existing EU member countries. On the one hand, the high concentration of foreign ownership in the Polish banking system has given rise to concerns that the financial needs of smaller domestic firms might be neglected. On the other hand, foreign ownership of domestic financial institutions may be desirable, as foreign investors bring fresh capital and knowledge to the institutions in which they invest. Foreign involvement in financial markets also strengthens competition among banking entities and may serve to improve performance in the long term.

The compliance-based regulatory model facilitates neither possibility. Polish derogations from the model may assist in the development and financing of small local enterprises. As of 2003, Poland had not yet complied with all of the relevant EU directives pertaining to the financial services industry, and further efforts were required to align domestic legislation with existing EU banking and securities law. Specifically, the state is still in control of four major Polish banks: PKO BP (the largest bank in Poland), BGZ (the agricultural bank), Bank Pocztoy, and BGK, arguably

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204 Id. at 6. Some estimates even place foreign ownership of Polish banking assets at 70%. See POLAND: COUNTRY PROFILE, supra note 74, at 39 (noting this statistical distinction among EU member states).

205 See POLAND: COUNTRY PROFILE, supra note 74, at 39 (indicating the economic realities of smaller companies may be incongruent with the current situation).

206 See id. at 29 (explaining the role of foreign investment capital in the Polish economy).

207 See id. at 46 (emphasizing the positive effects of foreign investment on national debt).


209 See POLAND: COUNTRY PROFILE, supra note 74, at 40-41 (writing on Poland's management of four banks).
in contravention of the Second Banking Directive of the EU.\footnote{Council Directive 89/646, 1989 O.J. (L386) 1 (EU). Specifically, the state's assistance of and preferential treatment to domestic banking institutions may violate the mutual recognition requirement of articles 18-21, which mandates freedom of establishment in EU member states other than the banking institution's home state. \textit{See id.} arts. 18-21 (elaborating on the possible contradiction of state law and international directives).} In addition, the government retains the right to approve certain investments\footnote{\textit{See Stephen Woolcock, Liberalisation of Financial Services} 27 (London School of Economics, Draft Paper) \textit{available at} http://www.lse.ac.uk/collections/internationalTradePolicyUnit/pdf/liberalisationOfFinancialServices.pdf (last visited Feb. 19, 2006) (noting that Poland has lagged behind certain other CEE countries in its efforts to liberalize the financial services sector).} and has inhibited foreign involvement in the insurance market.\footnote{\textit{See POLAND: COUNTRY PROFILE, supra note 74, at 41 (underscoring Poland's insurance market relationship with foreign insurers).} Perversely, this measure of nonconformity may yield better results than compliance, and yet it meets with censure from the EU. Particularly, increased foreign involvement in the financial services market has produced significant consolidation in the field. In 1999, the number of commercial banks in Poland fell from eighty-three to seventy-seven\footnote{\textit{See EURO INFO CENTRE MARKET ACCESS WORKING GROUP, COUNTRY PROFILE FACT SHEET: POLAND} 34-37 (Dec. 2002), \textit{available at} http://www.northeasteic.com/lib/liDownload/18 PROFILE-poland-2003.pdf (last visited Feb. 19, 2006) (discussing recent developments in the Polish banking sector).} and the U.S. Alliance for International Development ("USAID") estimates that this figure could decline to between thirty and forty in the next few years.\footnote{\textit{See USAID Mission to Poland, An Assessment and Rating of the Polish Banking System: Final report 2000,} \textit{available at} http://www.usaid.gov/pl/2000bank.htm (last updated Mar. 13, 2002) (evaluating the performance of different aspects of the Polish banking system).} Data shows that the consequences of consolidation are mixed.\footnote{\textit{See Olena Havrylchyk, Banking Efficiency, Consolidation, and Foreign Ownership: Evidence from the Polish Banking Market} (Jan. 31, 2005) (Ph.D. thesis, University of Viadrina), \textit{available at} http://edocs.ub.euw-frankfurt-o.de/data/dissertations/wiwi/2005/havrylchyk.olina.pdf (concluding that consolidations in the Polish banking market have produced mixed results).} The flurry of consolidations has eliminated many small and medium-sized Polish banks and financial services providers and has lessened competition in the industry, by reducing the number of market participants. Poland's ongoing noncompliance with EU directives through preferential treatment of domestic financial service providers and limitations on foreign involvement serves to curtail consolidation and help the development of small and me-
medium-sized local enterprise. Thus, in the case of financial services, "the adoption of compatible standards rather than [integration] through mere copying of existing financial systems" may prove to represent a superior regulatory alternative.

On the other hand, assuming foreign involvement in the financial services industry produces positive results, stronger EU enforcement of the directives in existing member states might produce greater diversity in the ownership of financial services companies. Italy and the recent Parmalat scandal represent perhaps the most flagrant example of EU directive non-enforcement in existing member states. Given the purported advantages of significant foreign ownership of the financial services sector, existing EU members may wish to emulate their Eastern neighbors by further opening their financial markets to increased foreign involvement.

4.2.2. Directives pertaining to migration

The Europe Agreements emphasize the right of resident EU workers from newly admitted states to be free from employment discrimination. However, specific regulation of the movement of labor from new member to existing member states is left to national governments, and the Europe Agreements implement transition periods to restrict the free movement of labor from east to west. Thus, according to the Europe Agreements, newly admitted EU members do not enjoy full access to EU labor markets and migration of workers from the new member states is strictly regulated. Following a period of opposition and intense negotiations, Poland largely complied with the EU's "transitional restric-

216 Id. at 9.
217 See EU to Act to Prevent "Another Parmalat", DAIRY INDUSTRIES INT'L, Dec. 2004, at 6 (indicating that the company's family-owned status and the country's flawed banking system enabled fraudulent conduct).
218 The transitional agreements allow members of the existing EU-15 to limit the immigration of workers from new Member States for a period of up to seven years after enlargement. See Andreas Schneider, Analysis of EU-CEE Migration with Special Reference to Agricultural Labour 6-7, (Hamburgische Welt-Wirtschafts-Archiv [Hamburg Institute of International Economics], Flowenla Discussion Paper No. 27, 2004), available at http://www.hwwa.de/Projects/Res_Programmes/RP/Mobility/Flowenla/Flowenla27.pdf (last visited Feb. 19, 2006) (describing integration legislation that is designed to inhibit labor migration).
219 Britain, Ireland, and Sweden excepted themselves from the imposition of "transitional restrictions" on the free movement of labor from CEE countries to their markets.
tions” on the movement of labor by updating its visa policy and improving border protection. According to Andrew Geddes, “policy in the [Central and Eastern European Countries] has arisen almost entirely as a result of the requirements of EU accession, [and] EU policy models and ideas about borders, security and insecurity have been exported to [CEE] countries ....”

In adhering to the EU’s imposed limitation on the migration of Polish workers, the Polish government is complying with a misguided policy measure that is neither in the country’s best interests nor to those of the EU. Given the rapid pace of growth in recent member nations, which has far outstripped levels at current member states, mass migration from new to old member states is unlikely to occur. Moreover, even were low levels of migration to happen, current EU members – demographically in decline at present – might benefit from the influx of labor particularly directed at lower-income opportunities. Expected labor shortages in Germany and Austria soon will make irrelevant the fear of additional workers from CEE states. The restrictions on the movement of labor already have created inefficiencies in various European countries. Specifically, some Western European countries are experiencing labor shortages in the service industries, which their citizens view with disdain and associate with servitude. CEE labor markets, on the other hand, continue to suffer from high unemployment rates. The migration of surplus labor from CEE countries to Western European countries would remedy both problems, but EU-imposed restrictions on labor movement preclude a remedy to

220 See Krystyna Iglicka, EU Membership Highlights Poland’s Migration Challenges, Apr. 2005, http://www_migrationinformation.org/Feature/display.cfm?id=302 (considering the implications of EU membership on Poland’s migration policy).
224 See Poland’s Unemployment Dulls Consumer Demand, MARKET EUROPE, Aug. 2005, at 1, 1 (identifying that the average unemployment rate in Poland has been 16.5% in the last decade).
this disequilibrium. The human capital endowments of these migrants, as measured by indicators such as amount of schooling, are higher than those of countries with comparable income levels and match those of existing EU member states, and it is clear that the workers would qualify for these vacancies.225

The restrictions on worker movement also do a disservice to the overall EU labor market. Empirical evidence indicates that open and unregulated labor markets correlate positively with economies that are highly successful in coping with structural change.226 Markets that are open to labor movement are thought to react more quickly and more flexibly to changes in the macroeconomic environment.227 Given the negative ramifications of its policy on both the Union as a whole and individual member states, the EU’s preclusion of migration represents another example of the forced imposition of misguided existing member agendas on recent admittees.

4.2.3. **Comparison with existing EU member success cases**

A comparison of the highly successful accession of Ireland and the less successful transition experienced by Greece further indicates that pure adherence to EU directives does not inevitably confer riches on a new member state.228 Ireland leveraged its accession to produce economic success by slashing taxes and reducing the state’s share of the economy, while simultaneously exploiting its access to the EU market and encouraging a torrent of foreign direct investment.229 The country’s ambitious efforts at economic growth,

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227 *Id.*

228 *See* Billie Morrow, *Ireland: The Road to Success*, at 15, available at [http://www.lehigh.edu/~incntr/publications/perspectives/v19/Morrow.PDF](http://www.lehigh.edu/~incntr/publications/perspectives/v19/Morrow.PDF) (commenting that many Irish citizens feel that the EU has played only a minor role in its economic progress).

including a measure on tax competition and resulting in a budget surplus in 2001, earned it criticism from other EU member governments for “disloyal” competition and behavior outside the discipline of the EMU.\textsuperscript{230} The strategies also earned Ireland a GDP growth rate of 4.9% in 2004.\textsuperscript{231}

In contrast, Greece employed EU subsidies to shore up existing public works efforts and stagnant enterprises.\textsuperscript{232} Fiscal imbalances and a widening general budget deficit plagued the country in 2003 and 2004,\textsuperscript{233} producing a slowdown in the GDP growth rate to 3.7%.\textsuperscript{234} The government has made efforts to contain inflation through the implementation of indirect tax reductions and wage moderation, but more fundamental structural improvements are required to increase productivity and competitiveness.\textsuperscript{235}

Hence, both Greece and Ireland nominally conformed with EU directives and legal mandates, but their divergent means of compliance yielded extremely different economic results. Thus far, CEE countries and Poland in particular have been fashioning themselves after Irish growth strategies.\textsuperscript{236} Poland’s ongoing reluctance to fully comply with EU corporate tax measures and its use of fiscal and other incentives to entice investment from abroad may be modeled after Irish efforts. Its efforts, like those of Ireland, may also earn it the ire of existing EU member states.\textsuperscript{237}

Ireland’s economic resurgence post-accession); see also, John Bruton, Leader, Ir.’s Fine Gael Party, The Irish Miracle: Creating the Celtic Tiger, Address at the Frontier Center for Public Policy (May 8, 2000) (analyzing the reasons for Ireland’s recent economic successes).

\textsuperscript{230} Wallace, supra note 30, at 30.


\textsuperscript{232} See Greek Prime Minister Says Country Faces Year of Major Changes, SOUTHEAST EUROPEAN TIMES, Jan. 5, 2005 (discussing how mismanagement of EU funds has only exacerbated preexisting economic problems).

\textsuperscript{233} See Dimitris Kontogiannis, Leader Tipped to Fall Back in Growth Race, EUROMONEY, Dec. 2003, at 34, 51 (explaining the economic woes of Greece in 2003 and 2004).


\textsuperscript{237} See id. (elaborating on the CEE countries’ resemblance to Ireland).
4.2.4. Common agricultural policy

The imposition of existing EU policy measures on newly admitted states through directives and the problematic nature of many of these policies underscores the need for dramatic reform of certain EU mandates. In particular, the heated debate over extension of the Common Agricultural Policy ("CAP") to new member states reflects on the self-interested nature of many EU policies and the need for their reform. In 2002, an agreement was reached whereby direct payments to farmers in new member states were set at 20% of EU levels upon accession and raised annually in 5% increments each successive year over a ten-year period. Critics disparaged the compromise as "the worst of all possible words" and a missed opportunity for reform of stagnant and expensive CAP policies.

On the one hand, prior conservative fiscal policies were abandoned; on the other hand, the new EU entrants received a small and unequal share of the monies.

The monetary distributions were coupled with requirements that new EU entrants formulate long-term agricultural reform policies and apportion subsidy payments to structural improvements. Most CEE nations have adhered to the reform mandate, and new member states, including Poland, generally apply approximately 30% of their monies to improvements in infrastructure. In contrast, West European recipients of CAP monies expend only approximately 10% of their funds on improvement of facilities, viewing the bulk of the monies received simply as subsidies. Long-term planning aimed at agricultural reform is ambivalent at best in many West European countries. Poland, in contrast, has established an Agency for Restructuring and Modernisation of Agriculture (ARMA), whose mandate is to promote agricultural reform on the regional level.

The disparity in CAP policy implementation underscores the extent to which existing EU members were motivated by self-interest in establishing accession criteria and employed directives "to carve 'model' member states" out of CEE applicants. In

238 OUDENAREN, supra note 7, at 156.
239 See EEC Treaty art. 33 (highlighting intensely vested national interests).
240 See id. (describing the fiscal inequality of the agreement).
241 See Ernst & Young, Poland–European Union, EU REV., Aug. 2003, at 2–3 (describing the functioning of ARMA).
242 EU ENLARGEMENT: A LEGAL APPROACH, supra note 28, at 12.
some situations, the expectations and reforms imposed on CEE states were ones which existing member states did not adhere to themselves, even when such adherence might have been beneficial. In other cases, existing EU members extended their own flawed policies onto new member states, propagating problems where reforms were needed. Ultimately, the preference for compliance-based regulations that rarified traditional member-state policies inhibited the regulatory diversity and innovation that might have yielded solutions to ongoing EU (and member state) problems in certain areas.

5. CONCLUSION—A COMPOSITE APPROACH

As the EU looks to the future, it might do well to evaluate the utility of its directives model in light of the Polish situation. Specifically, the EU might consider whether a purely compliance-based model comprised of legislative impositions from Brussels represents the best possible means of enacting socio-economic change in CEE countries or if a composite model, one that acknowledges the successes of the transition economies and involves greater interplay with the mechanisms that have yielded these positive results, might be more effective. A model that includes alternatives to uniform standards, such as controlled differentiation, arguably presents a superior approach.243

More dynamic regulatory paradigms will enable the EU to further tailor its legal mandates and its agenda to confront the more subtle obstacles that may continue to block its goal of becoming "the most competitive and dynamic knowledge-based economy in the world, capable of sustainable economic growth with more and better jobs and greater social cohesion."244 The biggest obstacle to this stated objective is not regulatory differentiation, but rather national labor and product markets that need liberalization and national welfare and pension systems that need reform. Troublingly, while advocating reform in the economies of new member states, the three biggest euro-area economies—Germany, France and Italy—continue to view internal economic liberalization with considerable hesitation.245

243 See LOUKA, supra note 66, at 2 (discussing the options available for regulation of environmental issues).
The ten new member countries may prove helpful in this regard. Not only are they growing faster than the existing members, but ironically, because of the mandates imposed on them by the EU, they are also more liberal economically in some areas. CEE economies are also more flexible, with populations and politicians who are more accustomed to dramatic reforms than many current EU members. Due to their general predisposition towards low taxes, smaller welfare systems, and more competition, driven by EU mandates, they may ultimately make their economies more vibrant and liberal than those in many of the existing member states. Perhaps in forcing the new member states to implement liberalizing directives, the existing member states could learn from their own teachings. An integrated approach, by recognizing the advantages that each party brings to the union, would enable this and arguably prove most successful to the economic progress sought by everyone.

See PUSCA, supra note 3, at 157.

As one author commented:

Similarly, it would be wrong to claim that the demands of transnational markets are doomed to encounter complete rejection anywhere they demand deep transformations. More commonly, controversial principles find their way even in the more recalcitrant of the member states but only partially and belatedly. National idiosyncrasies and international mandates then coexist in contradiction with each other, both under pressure to change. It follows that I do not intend to argue for the ubiquitous rejection of the transformative demands of transnational markets, but rather for an appreciation of the fact that transnational markets do demand transformation and that, as a result, they are bound to encounter resistance and therefore experience differences in implementation across member states.

DUINA, supra note 16, at 3.