Implementing a Competition Law System- Three Decades of Polish Experience

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Implementing a Competition Law System —Three Decades of Polish Experience

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Abstract

This article critically analyses the introduction and development of a system of competition law in Poland prior to 2016, a period when the country underwent two fundamental transitions: from a centrally planned economy to free markets and from communism to democracy. In particular, the study focuses on the competition agency's setup, advocacy and enforcement efforts. It also examines the position and input of the judiciary, practitioners and the broader epistemic community. The study uniquely benefits from in-depth interviews with individuals who shaped the Polish system over nearly thirty years of its existence (inclusive of all former heads of the agency, judges, leading practitioners and agency advisors) and from analysis of newly gathered data and statistics. It also draws on broader scholarship on new competition regimes. The findings are aimed to inform refinements in Poland and other countries establishing or developing competition law systems. This study will be particularly salient in countries that are undergoing or have undergone similar economic and/or political transitions.

KEYWORDS: competition law, antitrust, competition law institutions, legal institutions, institutional design, enforcement, competition advocacy, courts, economic development, developing country, Poland

JEL CLASSIFICATIONS: K21, K23, L40, L44, L50, O10, O43, P30, P31

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I. Introduction

The spread of competition legislation internationally in the last three decades has been unprecedented. While initially associated with Western liberal democracies with market economies, competition legislation has now spread to more than 130 countries with a range of economic structures. The new competition law jurisdictions differ greatly with regard to the level of development, type of economy, and broader socio-political and cultural contexts. As a result, each faces unique challenges in implementing competition systems.[1]

This article critically analyses the introduction and development of a competition law system in Poland. The system took root as Poland shifted from a centrally planned to a free market economy; from communism to democracy; and from isolation to accession to the European Union (EU). This research, while relying on broader scholarship on new competition regimes and doctrinal research, also draws on data and statistics. Moreover, this analysis benefits from nearly 30 in-depth interviews conducted with individuals who shaped the system over nearly 30 years of its existence, including all former heads of the competition agency, judges, leading practitioners, and agency advisors.[2]

Kovacic and Lopez-Galdos argue that establishment of a well-functioning competition law system is a slow process, requiring between 20 and 25 years before one can gauge its results.[3] In this light the Polish regime is ripe for such a broad empirical evaluation, which was undertaken with a focus on some of the key factors determining effective implementation of competition law and policy, drawing on the work of Aydin and Büthe.[4] The analysis begins with developments in the early 1980s, leading to the adoption of the first competition statute in 1987. It concludes at the end of 2016. It is the first such study of the Polish competition law system,[5] or indeed of a recently matured competition law regime.

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[1] For analysis of the phenomenon and the reasons behind it see Umut Aydin, 'The International Diffusion of Competition Laws' (APSA Annual Meeting Paper 2010), available at <https://papers.ssrn.com/abstract=1657456>; Eleanor M Fox, 'Antitrust in No One's World' (2012) 27(Fall) Antitrust 73.

[2] See Annex I: Interviewees list in the full report available at https://ssrn.com/abstract=XXXXX. The interviewees informed this project and served as sources, providing directly attributable comments and some observations on a not-for-attribution basis. In the case of attributable comments interviewees initials were used to identify them. Annex I provides a key to the initials' listing.

[3] William E Kovacic and Marianela Lopez-Galdos, 'Lifecycles of Competition Systems: Explaining Variation in the Implementation of New Regimes' (2016) 79(4) Law and Contemporary Problems 85, 94-97.

[4] Umut Aydin and Tim Büthe, 'Competition Law & Policy in Developing Countries: Explaining Variations in Outcomes; Exploring Possibilities and Limits' (2016) 79(4) Law and Contemporary Problems 1.

[5] The scholarship devoted considerable attention to the Polish competition system in its early years, typically alongside other new systems that emerged after the collapse of the Soviet Union. See, eg, Russell Pittman, 'Some Critical Provisions in the Antimonopoly Laws of Central and Eastern Europe' (1992) 26 The International Lawyer 485; Roger W Mastalir, 'Regulation of Competition in the New Free Markets of Eastern Europe: A Comparative Study of Antitrust Laws in Poland, Hungary, Czech and Slovak Republics, and Their Models' (1993) 19 North Carolina Journal of International Law and Commercial Regulation 61; John Fingleton, et al., *Competition Policy and the Transformation of Central Europe* (Centre for Economic Policy Research 1996); William E Kovacic, 'The Competition Policy Entrepreneur and Law Reform in Formerly Communist and Socialist Countries' (1996) 11(3) American University International Law Journal of Law and Policy 437; Ben Slay (ed), De-Monopolization and Competition Policy in Post-Communist Economies (Westview 1996); Robert H Lande, 'Creating Competition Policy for Transition Economies: Introduction' (1997) 23 Brooklyn Journal of International Law 339; Russell Pittman, 'Competition law in central and eastern europe: five years later' (1998) 43 Antitrust Bulletin 179. Probably the last attempt to offer a broad analysis of the system's development was the OECD study. Michael

The findings aim not only to inform refinements in Poland, but also to deepen our understanding of how new systems develop and to influence law and policy reforms in jurisdictions that are developing domestic competition systems. They will be particularly salient in countries that have undergone or are undergoing similar economic and/or political transitions.

This article first outlines the broader political and economic context of Polish transition. It then provides an overview of early developments in competition law under the communist regime (pre-1990). This leads to analysis of the competition system post-1990 divided into three sections that focus on the key co-producers of the system. The main section scrutinises the status and operation of the competition agency. In particular, it first critically examines the agency's setup, its resources and evolving mandate, allowing further examination of the agency's advocacy and enforcement efforts across the years. The main section is followed by sections focusing on the contributions and roles played by the judiciary, practitioners, and the broader epistemic competition law community. The conclusions bring together the key policy recommendations.

II. Political and economic context of transition

Any assessment of the competition system in Poland must consider the broader economic and political context of Poland's transition to a market economy and the related paradigm shifts. This section offers such an overview.

Between 1945 and 1989 Poland was a communist state, subordinate to the Soviet Union. In the late 1940s the economy was nationalised. A system of central planning (a command economy) was introduced. In this framework resource-allocation decisions (in relation to production, investment, and pricing) were made centrally by the government and not independently by firms. Most prices were fixed administratively, often below cost, artificially suppressing inflation. State-owned firms were formally grouped within industries into associations and they were supervised by sectoral ministries. Profits of efficient operators were transferred to cover losses incurred by inefficient ones. There was no real scope for competition. Foreign economic relations were reoriented to meet Soviet needs. Autarkic tendencies and insulation of the Soviet system meant that the economy was not exposed to foreign competition.

This grossly inefficient system led to a low living standard and shortage economy, including rationing of basic staples (such as sugar or milk) in the 1980s.[6] The dire and worsening state of the economy necessitated changes, which were pressed for by the newly established and free labour union—Solidarity (Solidarność).[7] In 1981 a White Paper on the Economic Reform[8] called for various far-reaching changes, inclusive of the introduction of competition legislation. The economic reforms of the 1980s indicated movement away from central planning. They included introduction of freedom of economic activities, formal ending of a privileged position of state-owned enterprises,[9] and dissolution

Wise, 'Review of competition law and policy in Poland' (2003) 5(2) OECD Journal: Competition Law and Policy 83.

[6] See further Glenn Eldon Curtis, *Poland: A Country Study* (Federal Research Division, Library of Congress 1994).

[7] See further Jan Kubik, *Power of Symbols Against the Symbols of Power: The Rise of Solidarity and the Fall of State Socialism in Poland* (Pennsylvania State University Press 1994).

[8] Komisja do Spraw Reformy Gospodarczej, *Podstawowe Założenia Reformy Gospodarczej: Projekt* (Książka i Wiedza 1981).

[9] Law on Business Activities of 23 December 1988, OJ No 41, item 324.

of conglomerates and sectoral associations (which deprived enterprises of commercial autonomy).[10] While themselves insufficient, these reforms heralded a major paradigm shift.

At the end of the 1980s Poland experienced a peaceful, yet difficult transition to democracy and capitalism. The first partly free parliamentary elections, in June 1989, led to the creation of Tadeusz Mazowiecki's government and initiation of a rapid economic transformation under Deputy Prime Minister and Minister of Finance Leszek Balcerowicz, a PhD economist. A group of experts under his supervision prepared a package of key reforms (the so-called Balcerowicz Plan, later referred to as shock therapy). State monopoly in international trade was abolished. Internal currency convertibility was introduced. Rationing of goods was ended. Subsidies to state-owned firms were slashed and their bankruptcy made possible. The majority of prices were freed, unleashing very high inflation (which, in turn, was curbed within a relatively short period of time).[11] In terms of competition, Balcerowicz prioritised introduction of an open trade regime with a view to generating import competition as a source of discipline for often grossly inefficient domestic incumbents. He was a keen believer in privatisation and demonopolisation.[12] Implementation of these early reforms helped establish the foundations of a market economy and reintegrate Poland into the global economy. Poland was the first country from the Soviet bloc to take this path.[13]

Polish reorientation to the West, especially towards the EU, was unambiguous. By September 1989 Poland had already signed the Trade and Commercial and Economic Cooperation Agreement with the European Community. In December 1991 Poland concluded an Association Agreement with the European Communities,[14] signalling ambition and firmly anchoring the country's future direction of travel. As part of this alignment effort, Poland undertook a commitment to approximate its laws to the EU regime, including in the sphere of competition.[15] The formal application to join the EU was submitted in April 1994. The accession process required fulfilment of various conditions (so-called Copenhagen criteria), among them establishing a functioning market economy and developing the capacity to cope with competition and market forces.[16] As early as 1997 the European Commission concluded that Poland met these criteria.[17] Accession required also acceptance and implementation of the entire body of EU law. Following successful adjustments and negotiations, Poland joined the EU on 1 May 2004.

The pro-EU orientation played a major role in the country's successful development. Market reforms put Poland on a trajectory of strong and sustained economic growth (see Figure 1 below). Recently FTSE Russell, a leading provider of stock market indices, announced Poland's reclassification from an

[10] Law on Various Conditions of Consolidation of the National Economy of 24 February 1989, OJ No 10, item 57. See further Hubert Izdebski, 'Legal Aspects of Economic Reforms in Socialist Countries' (1989) 37(4) The American Journal of Comparative Law 703, at 714-18.

[11] See, eg, Marek Belka, 'Lessons from the Polish Transition' in Ryszard Rapacki and George Blazyca (eds), *Poland into the new millennium* (Edward Elgar 2001).

[12] Interview with LB.

[13] Jeffrey Sachs and David Lipton, 'Poland's Economic Reform'(1990) 69(3) Foreign Affairs 47, 48.

[14] Europe Agreement Establishing an Association between the Republic of Poland and the European Communities and Their Member States, signed on 16 December 1991, effective on 1 February 1994.

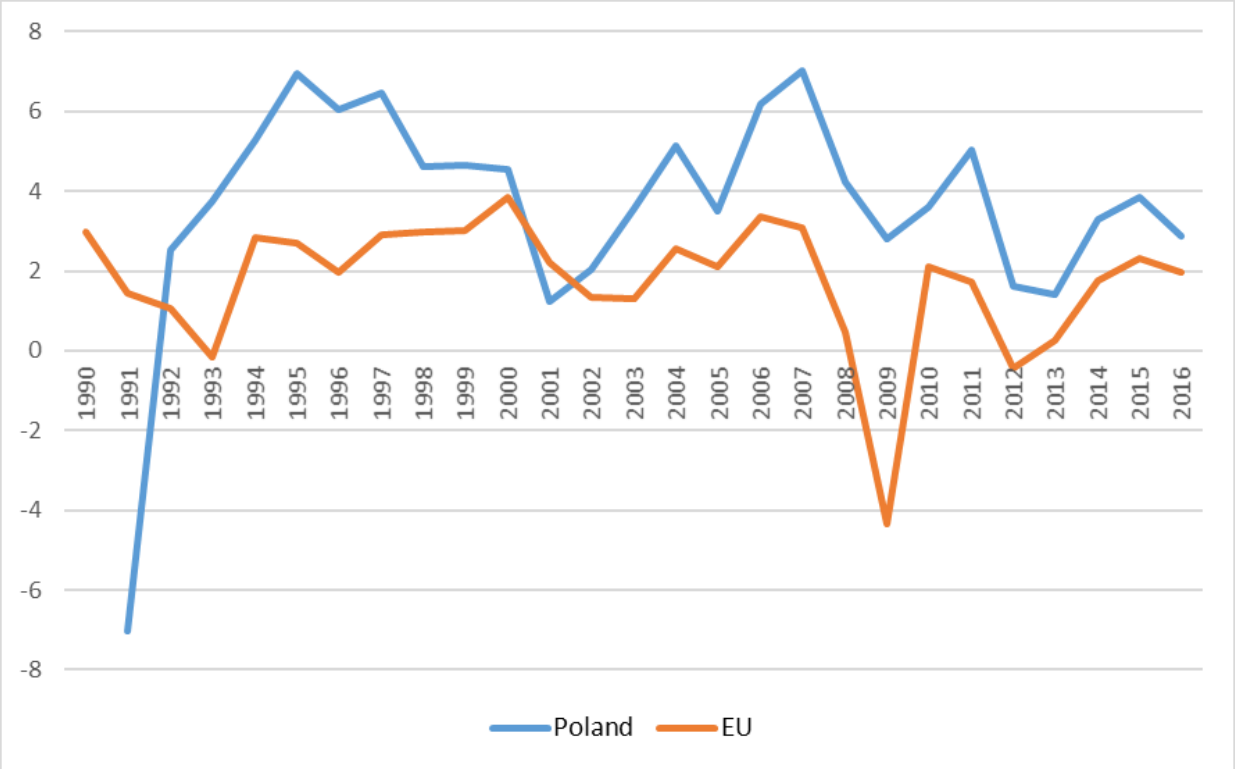
[15] Art. 69 of the Europe Agreement.

[16] For Conclusions of the Presidency, outlining the criteria see 26(6) Bulletin of the European Communities Commission (1993), 13.

[17] European Commission, Agenda 2000 - Commission Opinion on Poland's Application for Membership of the European Union, DOC/97/16 (15 July 1997), 111-14.

'emerging' to a 'developed' market, making Poland the first country in the region to reach that status.[18]

Figure 1: GDP growth in Poland (annual percentage rate).



Source: World Bank.

III. Pre-1989 developments

The creation of a competition system in Poland post-transition did not start with a clean slate. It faced a heavily concentrated economy dominated by largely inefficient state-owned enterprises and a business culture of close collaboration, required by law for decades.

Poland's modern experience[19] with competition law goes back to the early 1980s. The work on a statute began in 1982 in the context of pro-market reforms.[20] While the draft was prepared relatively quickly by a group of experts,[21] Law on Counteracting Monopolistic Practices in the National Economy was adopted only in January 1987 (the 1987 Act).[22] Poland was not the first communist state to introduce such legislation.[23]

[18] 'Poland to Switch from Emerging to Developed Market by September 2018', *Emerging Europe*, 2017, available at <https://emerging-europe.com/in-brief/poland-switch-emerging-developed-market-september-2018/>.

[19] Poland's first competition law was the Cartel Act of 28 March 1933, OJ No 21, item 270, which was later replaced by Act of 13 July 1939, OJ No 63, item 418. The Act has not been formally repealed, but it was not applied after 1945. Zbigniew Landau, 'The Extent of Cartelization of Industries in Poland, 1918-1939' (1978) 38 Acta Poloniae Historica 147.

[20] See notes 6-10 and accompanying text.

[21] Irena Wiszniewska, 'On the Draft on Antimonopoly Legislation in Poland' (1984) 22 Swiss Review of International Competition Law 7, 9.

[22] Law on Counteracting Monopolistic Practices in the National Economy of 28 January 1987, which came into force on 1 January 1988.

[23] Yugoslavia did so in 1974 and Hungary in 1984. Tibor Varady, 'The Emergence of Competition Law in (Former) Socialist Countries'(1999) 47(2) The American Journal of Comparative Law 229, 233-41.

The Act's drafters hoped to see the competition watchdog constituted as an independent, self-standing body, reporting directly to the Parliament. They argued that it was essential to safeguard the watchdog's independence and put it on an equal footing with government departments.[24] However, this solution was abandoned due to cost. The mandate to enforce the Act was vested with the minister of finance. The competition agency sat within the Ministry of Finance's Department for Counteracting Monopolisation of the National Economy. This structure was chosen to keep the competition agency in proximity with the price-control portfolio, which was seen as being closely related. However, that institutional-design choice was problematic given that the finance minister was concurrently representing the interest of the state treasury, responsible for securing appropriate state income.[25]

The competition agency was responsible for enforcement and advocacy. It could prohibit—by means of cease and desist orders—anticompetitive agreements, abuse of dominance, and instances of exploitation of contractual advantage (inequality of bargaining power between enterprises, regardless of their market position).[26] Sanctions in the form of fines were envisaged only in cases where a prohibition decision was violated.[27] Provision was also made for an obligatory pre-merger notification.[28] The main goal of the statute was to deal with abuse of dominance.[29] However, the statute did not empower the agency to effectively influence the market structure.[30] Moreover, the scope of the Act's application was constrained by exclusion of enterprises under authority of the minister of finance and other departments.[31] Apart from enforcement, the agency was to engage with other governmental bodies to counter monopolistic practices by highlighting anticompetitive legislation.[32] Hence, the advocacy function was explicitly recognised.

The Act's drafters considered subjecting the agency's decisions to review by courts of general jurisdiction, yet abandoned that idea anticipating the challenges of evaluating market mechanisms. The agency's decisions were subjected to review by the Supreme Administrative Court. This was meant to be a temporary solution until economic courts were created.[33]

In practice, the 1987 Act had very limited impact. The agency issued only nine decisions.[34] However, these early developments—the law's drafting and enactment, creation of the first agency, and some enforcement experience—played an important role. Institutionally, the department's staff constituted the core of the later self-standing agency, giving it a head start.[35] Moreover, these developments stimulated the emergence of expert interest in competition law. The 1990 Act, which re-designed the competition regime in a way which continues largely unchanged to date, was drafted by the experts who worked on the 1987 legislation, not the leadership which took over in 1990.[36] The creation of the competition system in Poland originated from within the country. It was not a legal

[24] Jacek Trojanek, 'Ustawa Antymonopolowa z 1987 roku. Próba oceny podstawowych rozwiązań' (1987) 4 Ruch Prawniczy 1, 18-19.
[25] Mateusz Błachucki, *Polish Competition Law: Commentary, Case Law and Texts* (Office of Competition and Consumer Protection 2013) 13.
[26] See further Eugeniusz Piontek, 'Polish Antimonopoly Law' (1988) 12 World Competition 41.
[27] Art. 20 of the Act.
[28] Art. 17-19 of the Act.
[29] Wiszniewska, n 21, 11.
[30] Art. 21 and 22 of the Act. See also Trojanek, n 24, 4.
[31] Art. 3(1) of the Act.
[32] Art. 4(4) of the Act.
[33] Wiszniewska, n 21, 18-19.
[34] Błachucki, n 25, 13.
[35] See also notes 80- 85 accompanying text.
[36] Interviews with AF, TS, WM, and RJ.

transplant. It was also not a by-product of imported international commitments, or an element of any externally imposed conditionality.

IV. Competition system post-1990

The transition to a market economy necessitated new competition legislation, which was adopted in 1990 (the 1990 Act).[37] Poland was the first nation from the former Soviet bloc to enact competition law after the fall of communism. Since 1990 the legislation was amended numerous times. The 1990 Act was replaced with the 2000 Act,[38] which was in turn replaced by the 2007 Act.[39] The major reforms were agency-driven, with the legislative drafts prepared by its staff. The institutional design and the goals of Polish competition law did not change substantially.

The 1990 Act, in its preamble, outlined the goals of the legislation: (1) securing the development of competition, (2) protecting firms against monopolistic practices, and (3) protecting consumer interests. The first of these goals was widely accepted as the principal one, especially in the context of moving away from a command-and-control economy towards the free-market.[40] The acts adopted in 2000 and 2007 no longer contained a preamble that explicitly named the goals. While the relevant jurisprudence is incoherent,[41] the law has been primarily understood as aiming to enhance efficiency and consumer welfare.[42]

The 1990 Act introduced a new institutional model with a free-standing agency and a specialised competition court. The agency was vested with investigatory and decision-making powers (an integrated agency model) and full decisional autonomy. The chosen design placed the agency in the centre of the competition law system. The scope for contribution of the system's key co-producers—the judiciary and the practitioners—became dependent on the agency's activity. Agency inaction would limit the scope for co-producers' input.

This section first analyses the institutional set-up and operation of the agency. It then moves to outline the contribution of the judiciary and the practitioners.

A. The agency

While initially constituted as the Anti-Monopoly Office (Urząd Antymonopolowy), the agency evolved into the Office of Competition and Consumer Protection (Urząd Ochrony Konkurencji i Konsumentów; UOKiK), gradually being entrusted with wider responsibilities, especially along the broadly-construed consumer protection spectrum.[43] Its head (the president) became singly responsible for managing the agency, overseeing investigations and issuing decisions. Effectively the position became the most important one in the entire competition system.

[37] Act on Counteracting Monopolistic Practices of 24 February 1990, OJ No 14, item 88, in force from 11 April 1990. The draft law was prepared in the ministry of finance, which incorporated the competition agency under the pre-1989 regime. See section Pre-1989 developments.

[38] Act on Competition and Consumers Protection of 15 December 2000, OJ No 122, item 1319.

[39] Act on Competition and Consumers Protection of 16 February 2007, OJ No 50, item 331.

[40] For discussion see Dawid Miąsik, 'Controlled chaos with consumer welfare as the winner–a study of the goals of Polish antitrust law' (2008) 8(1) Yearbook of Antitrust and Regulatory Studies 33, 39.

[41] Ibid, 37.

[42] Ibid, 33.

[43] For the sake of simplicity this piece consistently uses the generic term 'agency' to refer to the Polish competition watchdog. For discussion of the agency's expanding mandate see section Evolving mandate.

The agency is headquartered in Warsaw. Its head was empowered to establish regional offices. By the end of 1990 six such offices were established. The ninth and final one was created in 1995 in Warsaw.[44]

The following subsections investigate different aspects of the agency operation. First, the analysis focuses on key aspects of the agency's set-up and mandate. Attention then moves to advocacy efforts undertaken by the agency. The final part of this section examines competition law enforcement.

1. Set-up and mandate

This subsection starts by examining the set-up and development of Poland's competition agency through the lens of independence. Independence is essential if an agency is to safeguard competition as a public good, which often requires taking on powerful industrial lobbies, state-owned enterprises, or the state itself, which may pursue anticompetitive behaviours that influence markets or legislation, sometimes in pursuit of short-term political gains. Moreover, independence presupposes that the agency's commitment to competition and safeguarding the level playing field in the marketplace will not be easily overturned by future majorities.[45] Hence, for a state, it is a matter of making a credible commitment to a particular economic regime.[46]

The notion of independence is more complex than it appears on the surface. The narrow, formal understanding of independence focuses on organisational aspects, especially the rules on appointment and dismissal of an agency's head. A broader reading includes functional perspectives, raising the question of sufficiency of resources. The following analysis provides a holistic evaluation of such different features of this notion.

Formal independence also increases the perceived effectiveness of a system.[47] However, Aydin and Büthe argue convincingly that it may be more productive to think, instead, of an agency's embedded autonomy, which reflects an agency's long-term dependence on political and social support.[48] While adopting the language of independence, this piece recognises the value of a more nuanced understanding of agencies' interdependencies.

At the outset it should be noted that the Polish legislature did not decide to explicitly recognise the independence of the agency in the law. In organisational terms, the agency's head reports to the prime minister (PM). However, the PM has no competence to interfere in the ongoing work of the agency, preserving its decisional autonomy. Moreover, the government has no tools to change the agency's decisions. There is no scope for an executive override.

a) The agency's head

The chosen institutional design entrusts the Polish agency's head with considerable powers, placing her at the very centre of the competition system. In turn, her personality and integrity (given the lack of protection by means of a term of office, discussed below) continue to significantly influence the

[44] With time, the regional set-up—originally determined by the agency's head—became embedded in the Act itself, per Art. 18(1) of the 1990 Act, as amended per the Act of 22 October 1998, OJ No 145, item 938.

[45] See further Mattia Guidi, 'The impact of independence on regulatory outcomes: the case of EU competition policy' (2015) 53(6) Journal of Common Market Studies 1195, 1198.

[46] Giorgio Monti, 'Independence, Interdependence and Legitimacy: The EU Commission, National Competition Authorities, and the European Competition Network' (EUI Working Paper Series No 01, 2014), 3. Monti notes that such a commitment is particularly important in the case of states which had tolerated anticompetitive conduct in the past as it reassures markets that the change has occurred and will be of a lasting nature.

[47] Tay-Cheng Ma, 'Competition authority independence, antitrust effectiveness, and institutions' (2010) 30(3) International Review of Law and Economics 226, 231.

[48] Aydin and Büthe, n 4, 31-32.

agency's operations.[49] From a systemic perspective, this is unsatisfactory as it makes the agency prone to overreliance on individual characteristics of appointed leaders.[50] This feature leads to a perception that the agency lacks continuity, with a new head setting priorities afresh, possibly undermining the agency's long-term credibility. Proposals have been made to entrust decision-marking to specially appointed panels, removing this function from the portfolio of the agency's head,[51] but they have not been embraced.

The material impact of its leader on the functioning of the agency is well-illustrated by the changing expectations towards the agency's regional offices. While initially the regional offices were tasked with dealing with local and regional matters,[52] in 1998 the agency announced a de facto assumption of enforcement responsibility by regional offices, with headquarters focusing on merger control.[53] Over time those roles have shifted. For example in 2004 the agency decided that the regional offices would focus primarily on local matters.[54] Such organisational swings do not help to develop and sustain knowhow and capacity.

(1) Appointment and dismissal

The agency's head is appointed by the PM for an indefinite period of time. There is no term of office. It was in place from 2000 until 2006. This practice was externally perceived as giving the agency an independent status.[55] One agency head—Cezary Banasiński—was appointed under that regime. Yet, after a political swing to the right, in 2006, the tenure as well as a competition for the post were abolished as part of a broader reform of appointments to key offices in the public administration. Later a competitive appointment was reintroduced, but there was no attempt to re-instate the tenure. When it comes to a dismissal, but for the term-of-office interlude, the PM had and continues to have full discretion in this regard. Hence, the agency head's independence is not formally safeguarded. In fact, the current rules represent a step-back as compared to the 2000 Act. Given that heads of numerous other central authorities in Poland enjoy tenure of office,[56] it is notable that the head of the competition watchdog lacks any such security of appointment.

Up until 2001 the PM had full discretion in selecting the agency's head. There were no formal criteria which a candidate had to meet. The first rules on selection of the agency head were introduced in the 2000 Act, which obliged the PM to appoint a selection committee that would hold an open competition to select the agency's leader.[57] A candidate for the post was to: (1) have a degree in law, economics, or management and (2) be distinguished by theoretical knowledge of and experience in protecting competition and consumers.[58] Therefore, the criteria were rather loose and imprecise. The selection committee was to analyse applications, conduct interviews with eligible candidates, and

[49] Majority of interviewed practitioners, esp. AS2, RG, MS2, and MMD.
[50] In a similar vein also Kovacic and Lopez-Galdos, n 3, 108.
[51] See, eg, Tadeusz Skoczny, 'Polish Competition Law in the 1990s -- on the Way to Higher Effectiveness and Deeper Conformity with EC Competition Rules' (2001) 2(3-4) European Business Organization Law Review 777, 791.
[52] Poland's 1991 annual report to the OECD, DAFEE/CLP/WD(92)2, 4.
[53] Agency 1997 annual report, 16.
[54] Agency 2003 annual report, 11.
[55] European Commission, Regular Report from the Commission on Poland's Progress Towards Accession (2001), 49.
[56] For example, the head of the Energy Regulatory Office enjoys a term of five years. See, Art. 21(2l) of the Energy Law Act of 10 April 1997, as amended. Same term applies to the heads of the Office of Electronic Communications (see, Art. 190(4) of the Telecommunications Act of 16 July 2004, as amended) and the Office of Rail Transport (see, Art. 11b(1) of the Railway Transport Act of 28 March 2003, as amended).
[57] Art. 24(4).
[58] Art. 24(2) of the 2000 Act.

present the PM its choice.[59] The vetting of candidates was not public. This process of appointment was abandoned in 2006 and then re-introduced in a watered-down form in 2009.

Since 2009, the selection is conducted by a committee nominated by the head of the Chancellery of the Prime Minister.[60] The committee members need not meet any formal requirements. The committee selects the three best candidates of whom one is appointed by the PM. A candidate must have (1) managerial competences, (2) at least six years of work experience (including three years in a managerial post), and (3) 'education and knowledge in relation to matters falling within the remits of the operation of the agency's head'.[61] Therefore, the selection process is less rigorous and the criteria facing candidates even less demanding than under the 2000 Act. Given the appointment process, this is an open competition more in name than in fact. It does not, in any practical manner, limit the scope for discretion and it does not adequately safeguard that the appointee will have the necessary skills.

However, despite candidates facing broad or no criteria, four out of seven persons who served as the agency's head held a doctoral degree in law or economics, with only one person—Adam Jasser—not having a degree in either discipline. The legality of the latter appointment received media coverage[62] and was questioned in the Parliament.[63]

(2) Political involvement

Polish rules never required a candidate for the post of the agency head to be, in any manner, detached from politics.[64] The first two agency heads were academics and they were not politically active. However, four out of five later agency heads have been politically engaged prior to assuming the post. Tadeusz Aziewicz (1998-2001) was a full-time researcher and an active politician. When queried shortly before his appointment he noted that the position was to be assigned to the political party he co-managed (at the national level) and that he was its only candidate for the job.[65] Cezary Banasiński (2001-2007), Marek Niechciał (2007-2008, since 2016), and Adam Jasser (2014-2016) were all senior government officials. It would be difficult to argue that they benefited from any sort of nonpartisan support. Małgorzata Krasnodębska-Tomkiel (2008-2014) stands out as the only agency head without prior political involvement, having developed her career in the agency. In fact, she became the agency's deputy head under Niechciał, during a right-wing government, and became appointed its head after Niechciał's departure, following another political swing, demonstrating her detachment from politics. The appointments of politically engaged individuals indicate that the position has been politicised or, at least, perceived as politically not neutral for the majority of the analysed period.

(3) Leadership tenure

Between 1990 and 2016 the agency's head changed eight times. However, within the same period Poland had 16 different prime ministers and 17 governments. The period in office of the agency's head ranged from just over a year to nearly six years.

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[59] See the Ordinance of 29 June 2001 on the rules governing selection of the Head of the Office for the Protection of Competition and Consumers, OJ 2001, No 69, item 720.

[60] Art. 29(3d) of the 2007 Act, as amended.

[61] Art. 29(3b) of the 2007 Act, as amended.

[62] For example, Jarosaw Królak, 'Szef UOKiK mógł zostać wybrany wbrew prawu', *Puls Biznesu*, 23 March 2014.

[63] Parliamentary Question No 26004 of Grzegorz Napieralski, 23 April 2004.

[64] Although, for example, the head of the central bank and the members of the monetary policy council are prevented from being members of political parties. See, Art. 227(4) of the Polish Constitution and Art. 14(2) of the Act of 29 August 1997 on the National Central Bank, as amended. Similar rules apply to the leadership of the Personal Data Protection Office. See, Art. 37(2) of the Act of 10 May 2018 on the Protection of Personal Data.

[65] 'Aziewicz na monopole?', *Gazeta Wyborcza*, 5 January 1998.

The data shows that the change of the country's ruling majority led to a change of the agency's head within a reasonably short period of time. The only possible exception is the first agency head—Anna Fornalczyk (1990-1995), who headed the agency for more than a year after the political swing from right to left in 1993.[66] Banasiński (2001-2007), the only head with a five-year term, was dismissed within a period of six months after his term ended. Therefore, the agency's head is directly vulnerable to political swings. It is a position of power but it is not detached from party politics.

The only two dismissals outside a change in political control were those of Aziewicz and Krasnodębska-Tomkiel. The first case did not attract much media attention[67] but Krasnodębska-Tomkiel's dismissal was controversial. The media speculated that it was retribution for a prohibition of a merger between state-owned PGE and Energa[68]—the first and fourth player on the Polish energy market, in January 2011 (three years earlier).[69] This flagship project of the Tusk government was presented as a done deal, although no clearance was secured from the competition watchdog. The agency, on its own initiative, publicly raised objections early on in the planning stage.[70] Nevertheless, the government was determined to push ahead. Krasnodębska-Tomkiel was put under intense pressure. Tusk publicly did not rule out Krasnodębska-Tomkiel's dismissal in case of a prohibition.[71] He was quoted saying he would try to convince her to reconsider.[72] This led to various reactions. For example, Balcerowicz, former deputy prime minister and the mastermind of the Polish economic transformation, called on the government to refrain from attempts to influence the agency and to abandon the anticompetitive merger.[73] At the time, Krasnodębska-Tomkiel was not dismissed. Following the decision's challenge, the competition court upheld it in its entirety, causing further reputational damage to the government, but proving—at the same time—the credibility of the competition system. Noteworthy, it was not the first agency decision, under Krasnodębska-Tomkiel's watch, to hinder government plans.[74] In 2014, the year of Krasnodębska-Tomkiel's dismissal, the Treasury had further plans to

[66] When resigning, Fornalczyk pointed to differences of opinions between her, the prime minister, and other ministers, especially in relation to the slowing down of privatisation and the growing protectionist tendency to create centrally-managed industrial structures. 'Rząd czekania i gadania', *Gazeta Wyborcza*, 12 January 1995.

[67] However, Aziewicz's dismissal occurred during controversial takeover proceedings. In June 2001 the agency, on his watch, for the second time, prohibited a takeover in the cable and wire production market (takeover of Elektrim Kable by Tele-Fonika), which would have led to the merged entity controlling 63 percent of the relevant domestic market. The prohibition was challenged. Following Aziewicz's dismissal and after Banasiński's appointment, in November 2001 the decision was changed. The agency redefined the relevant market—from domestic to European—and granted the transaction an unconditional green light. At the time the media speculated about the political influence of Tele-Fonika's owner. These proceedings coincided with dismissal, in December 2001, of the agency's long-serving deputy head—Modzelewska-Wąchal, who reportedly opposed granting a clearance in that case and was removed from working on it. See Krzysztof Trębski and Sergius Sachno, 'Kabel u szyi', *Wprost*, 19 October 2003

[68] Decision of 13 January 2011, DKK 1/2011.

[69] Maciej Bednarek and Renata Grochal, 'Premier wietrzy ochronę', *Gazeta Wyborcza*, 11 February 2014.

[70] Konrad Niklewicz, 'UOKiK nie zgadza się na przejęcie Energi przez PGE', *Gazeta Wyborcza*, 18 August 2010.

[71] 'Energy merger', *Business Europe*, 1 September 2010.

[72] 'Przejęcie Energi przez PGE już w sądzie', *TVN24bis*, 16 February 2011.

[73] Leszek Balcerowicz, 'Balcerowicz w obronie niezależności UOKiK', *Dziennik.pl*, 17 September 2010.

[74] In 2009, the agency prohibited a takeover of Koltram by Cogifer. The three-to-two merger would led to Cogifer enjoying 70 percent market share of the rail turnouts market. Decision No DKK 67/09 of 8 October 2009. Koltram was a state-owned firm. This was the first Polish privatisation attempt of selling a firm's shares in a single step by means of an auction. The auction, considered successful by the government, took place six months before the agency issued its decision. Konrad Niklewicz, 'Aukcja prywatyzacja: 96 milionów w trzy minuty', *Gazeta Wyborcza*, 23 April 2009. On appeal the decision was upheld. Judgment of 14 May 2012, XVii AmA 41/11.

consolidate the energy sector. These were also expected to meet with resistance from the agency, possibly informing the PM's decision to dismiss its leader.[75]

The perception of Krasnodębska-Tomkiel's dismissal was unambiguous. Forbes magazine noted that 'Poles will remember her as a defiant, tough and principled warrior for economic freedom, who successfully opposed top state officials in the interest of businesses and consumers'.[76] An expert of the Polish Business Centre Club opined that only 'a person with a strong political backing can fulfil that role'.[77] This again points to at least a perception of politicisation of the post. However, to be fair, Krasnodębska-Tomkiel was dismissed in 2014, well after controversial decisions in 2009 and 2011. She served as the agency's head for nearly six years, becoming the longest-serving head of the competition agency in Poland to date.

In a system with no term of office an agency head's dismissal is always an option. However, the way this prerogative is used and the way the government interacts with the agency is critical. The government's conduct can support extensive agency independence or it can undermine its credibility. The government's handling of the PGE-Energa case falls into the latter category. Future agency heads will remember that the PM's prerogative of dismissing at will is a tool which has already been used. The case presented a clash between meritocratic enforcement of competition legislation and important economic policy choices made by the government, pointing to an institutional design flaw—a lack of a narrowly construed right of executive override.[78]

A number of former agency heads believe that the current rules do not adequately secure agency independence. The lack of security of tenure is often mentioned as the key issue. This view is shared by practitioners, some of who consider it equivalent to actual political control.[79] However, Banasiński (2001-2007), who benefited from tenure, notes that the Act can always be changed so any independence written into the law may be more apparent than real. In a similar fashion, Aziewicz (1998-2001) called independence 'a state of mind'. Two other former agency heads, independent of each other, similarly remarked on the contingent nature of independence. It transpires that throughout the investigated period, the government has attempted to influence the work of the agency, especially, but not only, when it comes to mergers involving state-owned firms. These issues point to the importance of embedding and strengthening the agency's position. Setting a term of office for the agency's head would be helpful, but insufficient and prone to capture.

b) Agency resources

(1) Staff

Staff is the most precious resource of any organisation and this is certainly true in the case of competition agencies. Building an organisation from a scratch is a challenge. Doing so in a hostile environment raises the stakes further.

Poland's first competition agency came into existence as a department in the Ministry of Finance in 1987 in the final years of the communist regime.[80] At that stage, market competition was an entirely foreign concept. Given that competition law deals with matters such as price-fixing and exploitative pricing, it was seen a reasonable step to locate this new competence within a ministry that formerly

[75] Wojciech Surmacz, 'Dymisja prezesa UOKiK, czyli czas „trzaskania statystyk"', *Forbes*, 11 February 2014. However, no such consolidation took place following the Krasnodębska-Tomkiel's dismissal.
[76] Ibid.
[77] 'Prawnik czy ekonomista? Kim powinien być nowy prezes UOKiK?', *TVN24bis*, 13 February 2014.
[78] See further notes 153-154 and accompanying text.
[79] Interviewed practitioners, for example, ASB, MS2, MMD, and JS.
[80] See above section 'Pre-1989 developments'.

oversaw prices.[81] The ministry's department was headed by Jerzy Chabros, former Pricing Policy Director of the Office of Prices. His deputy, Ryszard Jacyno, was one of few Polish specialists in competition matters.[82] The majority of the department's staff had no pre-existing competition law and policy knowledge. Some had a background in price regulation.[83] Others were newly hired or recent graduates.[84]

After the 1990 Act created a self-standing agency, Anna Fornalczyk, an academic PhD economist, was appointed the agency's head. One of her first tasks was establishing the agency as a separate organisation. All staff of the pre-existing department was able to join the new agency and most did so. For example, Jacyno became the agency's first Director General. In staffing decisions at higher levels, Fornalczyk tapped into the pool of academics.[85]

The number of staff grew steadily (see Figure 2 below). Some of that growth was determined by the agency's expanding mandate. Most notably, in 2009 the agency took on over 200 staff from the liquidated Trade Inspection, tasked with market surveillance and monitoring of products' safety. However, the ever-increasing competences[86] were not matched by appropriate increases in budget and staff numbers. In 2016 the agency employed nearly 500 members of staff (in its headquarter and regional offices), who were discharging the agency's responsibilities across all areas of its competence (inclusive of the very broadly construed consumer protection). In February 2018, the agency's Department of Competition Protection (which handles competition law cases brought at agency headquarter) had only 26 staff, whereas the Consumer Protection Department had 46 staff.[87]

[81] See notes 24-25 and accompanying text.

[82] In 1986 Jacyno completed a doctoral dissertation entitled 'Legal Aspects of Competition Protection in Poland in Light of International Practice' (manuscript on file with the authors).

[83] For example, Elżbieta Modzelewska-Wąchal, who later became the Deputy Head of the agency.

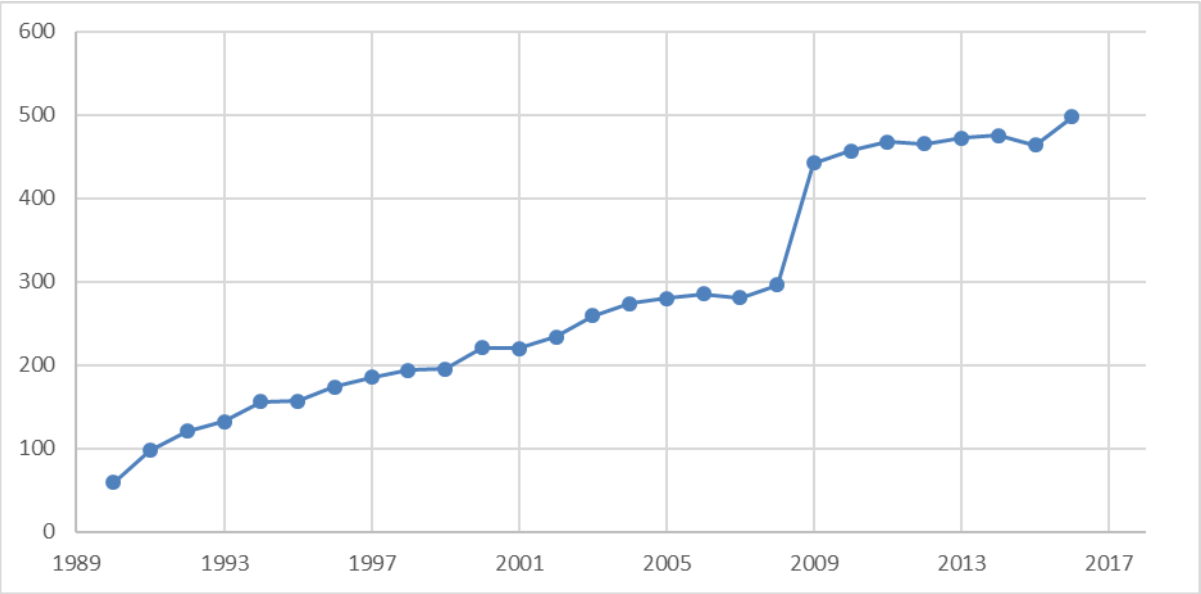
[84] Interview with RJ.

[85] For example, Andrzej Cylwik, the agency's deputy head under Fornalczyk, prior to assuming that role worked in the Institute of Organisation Management and Managerial Staff Training. Edward Stawicki was a faculty member at Adam Mickiewicz University prior to establishing and then directing the agency's regional office in Poznań.

[86] See section Evolving mandate.

[87] Agency's data (on file with the authors).

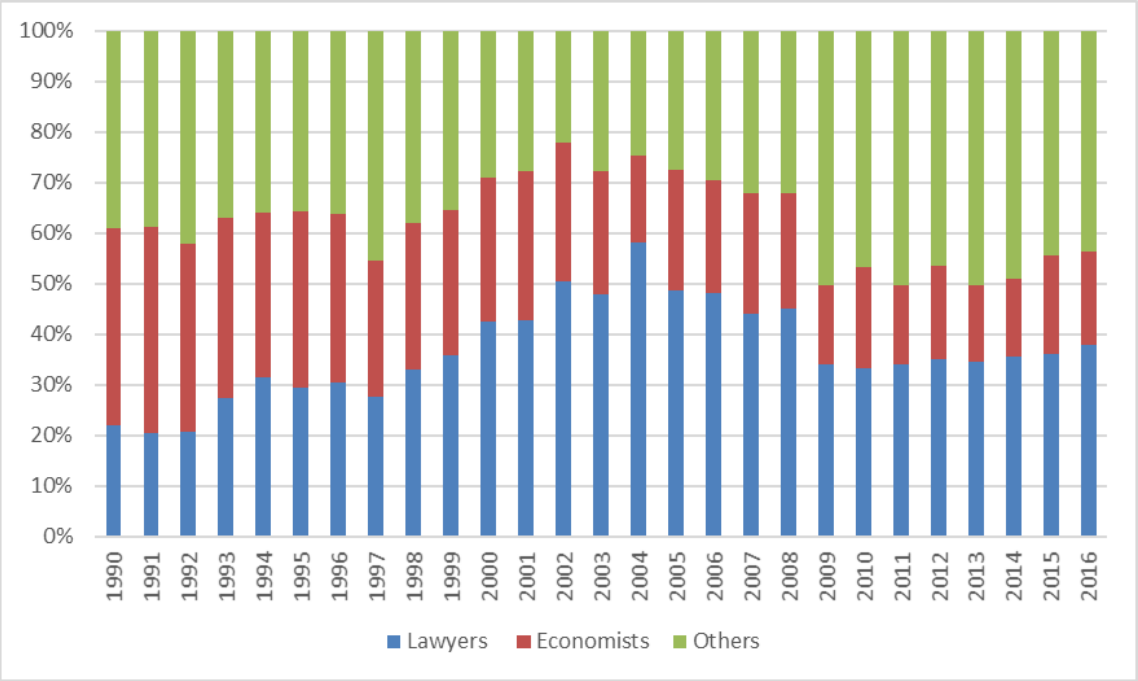
Figure 2: Agency staff (in numbers).



Source: Agency annual reports and reports to the OECD.

In terms of staff educational background, the agency employed more economists than lawyers in the early years. From 1997 onwards that relationship changed (see Figure 3 below). In fact, there often have been over twice as many lawyers as economists in the agency. A 'lawyer' would be a law graduate, not necessarily a qualified lawyer. The term 'economist' includes also graduates of business schools with degrees in, for example, finance, management, and marketing. Neither lawyers nor economists would have necessarily studied any competition law or economics prior to joining the agency. In the first decade of the agency's operation that was certainly not the case—no such courses were part of university curricula in Poland. The significant percentage of staff with a background in neither law nor economics, especially, chemists, reflects incorporation of Trade Inspection staff in 2009.

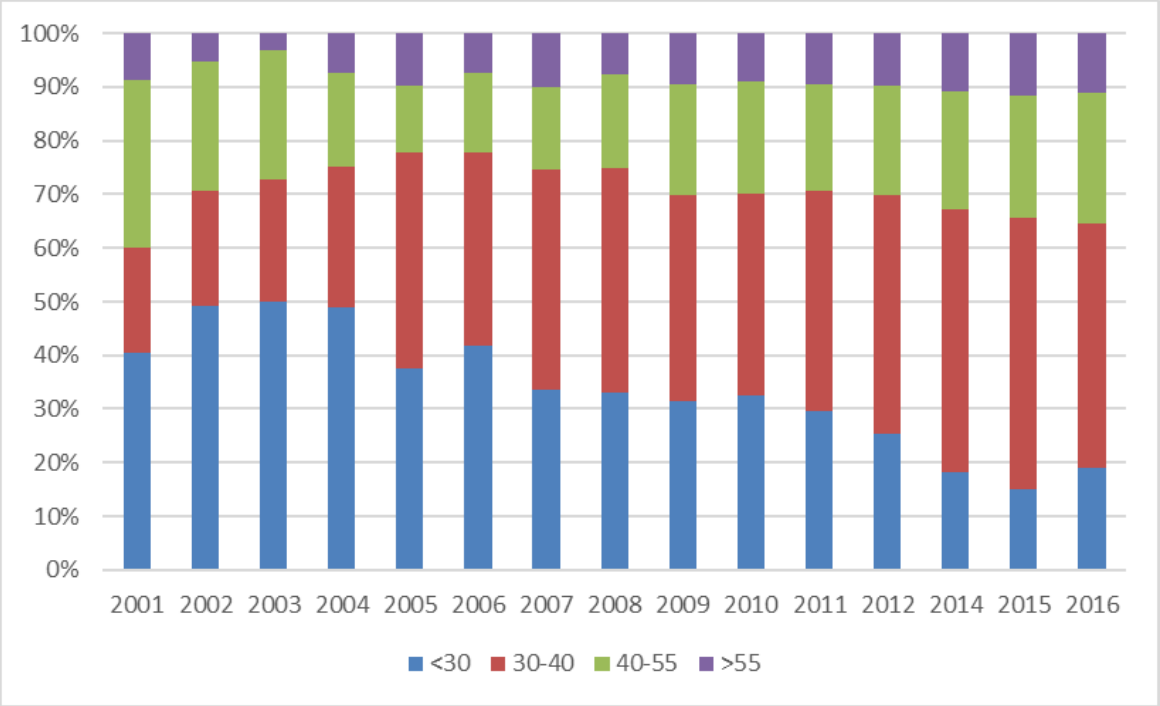
Figure 3: Agency staff educational background.



Source: Agency annual reports.

In terms of staff profile by age, the agency is very young (see Figure 4 below). In the period 2001-2016, staff under 30 constituted, on average, 34 percent of the overall staff, in some years reaching the level of 50 percent. Prior to 2000, the profile of the new agency was very different. In fact, at the end of 1999 only a quarter of the staff had less than five years' experience with the agency.[88]

Figure 4: Agency staff profile by age.



Source: Agency annual reports.

The agency's subcabinet status (of a central authority of the state administration[89] and not a supreme administrative body, such as ministries)[90] is reflected in staff salaries.[91] The average monthly staff salaries in the period 2014-2016 amounted to 5,950 PLN (1,402 EURO), inclusive of bonuses, gross.[92] Remuneration offered by leading law firms in Warsaw would be, at least, twice higher.[93] Moreover, in the period 2012-2016 staff salaries in the agency were, on average, 20 percent lower than salaries of ministries' staff and generally on par with average for all central authorities (see Figure 5 below). In the period 2007-2016 (ten years) they were, on average, 18 percent lower than salaries in the Energy

[88] Agency information per Wise, n 5, 117.

[89] This category embraces bodies whose scope of operation covers the entire country and which report directly to the cabinet, the prime minister or individual ministers. Heads of such authorities are not members of the cabinet.

[90] See also n 132 and accompanying text on the status consequences in relation to advocacy.

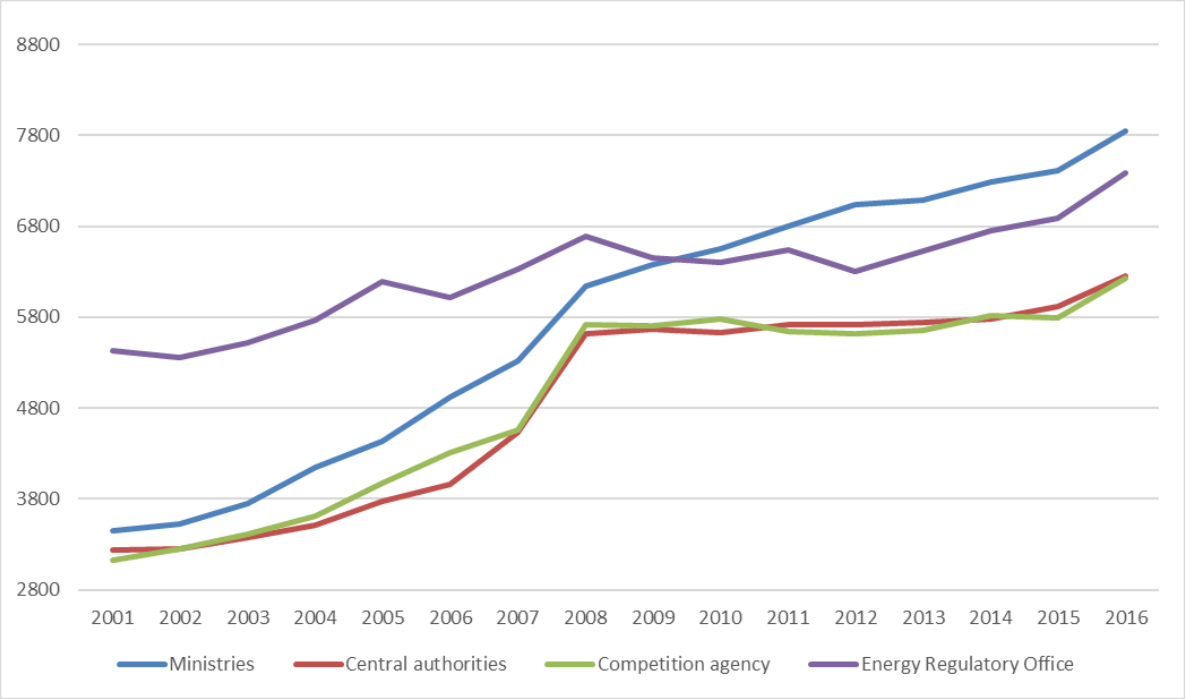
[91] A fact noted by the European Commission in its pre-accession reports. See, eg, European Commission, Regular Report from the Commission on Poland's Progress Towards Accession (2000), 43.

[92] Compilation based on data from (1) the Annual Reports on Employment and Salaries in Civil Service published by the Chancellery of the Prime Minister, Civil Service Department, and (2) provided by the Chancellery in response to a right-to-information request. Value in euro relies on an average exchange rate as published by the Polish National Bank.

[93] 2016 Antal's report provides that average salaries of lawyers in Poland (with at least two years' experience) amounted to 13,906 PLN, gross. Raport Płacowy Antal, <http://bpcc.org.pl/uploads/ckeditor/attachments/11814/Antal_Salary_Report_2016.pdf>. 2016 Report of Hays and Kozminski University provides that the most common remuneration for lawyers ranged from 12,000 to 15,000 PLN, gross. Raport Płacowy 2016, <http://www.hrtrendy.pl/wp-content/uploads/2016/01/Raport_-placowy_2016_v3.pdf>.

Regulatory Office (URE), a sectoral regulator. In the preceding five years (2001-2005) that difference was even greater. This indicates that the agency is not treated as a specialised body requiring additional resources to develop expertise and retain experienced staff.

Figure 5: Salaries comparison (average monthly salaries, inc. bonuses, gross, in PLN).



Source: Chancellery of the Prime Minister.

Unsatisfactory salaries is a long-standing, systemic problem.[94] Historically the agency has offered remuneration near the bottom of the scale when compared with other central authorities, and considerably lower than that paid by other sectoral regulators created in the late 1990s.[95] The pay issue is a major factor undermining the agency's capacity, making it a rather unattractive long-term employer relative to private employment or other opportunities in Polish civil service. If the agency is to deliver robust advocacy and enforcement, this issue needs to be remedied.[96]

Agency leadership has frequently boosted staff salaries by keeping some allocated posts vacant. This, in turn, enabled redistribution of 'saved' salaries to staff by means of bonuses.[97] This practice is not agency-specific. It continues to be used in public administration in Poland.[98] Effectively, it gives the agency head discretion to award staff and perhaps discourage some from leaving. Another way of retaining staff was to emphasize non-pay benefits. This includes facilitating employees' continued professional development, for example by granting paid study leaves or financing pursuit of professional legal qualifications.[99]

Subpar staff remuneration creates challenges in hiring and staff attrition. Historically, the agency's attrition rate was noticeably higher than the average in the Polish civil service, often exceeding 20

[94] The issue has been noted also by external bodies. See, eg, the 2003 OECD study. Wise, n 5, 117.
[95] Interviewed enforcers, in particular AS, TA, and CB.
[96] This is a view widely shared by interviewed practitioners who see the agency's underfunding as a major issue constraining its operations.
[97] For example, in 2005 the agency employed 422 staff despite being allocated 489 posts. However, it used 99.1% of its salary allocation. See Supreme Audit Office Report on State Budget Execution in 2005.
[98] See the Supreme Audit Office Reports on State Budget Execution.
[99] Interview with CB.

percent per annum.[100] The problem intensified around 2000, when the practitioner market picked up and the law firms began poaching the agency's junior staff.[101] In 2007 the attrition rate peaked at 29.1 percent,[102] more than doubling the rate of 13.9 percent for all central authorities that year. These were very high rates in comparison with international standards.[103] However, since 2010 the attrition rate fell to an average of 7.5 percent, on par with other central authorities in Poland.[104]

Staff turnover concerns predominantly more-junior positions, such as case handlers,[105] who often move to private practice upon gaining some professional experience. The work in the agency would often be their first job, following graduation in their mid-20s. Effectively, the agency is forced to keep investing its scarce resources in educating new hires and can be seen as providing paid traineeships to future employees of the private sector, especially the law firms. While there is some value in a revolving door policy—with staff moving from the agency to the private sector and vice-versa—in the Polish context, revolving doors work in one direction only. Until staff remuneration improves, the situation is unlikely to change. In effect, it makes it more difficult for the agency to develop sophisticated approaches to its caseload, given that a significant share of its staff is inexperienced and on a steep learning curve.

(2) Budget

Since its creation, the agency's budget was determined directly by the Parliament in the state's annual budget. This helps to safeguard the agency's autonomy, making it much more difficult for government officials to undermine the agency's day-to-day operation. Any cut requires an amendment of the state's budget—it is not merely a discretionary decision. The agency has no additional sources of income. In particular, it does not retain any of the imposed fines or revenue from merger notification fees. The budget act also fixes the number of agency staff.

[100] In its 1997 annual report, the agency called attrition a 'worrying phenomenon' for the first time. At that stage, over a third of agency staff had less than a year's experience with the agency. Agency 1997 annual report, 5.

[101] Interview with CB. Poaching is more of a problem at the agency's headquarters. The agency's regional offices are still relatively attractive, given more-limited employment options in the private legal sector in the regions. Interview with MKT.

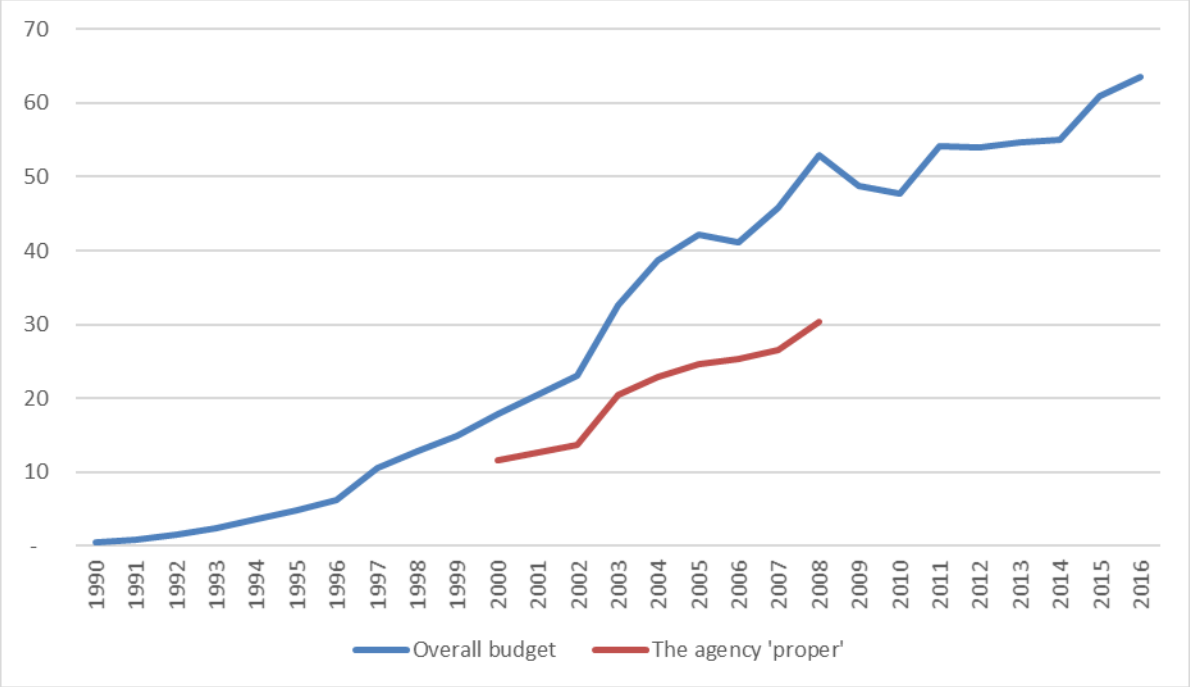
[102] Chancellery of the Prime Minister, Civil Service Department, 2007 Report on Employment and Salaries in Civil Service, 9.

[103] Aydin and Büthe show that similarly high attrition rates characterise some of the developing countries, such as South Africa, Mexico and Russia. For comparison, attrition rates in Australia and Germany were 14 and 5 percent, respectively. Aydin and Büthe, n 4, 18, fn 58. In past, the European Commission recognised high turnover of staff due to low remuneration as a significant constraint on the Polish agency's effective functioning. See, eg, European Commission, Regular Report from the Commission on Poland's Progress Towards Accession (1998), 42; European Commission, Regular Report from the Commission on Poland's Progress Towards Accession (2000), 43.

[104] Author's calculation based on data from the Chancellery of the Prime Minister, Civil Service Department.

[105] Interviews with practitioners, in particular MS2 and KK.

Figure 6: Agency budget (in millions PLN).



Source: Agency annual reports. Agency proper excludes funding for Trade Inspection.

The agency's budget has grown steadily in absolute terms.[106] On average the budget increased by nine percent annually in the period 2001-2016, hence after a period of very high inflation in Poland.[107] However, the budget increases differed considerably and they do not easily correlate with the agency's growing mandate.[108] Figure 6, above, illustrates the growth of the agency's budget. From 2009 the Trade Inspection division (tasked with market surveillance and monitoring of products' safety) was formally incorporated into the agency. Prior to that, in the period 2000-2008, the head of the competition agency oversaw Trade Inspection and its budget was separated in agency reports. On average, Trade Inspection accounted for 40 percent of the agency's overall budget and that most likely continues. Hence, only about 60 percent of the reported budget is devoted to the agency's pre-existing activities straddling both competition and consumer protection. This funding is shown as the agency 'proper' budget in Figure 6 above. As in many agencies around the world, the largest portion of the agency budget covers staff salaries. For example, in 2015 salaries amounted to 70 percent of the budget.[109]

The budget increases could reflect the relationship of the agency's head with the political powers in charge, pointing to politicisation of the budgetary allocation. Through this lens, in the period 2009-

[106] 'Budget' denotes the actual expenditure by the agency as per the ex-post annual reports of the Supreme Audit Office on the state budget execution. The relevant part 53 embraces all activities under the agency head's supervision (hence, including also resources devoted to Trade Inspection).

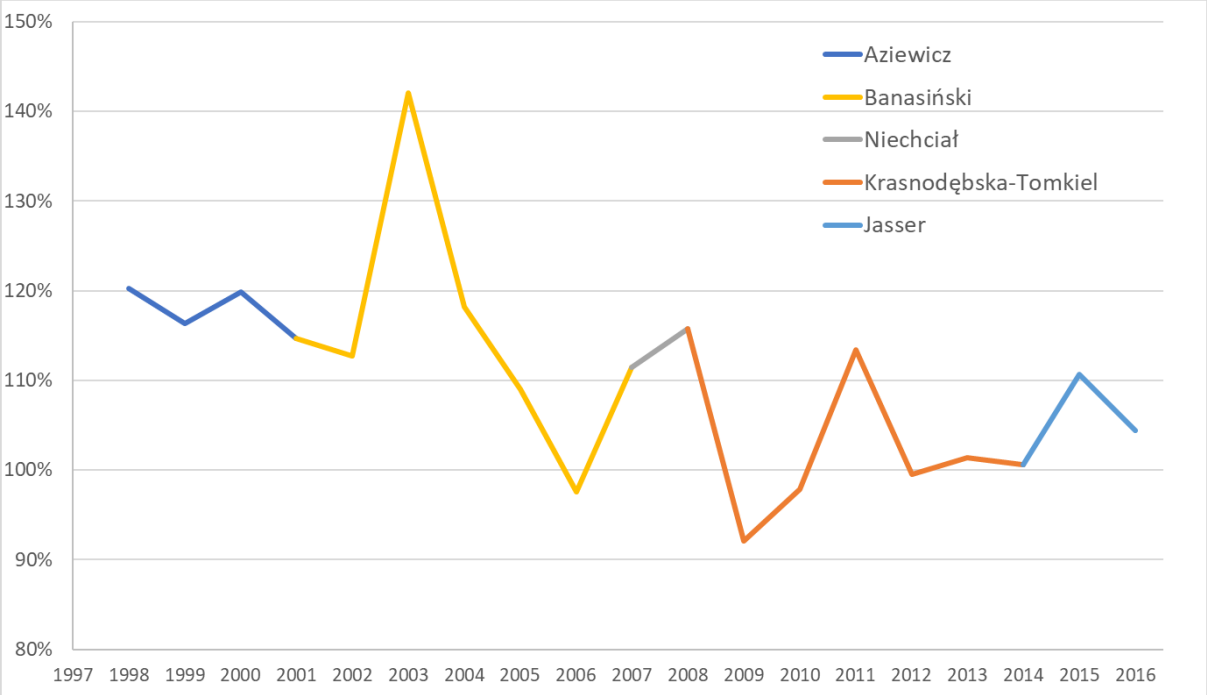
[107] 2000 was the last time inflation in Poland exceeded 10 percent. In the 2001-2016 period the average inflation rate was just over two percent. See Statistical Offices, <https://stat.gov.pl/obszary-tematyczne/ceny-handel/wskazniki-cen/wskazniki-cen-towarow-i-uslug-konsumpcyjnych-pot-inflacja-/roczne-wskazniki-cen-towarow-i-uslug-konsumpcyjnych/>.

[108] Interviewed enforcers, in particular EM and BKS (commenting, respectively, on inadequate additional budgetary appropriation following addition of the consumer protection portfolio, and vesting of the enforcement obligations in relation to the law on unfair use of contractual advantage). See also Evolving mandate section.

[109] Supreme Audit Office, State Budget Execution in 2015: Part 53—Office of Competition and Consumer Protection (2016), 9.

2014, during the leadership of Krasnodębska-Tomkiel, budget growth plummeted to just one percent on average (see Figure 7 below). She was the only head of the agency since 1998 without pre-existing governmental involvement and she publicly challenged the government's strategic plans.[110] During Aziewicz time (1998-2001) the agency's budget grew on average 18 percent a year. Under Banasiński (2001-2007) it grew by 20 percent, up to the point of the major political swing to the right—when the agency's budget actually fell, in absolute terms, in 2006. Budget growth returned to two-digit increases after Niechciał's appointment (2007-2008). The arrival of Jasser, following Krasnodębska-Tomkiel's dismissal, coincided with budget growth of 11 percent in 2015. The differences in budget growth under different agency heads point, at a minimum, to some dynamic between the agency's leadership and the government and the need of at least some agency embeddedness in broader economic policy.

Figure 7: Growth in annual agency budget (in percentage) distinguishing changes in the agency leadership.



Source: Agency annual reports.

The agency's budgetary position reflects path dependence and the importance of the agency's original formal setup.[111] While the agency continues to be underfunded, its leader has to compete against other agency heads for additional resources. Had it been on a par with government departments (that is, ministries), its staff would have been remunerated at a similar level, making the budget appropriation considerably larger.

In the ten-year period 2007-2016, the agency's budget amounted to 53.7 million PLN on average. The collected net fines for violations of competition law amounted to 59.6 million PLN per annum.[112] This means that Poland's competition and consumer rights watchdog was effectively financed by violators of competition law. While consumers enjoyed increased welfare due to the agency's operation across all its areas of competence, the data show that that the agency's operation was effectively costless to

[110] See notes 68-75 and accompanying text.
[111] See further notes 132-133 and accompanying text.
[112] Authors' own computation based on the annual ex-post reports by the Supreme Audit Office on state budget execution for the relevant period.

Polish taxpayers. While this should not be an aim in itself, or an indicator of an agency's effectiveness, the agency may consider using these statistics in bidding for a larger budget appropriation to further develop its capacity and start adequately paying its staff.

c) Evolving mandate

At its inception, the agency's mandate was reasonably clear. The body was established as the country's competition watchdog, responsible for enforcing competition law and contributing to the state's broader economic policy.[113] The first few years of its operation were characterised by active involvement in post-transition restructuring and privatisation processes.[114] However, over time the agency's mandate expanded significantly. Some of the mission creep was agency-driven. That was certainly the case in 1996, when the agency assumed responsibility for the consumer protection portfolio.[115] In fact, some of the key individuals behind Poland's first antimonopoly law believed that the consumer protection role could help the agency prove its usefulness, facilitating its operations across the entire spectrum of competences.[116] The agency also succeeded in taking over the state aid portfolio from the Ministry of Economy.[117] Various other prerogatives were imposed on the agency, possibly as an unintended consequence of it being in charge of all consumer-related matters, while not having enough political clout to oppose competence amalgamation. As of 2016, apart from its role on the competition law and policy side, the agency was also responsible for addressing practices that infringe collective consumer interests, dealing with prohibited clauses in standard contracts, and ensuring surveillance over general product safety (inclusive of supervision of eight laboratories and monitoring of fuel quality control).[118] The agency is also co-responsible for enforcement of the Polish Language Act (ensuring that goods and services descriptions, ads, instructions and guarantees are in Polish).[119] The most recent significant addition to the agency's mandate concerns enforcement of the new law on unfair use of contractual advantage, which aims to eliminate unfair trade practices on behalf of stronger parties to a contract.[120] While the enforcement expectations are considerable, the agency received only minimal additional funds to meet them.[121]

In effect, the agency ended up saddled with considerable responsibilities, especially along the very broadly construed consumer protection spectrum. Inadequate increases in budget only stretched this already underfunded and possibly understaffed body further. The mandate expansions also meant that the agency management's attention had to be spread more thinly—diluting focus on the agency's original core competition portfolio.

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[113] As per Art. 19 of the 1990 Act.

[114] See notes 140-146 and accompanying text.

[115] In 1996 the Anti-Monopoly Office became the Office of Competition and Consumer Protection.

[116] Interviews with WM, AS and SS.

[117] In 1995 the agency was made responsible for preparing groundwork for a system of monitoring of state aid, in the framework of Poland's engagement with the EU. See the agency 1995 annual report, 35. However, in 1996 the ministry of economy became responsible for all state aid monitoring. Agency 1996 annual report, 26. In 1998 the agency reclaimed that portfolio, seeing itself as the best-placed body to deal with such matters, in light of the process of accession to the EU. Agency 1999 annual report, 8-9. This was possible thanks to the direct support of Deputy Prime Minister Balcerowicz. Interviews with TA and EM. In 2000 a new state aid law was adopted, making the agency responsible for monitoring and approving of state aid. Agency 2000 annual report, 6. From May 2004, when Poland joined the EU, the European Commission became the sole body responsible for approving of state aid, with the agency retaining only an advisory function.

[118] See agency 2016 annual report.

[119] Per Art. 7b of the Polish Language Act of 7 October 1999, as amended, OJ 1999, No 90, item 1999.

[120] Act of 15 December 2016 on Counteracting the Unfair Use of Contractual Advantage in Trade in Agricultural and Food Products, OJ 2017, item 67.

[121] In this vein BKS.

Moreover there is no evidence of any positive impact arising from the supposed synergies between competition and consumer protection, beyond the obvious cost savings (by means of having a single body instead of two separate bodies). In fact, both portfolios (competition and consumer protection) have always been perceived, managed, and implemented separately, without any real cross-fertilisation or any actual synergies being identified in the agency's ongoing work.[122] On the contrary, it is quite likely that this ever-broadening mandate only weakened the competition regime in Poland.

More worryingly, in an agency with limited resources, complex competition law cases are likely to lose out to efforts in the consumer sphere. Fighting the most egregious competition law violations, such as hardcore cartels, is resource-intensive, often factually and legally complex, and prone to prolonged appeals. Challenging the conduct of dominant firms, often state-owned, or government policy proposals with anticompetitive effects often means taking on powerful interests with significant lobbying power. Those who benefit from the agency's actions—consumers and potential competitors—are often poorly organised, dispersed, and do not speak with a single voice. There is no evidence that the beneficiaries of the agency's actions on the competition side offered the agency any appreciable political backing to strengthen its position.

By contrast, the agency's work on behalf of consumers need not present similar political risks and is better perceived by the general public and the media. The general public can often more easily relate to consumer cases and understand the direct benefits. Moreover, efforts on the consumer protection side offer better returns for the agency (in terms of faster, favourable outcomes and positive media coverage). Even if the agency exceeds its remit, it is likely to enjoy public backing, unlike the powerful opposition it faces in many competition cases. Therefore, having both competition and consumer portfolios in one agency creates the risk that the agency, for a variety of reasons, may—consciously or not—favour the less problematic and easier actions on the consumer side. Hence, the amalgamation of competences is problematic by design. In Poland the growing emphasis on consumer protection and declining focus on competition law enforcement indicate that these temptations have been yielded to in different periods.[123] This became visible in a mundane way. The agency's annual report for 2014 was the first one in which the first substantive chapter focused on consumer protection, not competition enforcement or policy, as was the norm until then. Moving the enforcement lever towards consumer protection means that earlier accumulated knowhow and skills may be disappearing in line with the use-it-or-lose-it axiom,[124] making it more difficult to readjust priorities later.

Moreover, the agency is a useful scapegoat for any problems arising in the market due to its: broad mandate; considerable sanctioning powers; peculiar status (below the ministries whose anticompetitive ideas it may need to challenge); and general detachment from politics.[125] The agency is important enough to be blamed, but not politicised enough to constitute liability for key politicians. An underlying misunderstanding of market mechanisms feeds the potential for this blame game. For example, every summer the agency tends to get blamed for not addressing alleged speculation that depresses prices for soft fruits. Producers could instead acknowledge the problem of oversupply or take steps to increase their bargaining power. Other cases carry more significance for the agency. For example, after the 2012 collapse of Amber Gold, effectively a large Ponzi scheme, the agency was publicly accused—including by the prime minister—of not taking adequate steps to protect

[122] In fact, in 2007 the agency commissioned research on synergies between competition policy and consumer protection. Agency 2007 annual report, 54.
[123] This is also the prevailing view of the interviewed practitioners.
[124] An interviewed practitioner (not for attribution).
[125] In this vein also MKT.

consumers. However other state agencies, such as the Financial Supervision Authority, were equally well placed to act.[126] Stronger status would better shield the agency from similar scapegoating, which undermines the trust vested in it and earned over time.

The Polish experience highlights the impossibility of having it all. The agency has done a good job, given the framework and constraints within which it operates. But mission creep has stymied the competition system by stretching the agency's resources and creating a design flaw—allowing for focus to shift away from more difficult tasks on the competition end of the spectrum. Hence, the Polish experience raises questions about the soundness of an emerging international trend towards connecting competition and consumer protection watchdogs.[127]

2. Competition advocacy

Competition advocacy promotes a competitive environment by means of non-enforcement mechanisms, mainly through interactions with governmental entities and increasing public awareness of the benefits of competition.[128] Advocacy vis-à-vis the state boils down to: (1) feeding into the legislative process and (2) contributing to any economic restructuring (such as privatisation or consolidation plans). Such activities are undertaken to promote procompetitive solutions. Public awareness efforts may involve educating and, more fundamentally, shaping social norms. Advocacy is particularly salient in economies transitioning towards a market economy, where the normative embrace of free markets would often face hurdles. These include the lack of a competitive culture and little awareness among policy-makers and the populace of the benefits of market competition.[129] Poland illustrated these challenges.[130] This section analyses the key institutional aspects affecting advocacy and outlines some of the efforts undertaken.

In the case of advocacy vis-à-vis the state, the agency's formal status matters. Being established as a central authority of the state administration, the agency has a second-best status in Polish administrative law, below the supreme administrative bodies (typically the ministries).[131] The accorded status means that the agency's head is a member of the Standing Committee of the Council of Ministers (a subcabinet auxiliary body), which feeds into the meetings of the Council of Ministers (the Cabinet). In effect, the Standing Committee is the key forum available for formal advocacy vis-à-vis the government. During the Committee's meetings the agency can challenge any proposed

[126] PM Tusk was quoted saying: '[the agency's] mission is also to protect the interests of consumers, not only to [ensure] competition (…) It's not acceptable that this institution of public trust deemed Amber Gold's advertisements … fair.' Jan Cienski, 'Poland's Amber Gold to liquidate', *Financial Times*, 18 August 2012.

[127] In the last two decades such a merger occurred in at least seven jurisdictions. Frederic Jenny, 'The Institutional Design of Competition Authorities: Debates and Trends' in Frederic Jenny and Yannis Katsoulacos (eds), *Competition Law Enforcement in the BRICS and in Developing Countries: Legal and Economic Aspects* (Springer 2016) 9-17.

[128] International Competition Network, Advocacy Working Group, 'Advocacy and Competition Policy: Report' (2002), i, available at <http://internationalcompetitionnetwork.org/uploads/library/doc358.pdf>.

[129] Armando E Rodriguez and Malcolm B Coate, 'Competition policy in transition economies: the role of competition advocacy' (1997) 23 Brooklyn Journal of International Law 365. In a similar vein Aydin and Büthe, n 4, 10-11.

[130] The popular misperception of the role of the competition agency, then called Anti-Monopoly Office, illustrated the scale of the challenge for the agency's advocacy efforts. Given that the Polish term for 'monopoly' denotes stores selling alcohol in popular parlance, many individuals thought the agency's aim was to promote sobriety.

[131] Such distinction is made in numerous acts (eg, Art. 18 of the Code of Administrative Procedure) and it is recognized by the doctrine. In the past, only two non-ministries were established as supreme administrative bodies (the State Committee for Scientific Research and the Committee for European Integration, both committees no longer exist).

legislation or government's plans with anticompetitive potential, or else seek support for its own initiatives. However, any issues, not resolved by the Committee, are addressed by the Cabinet itself and the agency's status does not provide it with direct access to that forum. The subcabinet status and the lack of access to the Cabinet meetings, as of right, may also explain why the agency was sometimes perceived as a subordinate institution by the government's ministers.[132] In fact, for similar reasons the framers of the 1987 Act wanted to accord the agency a standing akin to that enjoyed by ministries, although this was ultimately not done due to the costs involved.[133]

The Cabinet can request the agency's head to join relevant parts of its meetings. In practice, depending on who was prime minister, agency heads were granted permanent access to the Cabinet's meetings.[134] The majority of agency heads consider access to the Cabinet forum important. For example, in 2008, despite the agency opposition the government pushed for introduction of uniform rules on inspection of firms by state agencies, requiring advance notice,[135] thereby threatening to undermine the agency's investigatory powers (by eliminating unannounced inspections). The agency's head had no standard access to Cabinet meetings at that time. Krasnodębska-Tomkiel had to use a ruse and joined the Cabinet meeting without a formal invitation in a final—and successful—effort to secure an exception to these new rules for the agency.[136] Without access to the Cabinet's meetings, where the key decisions are taken, it is only more difficult for the agency to promote procompetitive solutions and challenge anticompetitive proposals (especially in the context of the legislative process).[137] This raises the question of the actual level of commitment attached to competition policy in such an institutional setting. Access to the Cabinet meetings should not be seen as politicisation of the role, but as a pragmatic means of giving the agency more equal footing vis-à-vis government departments in recognition of its uneasy advocacy work.

Cabinet meetings aside, the agency is involved in general inter-governmental consultations of legislative proposals. However, this formal and largely bureaucratic process does not ensure that any raised concerns will be addressed. Competition policy is just one of many policies which may need to be considered.

It is worth noting that past agency heads had different visions as to the proper role of the agency in shaping the state's broader economic policy. It seems that the agency did not manage to settle its role in this regard. For example, while some heads perceived competition advocacy as critical, others considered that the agency should focus more narrowly on enforcement. However, when asked about domestic allies, all former agency heads recognised that the agency acts horizontally and that, while the government supports it in abstract terms, such enthusiasm fades when it comes to querying individual projects with potential anticompetitive effects. In this light, the agency's subcabinet status, suggests it is forced to fight uphill battles.

If the agency is not adequately empowered to effectively challenge proposed anticompetitive measures, the question arises whether another entity can do so. This is an important practical question, especially in cases of economies transitioning to a free market with the baggage of

[132] Interviews with enforcers, in particular AF, CB, and MKT.
[133] See n 24 and accompanying text.
[134] That was so in case of Fornalczyk (since Bielecki's government, 1991-1995) and Banasiński (during the terms of Buzek and Belka, 2001, 2004-2005).
[135] Introduced per Act of 19 December 2009, amending the Act on Freedom of Economic Activity, OJ 2009, No 19, item 97.
[136] Interview with MKT. See also agency 2008 annual report, 12.
[137] An interviewed enforcer (not for attribution).

significant state intervention in the economy and general market scepticism. In the Polish context it seems the question has been neither seriously entertained nor systemically resolved.

Poland's transition largely benefited from the political imperative that emerged early on in support of swift reforms and eliminating inefficiencies of the previous system. This imperative and the external backing (especially of the United States[138]) empowered the competition agency, giving it clout beyond that explicitly arising from the law. The first agency head, Fornalczyk (1990-1995), understood that dynamic. She seized the opportunity to give the agency a more prominent say in government economic policy, perhaps best illustrated by her access to Cabinet meetings during most of her tenure. However, the agency's reasonably high level of initial influence did not become formalised (for example, by elevating the agency's status), marking an important, but only temporary, win for competition policy. By the early 2000s some observers noted shallower support for competition policy in the administration, as compared to the early 1990s.[139]

In the first years of the transition to a market economy, the agency was actively involved in the process of restructuring of the economy, although its input was non-binding and generally not public[140]—making its effects largely non-measurable. In many cases the agency's views were accepted, but there were instances when they were ignored.[141] In 1992 the agency reported that competition policy *often* had to concede to other considerations.[142] In 1993, Fornalczyk observed that 'it turns out that privatization of an enterprise often involves replacing a state monopoly with a private one'.[143] In these early years the agency became a vocal promoter of open markets, actively opposing developing protectionist tendencies.[144] It recognised the importance of import competition as a source of market discipline.[145] In the late 1990s the agency's involvement in the privatisation process subsided. In the early 2000s, some observers believed that the agency muted its concerns about privatisation outcomes with a view to maintain its contact with the policy process.[146]

The most notable case of a *de facto* competition policy override was the privatisation of the state-owned telecommunications company, Telekomunikacja Polska (TPSA). It was the largest privatisation in Eastern Europe.[147] Consecutive governments decided to cash in on the monopolist's premium and privatised a *de facto* and partly also legal monopoly,[148] despite sustained opposition of the agency.[149]

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[138] In 1990 the US government began funding technical assistance projects in the area of competition law and policy in countries undergoing transition. From 1990 until mid-1990s, the Polish agency benefited from short-term visits and resident advisors from the Antitrust Division of the Department of Justice and the Federal Trade Commission. For a US advisors perspective see James Langenfeld and Marsha W Blitzer, 'Is competition policy the last thing Central and Eastern Europe need' (1990) 6 American University International Law Journal of Law and Policy 347.

[139] Wise, n 5, 127. The US advisors who worked with the agency in the early 1990s are of the view that the agency benefited from strong political backing at the time. Interviews with DHB and JL.

[140] Fingleton, et al., n 5, 155.

[141] Ibid.

[142] Emphasis in the original. Agency 1992 annual report, 13.

[143] *Życie Warszawy*, 11 February 1993, translated in *Polish News Bulletin*, 28 February 1993.

[144] Agency 1992 annual report, 2.

[145] Agency 1992 annual report, 13.

[146] In this vein Wise, n 5, 127.

[147] For statistics on privatisation see the portal of the Polish Ministry of Treasury at <https://www.msp.gov.pl/en/privatisation/statistics?page=0>.

[148] OECD, Regulatory Reform in the Telecommunications Industry: Poland; Background Report (2002), 13-14. The privatisation was ultimately completed in 2000, but the telecom retained legal monopoly in international telephone market until January 2003.

[149] Interviews with enforcers, in particular AF, AS, and TA.

Following the guidance of US advisors, the agency sought to divide the telecom in the early 1990s however the government successfully opposed it.[150] In 1997, before the sale of the government's minority stake in TPSA, Sopoćko (1995-1997) observed that 'the government treats TPSA only as a source of big money for the budget … They think that selling it as a monopoly will give a better price', noting that, 'TPSA still acts like a lord in the countryside with special rights'.[151] Aziewicz (1998-2001)—during whose term the privatisation was consummated—recalls that the agency's decision to fine TPSA on the eve of privatisation complicated the agency's relations with the government, showing how important TPSA revenues were for the government. Both before and after the privatisation, TPSA was a frequent addressee of agency decisions finding violations of both competition and consumer legislation.[152] Overall, this case is a prime example of competition policy and consumer welfare being trumped by other policy considerations.

The most recent controversial contest between competition and broader economic policy was the already discussed prohibition of a the PGE-Energa merger.[153] While the agency prevailed, the pressure exerted on it by the government revealed a systemic weakness—the failure to resolve policy clashes through a transparent and reasonable process. It suggests that a narrowly construed right of executive override (a systemic safety valve) may be needed to accommodate these rare instances in which the state's key strategic interests surmount competition concerns, without undermining the agency's credibility. To make it transparent, such governmental prerogative could require parliamentary involvement. Polish rules currently do not provide for such a process.[154]

As regards the broader engagement, the agency has been active mostly by means of regular contacts with media, by organising conferences and contributing to academic events, bringing together broader, typically specialist audiences. The agency became and continues to be active on the publishing front, disseminating information about its activities, changes in the law, and the general benefits of competition.

In the mid-1990s the agency led a large Phare-funded[155] publishing project, initiated and organised by Tadeusz Skoczny, a legal academic and an agency advisor. In its framework, in 1995-1996, the agency published nearly 40 volumes, focusing on different aspects of competition law and policy.[156] The series helped identify existing and emerging authorities in the field in Poland and encouraged further specialisation among them. It also became a core point of reference for the Polish competition community,[157] filling a gap in scholarship.

[150] Interview with AF.

[151] Daniel Michaels, 'Poland's phone monopoly is still seen as a dinosaur that focuses on power', *Wall Street Journal*, 19 May 1997.

[152] Eg, decisions of 20 December 2007, DOK-98/07; of 29 December 2006, DOK-166/06; and of 5 June 2006, DOK-53/2006.

[153] See notes 68-77 and accompanying text.

[154] Should the rules facilitate it, we do not imply that such an override should have been used in the PGE-Energa case.

[155] Poland and Hungary: Assistance for Restructuring their Economies (Phare) programme was one of the EU instruments helping countries of Central and Eastern Europe in preparations for joining the Union. David Bailey and Lisa De Propris, 'A Bridge Too Phare? EU Pre-Accession Aid and Capacity-Building in the Candidate Countries' (2004) 42(1) Journal of Common Market Studies 77.

[156] For the listing see Tadeusz Skoczny (ed), Harmonisation of the Polish Competition Legislation with Competition Rules of the European Communities: Summary and Recommendations (Elipsa 1997).

[157] This fact was corroborated by virtually all of the interviewees active in that period (judiciary, enforcers, and practitioners).

Normally the agency reached out to its core specialist audiences, with only more general media contributions reaching the public. However, in 2009, the agency launched its largest campaign—aimed at increasing awareness of entrepreneurs. The campaign focused on price-fixing and promoted the newly created leniency programme. The TV spot, prepared by a leading Polish cartoonist, was witty and attention-grabbing.[158] The agency secured free broadcasting in many outlets. The campaign included mailing of leniency-focused materials to the 500 largest firms and over 350 local firms.[159] It was the first of many times the agency would avail of such mass communication.[160] While it does not seem to have led to a larger number of opened cases, the campaign, which ran until 2011, gave competition issues more visibility and brought the agency's operations to the attention of entrepreneurs and the wider public. The campaign was followed in 2012 by another more educational effort directed specifically at market participants, which aimed to raise awareness of the effects of anticompetitive agreements.[161] No similarly large campaigns have been run since then.

In recent years the agency has increasingly used soft measures to guide market participants on the remit of legally permissible conduct. For example, in 2014 the agency published a guidebook targeted at cemetery administrators, explaining in simple terms the applicable rules.[162] In 2016 it published a similar guidebook on the water and sanitation services market.[163] These efforts have been internationally recognised by the International Competition Network and the World Bank.[164]

Two other initiatives seeking to galvanise interest in competition law are noteworthy. First, in 2006 the agency began awarding journalists for their work focusing on competition and consumer protection (Libertas et Auxilum awards), in collaboration with the Polish Journalists Association and the Adam Smith Centre, a thinktank.[165] The competition was run annually until 2013 when, unfortunately, it was discontinued.[166] Second, in 2008 the agency began running an annual competition for the best master's thesis devoted to competition protection,[167] and from 2010 the Competition Law Society become involved in this venture, with its members co-assessing the submissions and the Society awarding its own distinction.[168] The thesis competition has been a good way to promote competition law among students close to graduation and to identify prospective hires for the agency.

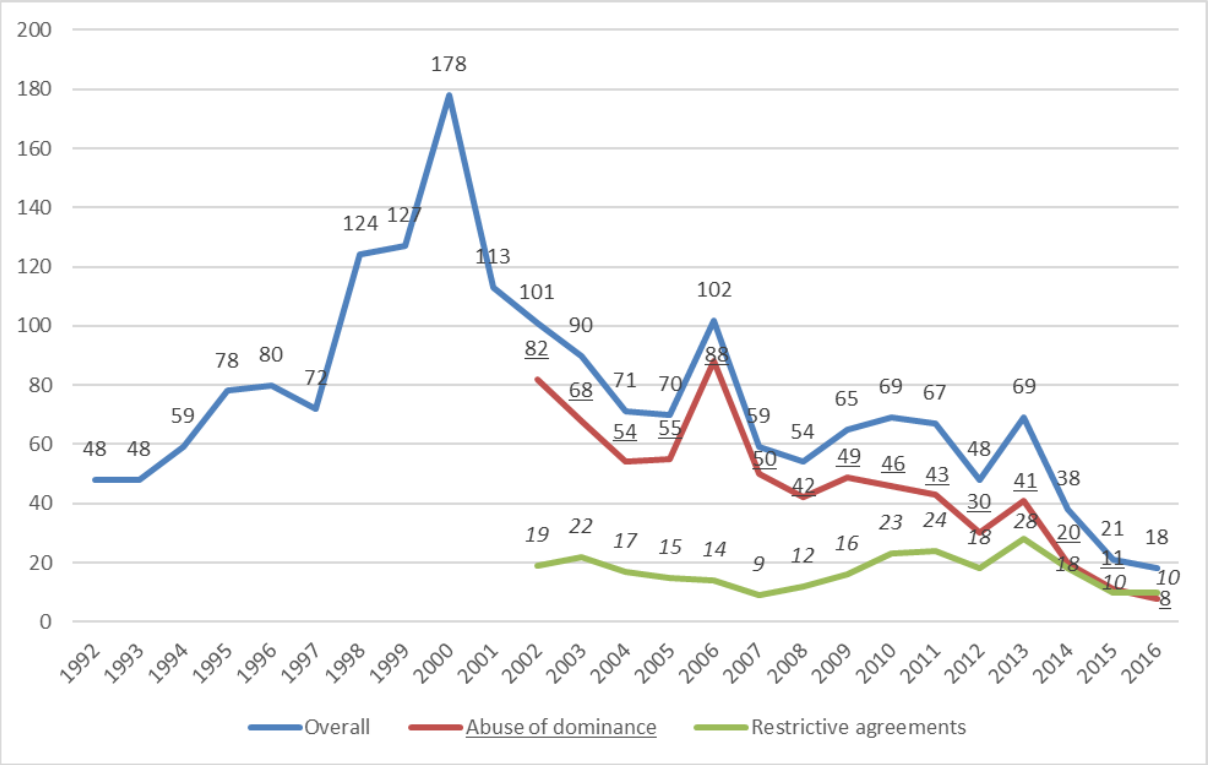
3. Enforcement efforts

This section analyses competition law enforcement in Poland in three principal areas: abuse of dominant position, anticompetitive agreements, and mergers. It outlines the characteristics and shortcomings of each.

[158] Available at <https://uokik.gov.pl/komentarze_wyjasnienia_i_stanowiska.php?news_id=2422>.
[159] Agency 2009 annual report, 51.
[160] Interview with MKT.
[161] Agency 2012 annual report, 35.
[162] The Guidebook, in Polish, is available at <https://uokik.gov.pl/download.php?plik=15793>.
[163] The Guidebook, in Polish, is available at <https://uokik.gov.pl/download.php?plik=18155>.
[164] See <http://www.worldbank.org/en/events/2015/10/30/the-2015---2016-competition-advocacy-contest-how-to-build-a-culture-of-competition-for-private-sector-development-and-economic-growth#5> and <http://www.worldbank.org/en/events/2016/10/24/the-2016---2017-competition-advocacy-contest#1>.
[165] Agency 2006 annual report, 42.
[166] See <https://uokik.gov.pl/aktualnosci.php?news_id=10389>.
[167] Agency 2008 annual report, 54. In 2016 the competition was expanded to encompass doctoral thesis. Agency 2016 annual report, 60.
[168] Agency 2010 annual report, 55.

The scholarly consensus suggests that developing countries should focus on hard-core cartels and mergers leading to monopoly, that is on challenging conduct whose harmful nature is unquestionable.[169] In addition, restraints involving state actors should be prioritised,[170] in particular, abuse of dominance by state-owned enterprises.[171] However, developing and sustaining such enforcement is challenging. Polish experience shows that capacity building is a long-term project.

Figure 8: Infringement decisions issued by the agency.



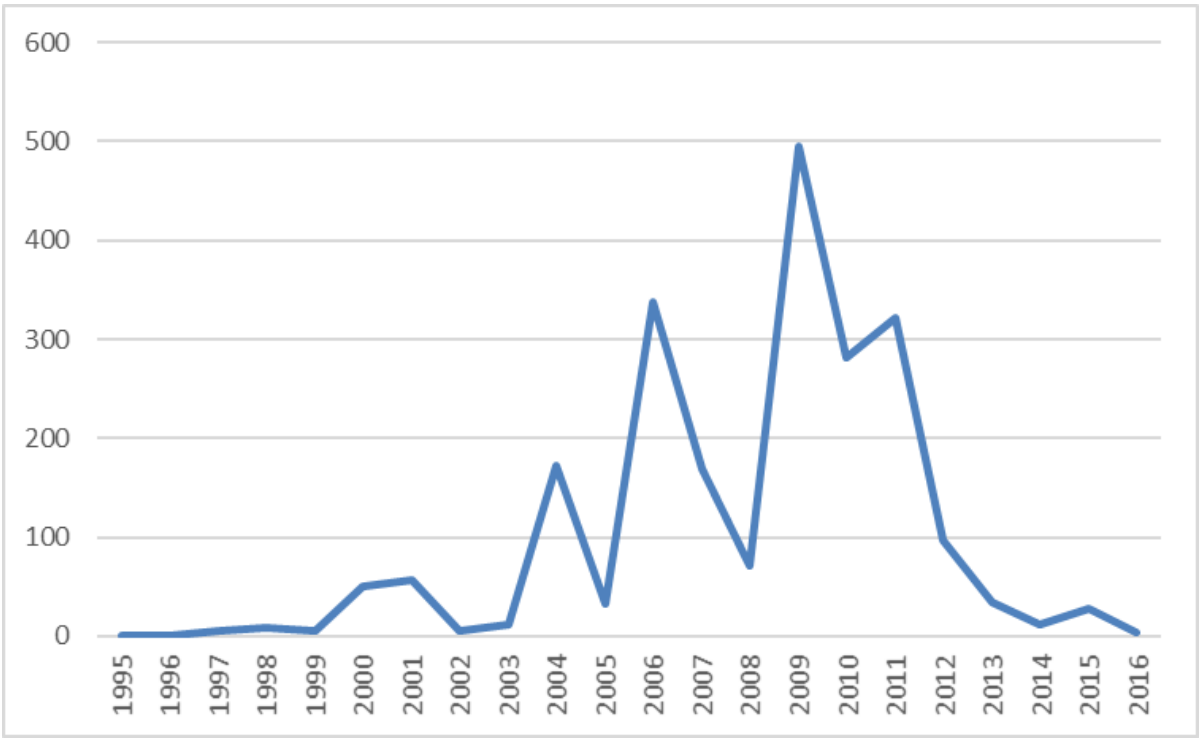
Source: Agency annual reports. Pre-2002 data allowing for distinction between categories of cases are unavailable.

[169] Aditya Bhattachajea, 'Who Needs Antitrust? Or, Is Developing-Country Antitrust Diferent? A Historical-Comparative Analysis' in Daniel D Sokol, et al. (eds), *Competition Law and Development* (Stanford University Press 2013) 61-62; William E Kovacic, 'Institutional Foundations for Economic Legal Reform in Transition Economies: The Case of Competition Policy and Antitrust Enforcement' (2001) 77 Chicago-Kent Law Review 265, 93-95.

[170] Michal Gal and Eleanor Fox, 'Drafting competition law for developing jurisdictions: learning from experience' in Michal Gal, et al. (eds), *The Economic Characteristics of Developing Jurisdictions: Their Implications for Competition Law* (2015), 319; Kovacic, n 169, 284.

[171] Philippe Brusick and Simon J Evenett, 'Should Developing Countries Worry About Abuse of Dominant Power?' (2008) Wisconsin Law Review 269.

Figure 9: Amount of fines imposed by the agency in competition cases (in million PLN).



Source: Agency data.

The data shows a steady increase in the number of infringement decisions in the 1990s followed by a gradual, but sustained decrease in the new millennium. Some of that fall might be the effect of system's maturing with elimination of most obvious types of violations, development of compliance and shifting of some of the caseload to sectoral regulators. However, the continuing decline in the number of infringement decisions since 2013 (related mainly to decreasing number of dominance cases and inability to detect cartels, discussed below) is worrying (see Figure 8). Fine levels reflect three phases: (1) a very lenient approach taken by the agency up to 2004, (2) substantial fines imposed between 2004 and 2012, and (3) a notable fall since 2012 (see Figure 9).

a) Abuse of dominant position

The enforcement of competition law in Poland is characterised by a significant focus on abuse of dominance throughout the entire period.[172] Even in the last 15 years the number of infringement decisions in this area was up to three times higher than the number of infringement decisions concerning anticompetitive agreements (see Figure 8 above).

Active enforcement in the dominance field, in particular on natural monopoly markets,[173] was informed for many years by the zeitgeist of the transformation with the populace at large despising dominant state-owned firms and their behaviour.[174] Dominant incumbents were exploiting their market power by means of both exclusionary and exploitative conduct.[175] These practices sometimes

[172] No exact data is available for the early years, however, the agency's annual reports show a primary focus on abuse-of-dominance cases.

[173] Interviews with MM, RG, JS, AS2. See also Tadeusz Skoczny, *Polish Antimonopoly Case Law* (ELIPSA 1995), 83-84.

[174] Slay, n 4, 135.

[175] See, eg, decisions of 17 June 2004, DOK-50/2004; 31 December 2004, DOK-140/2004; 9 August 2005, DOK-91/2005.

caused direct harm to the end consumer.[176] Hence, the agency often focused its resources on exploitative practices.

In terms of sanctions, state-owned firms or their successors were the recipients of the highest fines (see Table 1 below). The fact that such fines were indeed imposed shows that state-related anticompetitive conduct did not benefit from any special or lenient treatment.[177]

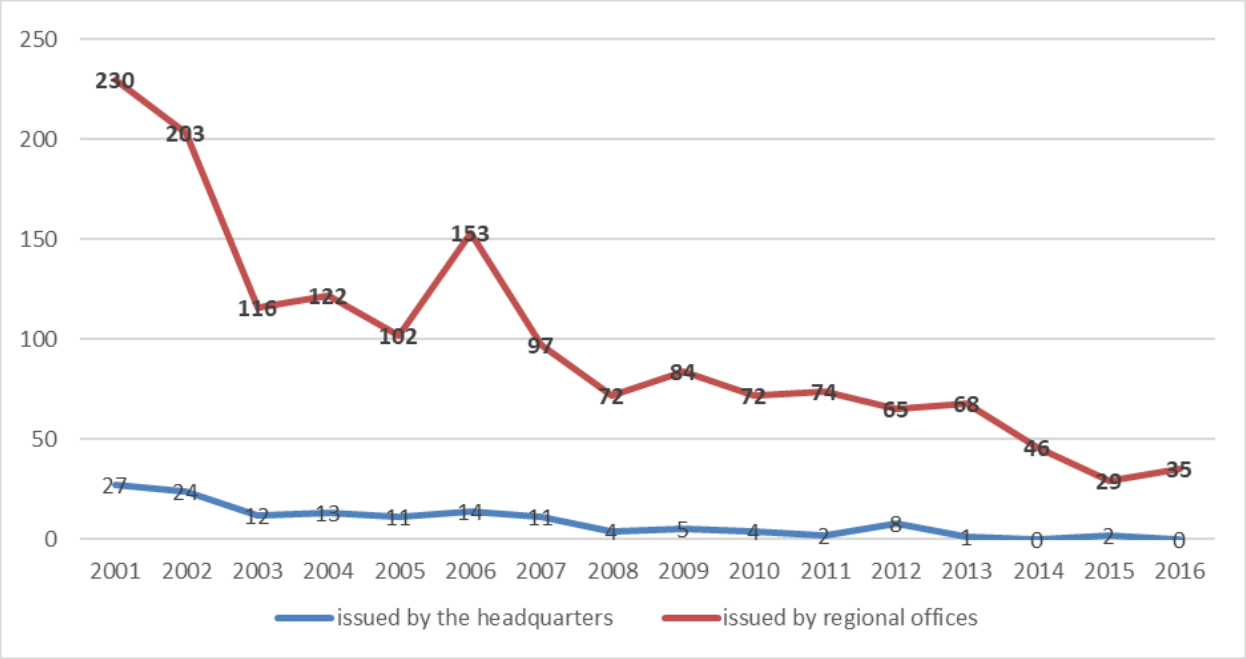
Table 1: Top fines imposed in abuse of dominance cases (in mln PLN).

Amount	Case	Year
75	Telekomunikacja Polska (TPSA)	2007
60	PKP Cargo	2009
60	Polskie Górnictwo Naftowe i Gazownictwo	2012
50	PZU Życie	2007
40	PKP Cargo	2004

Source: Agency's data.

The agency's regional offices were responsible for the bulk of enforcement in this area (see Figure 10 below). Data shows the agency's predominant focus on local and regional practices. In fact, between 2001 and 2016 regional offices issued 92 percent of all agency decisions in the dominance field.

Figure 10: Overall number of decisions concerning abuse of dominance.



Note: The number of decisions is not limited to infringement decisions. It includes also other types of decisions (such as decisions dismissing complaints). Source: Analysis on the basis of <https://decyzje.uokik.gov.pl/bp/dec_prez.nsf>.

Overall, the enforcement in the abuse-of-dominance field has been vigorous. The cases brought against dominant firms helped to lower barriers to entry and to eliminate numerous exploitative

[176] For example, decision of 30 July 1993, DO-III-500-25/93/ZW; judgment of 31 May 1995, XVII Amr 9/95, decisions of 7 August 2002, DDI–63/2002 and 30 September 2008, RPZ-34/2008.
[177] This view is also widely shared by the interviewed practitioners.

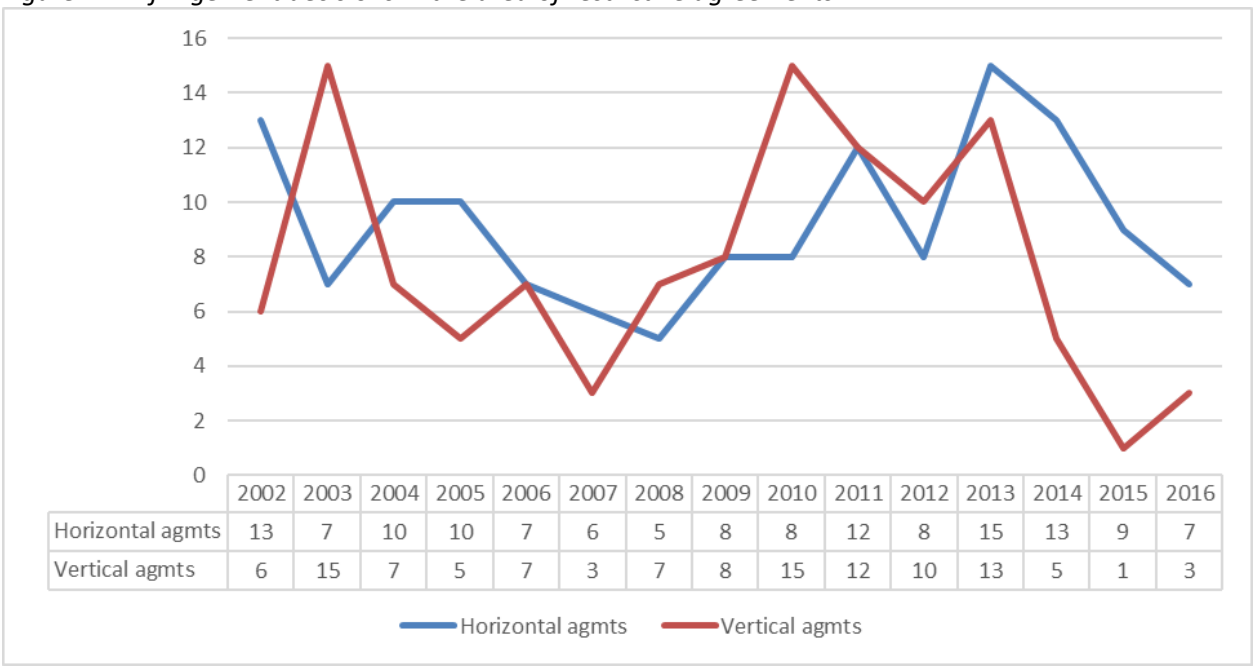
practices. However, the sanctioned violations were usually neither difficult to prove nor difficult to detect (more of a low-hanging fruit). Moreover, data shows a gradual and very significant drop in the overall number of decisions issued in this area. Headquarters averaged less than one decision per year for the four years ended 2016.

The number of decisions fell after 2007, partly due to elimination of motion-based investigations. Until then the agency was compelled to take formal action whenever it received a complaint notice. The motion-based system was very laborious for the agency.[178] The agency justified its abandonment by a willingness to focus on the most harmful violations of competition law,[179] such as cartels. However, this change carried a risk of complacency. The virtually non-existent record of cartel enforcement suggests that risk has materialized.

b) Cartels and other agreements restricting competition

Throughout the investigated period the agency focused on unilateral practices. The number of decisions issued in cases involving anticompetitive agreements was significantly lower (see Figure 8). The agency statistics do not clarify to what extent the agency focused on cartel conduct. While in its reporting the agency distinguishes between cases concerning horizontal and vertical agreements (see Figure 11), it is unclear how many of the former decisions involved cartels.

Figure 11: Infringement decisions in the area of restrictive agreements.



	2002	2003	2004	2005	2006	2007	2008	2009	2010	2011	2012	2013	2014	2015	2016
Horizontal agmts	13	7	10	10	7	6	5	8	8	12	8	15	13	9	7
Vertical agmts	6	15	7	5	7	3	7	8	15	12	10	13	5	1	3

Source: Agency annual reports.

Poland's early cartel cases did not pose significant evidentiary challenges.[180] The first cartel[181] to be investigated was detected thanks to minutes from the cartelists meeting.[182] The cartel of billboard

[178] 80 percent of complaints did not lead to a finding of a breach. Agency 2007 annual report, 5.
[179] The explanation attached to the Draft Proposal of the 2007 Act, 17, 20.
[180] Interviews with AS, CB and AF.
[181] Agency 1992 annual report, 6, upheld on appeal, judgment of 1 March 1993, XVII Amr 37/92.
[182] Interview with AF.

leases was announced by its members at a press conference, with direct inculpatory evidence being contained in the written agreement signed by the parties.[183]

These easier cases aside, the agency track record of uncovering nation-wide cartels is poor. In fact, for a long time the cement cartel was the only large country-wide and secret cartel successfully investigated by the agency. The agency found that seven major producers of grey cement had been colluding for 11 years.[184] Although the case received considerable media attention, it did not constitute an enforcement breakthrough. In fact, setting aside bid-rigging, in the period 2010-2016 the agency managed to sanction only one large cartel.[185]

Instead of cartels, the agency went after the low-hanging fruit and focused, after 2007 in particular,[186] on retail price maintenance (RPM), which it tends to equate with cartels in its rhetoric. This approach was compounded by imposing very large fines in the most serious cases (See Table 2).

Table 2: Ten highest fines (per case) for anticompetitive agreements, per case (in mln PLN).

Amount	Case	Year
411	Lafarge Cement and others (cement cartel)	2009
164	Bank Millenium and others (interchange fee)	2006
113	Polkomtel and others (Mobile TV)	2011
108.6	Polifarb Cieszyn-Wrocław and others (RPM)*	2006
56	PZU and Maximus Broker	2011
48.3	Tikkurila and others (RPM)	2010
25	Akzo and others (RPM)*	2010
18	Minova Ekochem and others	2013
9	ICI and others (RPM)	2008
8	PZPN and Canal+	2006

Source: Agency data. Original amount of fines as imposed by the agency.
** These cases had some hub-and-spoke characteristics (involving communications between retailers via a common wholesaler).*

The low cartel-detection rate and rare instances of imposition of high fines for cartel conduct undermined the deterrent effect of the Polish system. Lacking deterrence from detection and enforcement is likely to adversely affect compliance.[187]

There are two key interrelated factors explaining the lack of cartel enforcement in Poland. The first one relates to the agency's lacking capacity to detect cartels. The second relates to the failure of the leniency programme.

So far the agency has not developed sufficient skills to proactively uncover and sanction cartel conduct.[188] Although from 2007 it had full investigative discretion, the agency focused on abuse of

[183] See decision of 22 October 2002, RPZ-21/2002.
[184] Decision of 8 December 2009, DOK-7/2009.
[185] Decision of 16 December 2013, RKT-46/2013.
[186] See, in particular, decisions of 7 April 2008, DOK-1/2008; 24 May 2010, DOK-4/2010; 31 December 2010, DOK-12/2010, 21 August 2013, DOK-2/2013; 30 December 2016, DOK-2/2016.
[187] Caron Beaton-Wells and Christine Parker, 'Justifying criminal sanctions for cartel conduct: a hard case' (2013) 1(1) JAE 198, 205-206.
[188] In this vein also interviewees MS, AS2, AF.

dominance and vertical agreements. Moreover, it seems it may not be opening proceedings when informed of non-trivial violations, even cartels.[189]

Enforcement shortcomings cannot be explained by insufficient investigatory tools (such as eavesdropping), since the agency is not using the tools at its disposal (eg, it has never searched a private premise[190]). Moreover, the agency still seems not to have developed good working relationships with other state authorities, such as police and the prosecutor's office. The agency's relative success cooperating with such authorities on bid rigging[191] might be related to the fact that they are responsible for criminal enforcement in this field. The same does not apply in other cases, leaving the agency on its own. The situation is not aided by resource limitations.[192] The agency's key cartel-busting unit—the Department of Competition Protection—has fewer than 30 staff. In addition, it suffers from high staff turnover[193] and its staff has often only limited experience.[194] Lack of case-teams is yet another agency weakness.

Moreover, the Polish system has not provided a sufficient deterrent, partly by not presenting a credible threat of detection. The time gap between the fines imposition and collection of fines undermines deterrence further.[195] Poland has a complex system of judicial review.[196] It normally takes years before the decision becomes final and fines become due. For example, the 2009 cement cartel decision became final only in 2018. In addition, courts have tendency to significantly reduce fines, especially after 2010 when decisions imposing severe fines reached the court.[197]

The failure of businesses coming forward to claim leniency is a second key reason explaining low cartel detection in Poland. This comes as no surprise given the limited ability of the agency to uncover cartels through its own investigations, which is linked to social norms permissive of cartel practices.[198] In Poland businesses do not consider detection as a high risk and so they do not have incentives to apply for leniency.[199] Unlike in virtually all other jurisdictions, Polish leniency programme (introduced in 2004) applies to all types of anticompetitive agreements (including vertical arrangements).[200] However, even with its broad applicability, the number of received applications has been very low (see Figure 12 below). Overall, the programme did not meet expectations, despite its fine-tuning[201] and media campaigns.[202]

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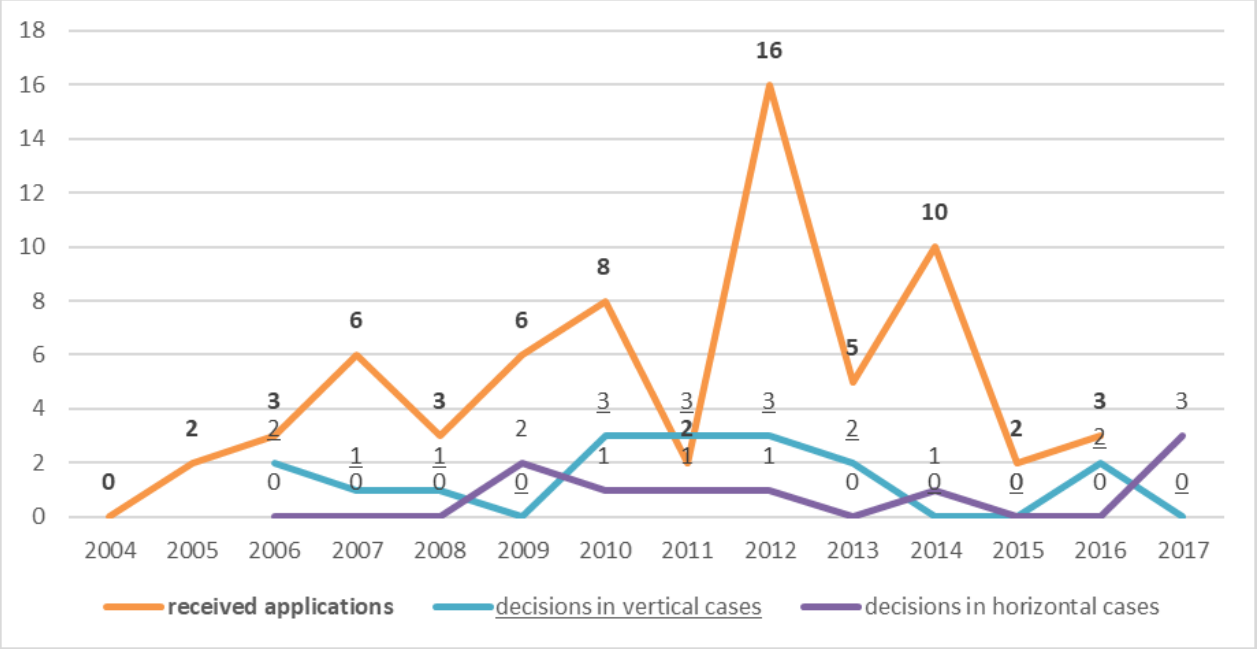
[189] The opinion of two interviewed practitioners.
[190] Agency data arising from public information request.
[191] The interviews with AJ and BKS. For example, in Minova Ekochem bid-rigging case, the agency cooperated with the Internal Security Agency. See decision of 16 December 2013, RKT-46/2013.
[192] See section Agency resources.
[193] The interviews with AJ and BKS.
[194] See n 88 and accompanying text.
[195] Rajmund Molski, 'Polish Antitrust Law in its Fight Against Cartels – Awaiting a Breakthrough' (2009) 2(2) Yearbook of Antitrust and Regulatory Studies 49, 74.
[196] See notes 229-233 and accompanying text.
[197] Maciej Bernatt, 'Między pełną kontrolą sądową a poszanowaniem polityki karania organu administracji – o sądowej kontroli kar nakładanych w sprawach konkurencji' (2016) 9 Europejski Przegląd Sądowy 18, 23-24.
[198] Andreas Stephan, 'Cartel Laws Undermined: Corruption, Social Norms, and Collectivist Business Cultures', 37(2) Journal of Law and Society 345, 56 (2010).
[199] Interviews with RG, MMD, and MS.
[200] Article 113a of the 2007 Act.
[201] See Marek Martyniszyn and Maciej Bernatt, 'On Convergence with Hiccups. Recent Amendments to Poland's Competition Law' (2015) 36(1) European Competition Law Review 8.
[202] See notes 158-161 and accompanying text.

Figure 12: Leniency-related statistics.



Source: Agency data.

The broad nature of leniency had somewhat perverse consequences. Only six out of 26 leniency-related decisions concerned horizontal agreements and only two of them related to country-wide secret cartels (the cement cartel and the wood-based panels cartel[203]). Even in these two cases leniency did not play its primarily role—cartel detection. The applications were filed after the agency conducted dawn raids.

Culture or even history of non-cooperation with state authorities against the interests of other individuals/firms is often recognised as a reason for leniency's failure in Poland.[204] Businesspersons may be afraid of being considered informers by their peers.[205] Programme design and agency practice also matter. For example, the interviewed practitioners noted the unsatisfactory position vis-à-vis legal certainty.[206] Furthermore, the firms may be discouraged by the duration of cartel investigations. For example, the decision in the wood-panel cartel was issued six years after the leniency application was filed.

c) Merger control

Under the 1990 Act, the concentration control focused primarily on de-monopolisation, especially on transformation of state-enterprises into single shareholder companies owned by State Treasury. For example, in 1992 52 percent of agency decisions concerned such transformations.[207]

The 1995 amendment changed the system.[208] It introduced quantitative thresholds over which the notification of a planned concentration was required. It also added procedural rules. The awareness of the merger notification regime increased due to agency initiatives, such as the 1996 market study,

[203] Decision of 28 December 2017, DOK-3/2017.
[204] Interviews with MMD, BKS, and MS.
[205] Interviews with RG, MMD, and MS.
[206] Interviews with RG, KK, MMD, and MS.
[207] Agency 1992 annual report, 9.
[208] Ustawa z 3 lutego 1995 r. o zmianie ustawy o przeciwdziałaniu praktykom monopolistycznym, OJ 1995, No 41, item 208.

which revealed a high number of transactions that were not notified to the agency despite the obligation prescribed in the 1995 regime.[209] In addition, sanctions for non-notification of mergers were frequently imposed.[210]

Between 1997 and 2000 the agency received a significant number of notifications (more than 1,000 per year, see Table 3 below). The number of notified transactions grew in comparison to 1995-1996 because of growing awareness among firms that concentrations have to be notified.[211] The 2000 Act introduced a higher quantitative threshold (50 million EUR), leading to a significant drop in notified transactions. Since 2002 the number of notified transactions was relatively stable (on average 209 transactions a year). A decisive majority of concentrations were cleared unconditionally. Since 2002 only 27 conditional clearances and eight prohibitions were issued.[212] No prohibition decision has been issued since 2011.

Table 3: Merger control 1995-2016.

Year	Number of scrutinised cases	Clearance	Conditional clearance	Prohibition
1995	333	261	n/a	0
1996	469	377	n/a	2
1997	1387	1225	n/a	2
1998	1872	1510	n/a	1
1999	1079	917	n/a	0
2000	1107	911	n/a	0
2001	542	no data	no data	no data
2002	180	168	1	0
2003	194	149	2	0
2004	218	175	1	2
2005	329	265	2	0
2006	263	215	1	1
2007	310	205	2	0
2008	177	153	2	0
2009	123	97	1	3
2010	188	147	2	0
2011	187	166	3	2
2012	155	136	1	0
2013	177	156	2	0
2014	190	169	4	0
2015	235	218	1	0
2016	215	194	2	0

Source: Agency annual reports.
Note: The overall number of cases for 2002 is approximate, based on the agency 2003 annual report (no exact data provided); the overall number of notifications the agency dealt with in 2007 is provided (no information about the number of cases concluded in 2007).

[209] Agency 1997 annual report, 21-22.
[210] For example, 132 such fines were imposed in 1998. Agency 1998 annual report, 9.
[211] Agency 1997 annual report, 21-22.
[212] Two of these decisions (PGE/Energa and Cogifer Polska/Koltram) were highly political. See notes 68-75 and accompanying text.

Employment stability in the agency's Department of Concentration Control contributed to growing agency experience after 2004.[213] The transparency of the reviews also increased. In 2010 the agency issued merger guidelines. However, the review system had a key deficiency: there was no moment during the proceedings at which the agency was to formulate its concerns (that is, express its reasoned doubts about the transaction).[214] Length of proceedings was a problem too. The 2014 amendment of the 2007 Act aimed to address these shortcomings with the introduction of the two-stage review and the issuance of a list of concerns at the stage II. These legal changes shortened the stand-still period for non-problematic concentrations. In 2014 the merger review proceedings lasted on average 57 days.[215] In 2015, the first year during which the new rules were in force, the average time decreased to 34 days and to 38 days in 2016.[216] Shorter merger reviews is clearly a positive development.

Another positive change in the merger review system recently is the agency's greater openness. The interviewed practitioners note that since 2014 the agency became more open for direct, informal discussion of notified transactions.[217] This change was reinforced by the introduction of the possibility of pre-notification meetings with agency staff.[218]

Another issue concerning merger review relates to the role of economic analysis, which gained greater prominence at the agency[219] and indeed drove some of its decisions.[220] Yet, the agency has been criticised for being overly dependent on quantitative rather than qualitative analysis of relevant markets (with a focus on market share)[221] and attaching too much attention to stakeholder responses to its inquiries.[222] However, any such flaws in agency decision-making go unchecked because only the notifying firm is a party to the merger proceedings,[223] and so it alone is entitled to challenge agency findings. The exclusion of third parties from the proceedings leads to a situation in which merger clearance decisions, as well as conditional ones, even if possibly deficient, are never appealed.[224]

B. Judiciary

Having explored the evolution of the agency and its activities, we now turn to the judiciary and its contribution to the broader competition law system in Poland. The primary focus is on the competition court hearing appeals from agency decisions. In the first decade of its operation, the court played a very constructive role. However, over time its substantive contribution became rather limited—largely due to its having to cope with the tsunami of cases caused by a misguided expansion of its jurisdiction. It came under criticism for an overly formalistic approach and increasing delays. While it seems that some of the key institutional problems have now been addressed, its workings offer valuable lessons on system design.

[213] Interviews with BKS, KK, and MS2.
[214] Tadeusz Skoczny, 'Polskie prawo kontroli koncentracji – ewolucja, model, wybrane problemy' (2010) 5 Europejski Przegląd Sądowy 15, 21.
[215] Agency 2014 annual report, 35.
[216] Agency 2016 annual report, 38.
[217] Interviews with RG, AS2, MS, MS2, and ASB.
[218] *Rules for Contact with Enterprises* of 23 January 2015, available in English at <https://uokik.gov.pl/download.php?plik=16154>.
[219] See agency 2016 annual report, 37.
[220] For example, the conditional merger clearance decision in Auchan/Real, decision of 21 Jan 2014. See also decisions of 6 February 2014, DKK-11/2014 and of 6 September 2011, DKK-101/2011.
[221] Interviews with AS2, RG, and MS2.
[222] Interview with KK.
[223] See Article 94(1) of the 2007 Act.
[224] Skoczny, n 214, at 20.

Under the 1987 Act the agency's decisions were subject to legality review by the Supreme Administrative Court.[225] The 1990 Act introduced a different system. A specialised civil Antimonopoly Court was created within the structure of the district court in Warsaw,[226] hence within the system of common courts. In 2002 it was given its current name—Court of Competition and Consumer Protection ('Sąd Ochrony Konkurencji i Konsumentów', hereinafter the competition court).[227] It is the only court competent to hear appeals against the agency's decisions. It is empowered to issue substantive judgments, take evidence (inclusive of new evidence not presented to the agency), oblige the agency to re-examine decisions, and reverse or quash agency findings.[228] Hence, it is to engage in full review on merits.

Initially, the court's judgments were final, subject only to extraordinary revision by the Supreme Court. However, the nature of judicial review in competition cases evolved over time.[229] The creation of the present two-tiered review system was triggered by a judgment of the Constitutional Tribunal, which held that lack of appeal from the judgments of the Antimonopoly Court—which in view of the Tribunal is a first instance court—was unconstitutional.[230] The necessary changes provided for appeal from the competition court to the Court of Appeal.[231] Judgments of the Court of Appeal, in turn, may be challenged before the Supreme Court by means of an extraordinary cassation complaint. Since competition cases often involve novel legal issues, the Supreme Court often accepted complaints and issued judgments on merits. In the period 2001-2016, the Supreme Court issued 124 judgments in competition cases.[232] Neither the Court of Appeal, nor the Supreme Court established specialised units to deal exclusively with competition matters.[233]

Creation of a new court necessitated its staffing. Stanisław Gronowski became Poland's first competition judge and presided over the court until 2000. Although he had no background in competition law, he had a sound understanding of commerce having served for nearly 30 years as an arbiter (a *de facto* judge) of the state economic arbitration process—a compulsory system of resolving commercial disputes in communist Poland.[234] He proved to be an extremely capable individual, immersing himself in studying comparative competition law and contributing to the system's development through off-bench writings. Most significantly, in 1996 Judge Gronowski published a

[225] See n 33 and accompanying text.
[226] Ordinance of the Minister of Justice of 13 April 1990 on the Creation of the Antimonopoly Court, OJ No 27, item 157, replaced by Ordinance of the Minister of Justice of 30 December 1998 on the Establishment of Antimonopoly Court, OJ No 166, item 1254.
[227] Act of 5 July 2002 amending the Act on Competition and Consumer Protection, OJ No 129, item 1102.
[228] As established by the Constitutional Tribunal in its judgment of 31 January 2005, SK 27/03, OJ 2005 No 22, item 185.
[229] Stanisław Gronowski, 'Competition Judiciary in Poland' in Małgorzata Krasnodębska-Tomkiel (ed), *Changes in Competition Policy Over the Last Two Decades* (UOKiK 2010).
[230] Judgment of 12 June 2002, P 13/01, OJ 2002 No 84, item 764.
[231] Act of 2 July 2004 amending Code of Civil Procedure, OJ 2004 No 182, item 1804.
[232] However, a downward trend is noticeable. Per agency annual reports, in the period, 2005-2010 (six years), the Supreme Court issued annually, on average, 7.3 judgments in competition cases. In the period 2011-2016 (six years), it issued only 2.7 such judgments. See also Figure 16.
[233] However, at least two Supreme Court judges were not strangers to competition law. Judge Andrzej Wróbel, who joined the court in 2004, is a leading EU and administrative law scholar. Judge Dawid Miąsik, a leading competition law expert, joined the court in 2014 after serving as a référendaire at the court from 2006. Both were actively involved in competition cases, often acting as judge rapporteurs (as per the court judgments database <http://www.sn.pl/orzecznictwo/SitePages/Baza_orzeczen.aspx>).
[234] Jan K Grodecki, 'State Economic Arbitration in Poland' (1960) 9(2) International and Comparative Law Quarterly 177.

commentary on the 1990 Act.[235] This was effectively the first book comprehensively analysing the Act and its application, which became the key point of reference in the Polish system. It was of great practical importance also because, at that time, access to court judgments was not easy.

Judge Gronowski considered it important to engage other judges and support them in developing their expertise in competition law. While initially he was the only judge in the court, other judges were delegated to hear cases, as they were presented before three-judge courts until 1999.[236] Judge Gronowski strived to involve colleagues with similar considerable experience in commercial matters. For example, in 1993 Judge Andrzej Turliński—who also had a background in state economic arbitration—started hearing competition cases as a delegated judge, before joining the court permanently in 1998. In July 2000 Judge Turliński took over from Judge Gronowski as the judge president of the court. When recommending colleagues to join his court, Judge Turliński was following Judge Gronowski's approach of recommending judges with considerable expertise in commercial law.[237]

In the 1990s judges were largely self-educated in competition law, which was challenging due to the scarcity of sources in Polish and the judges' lack of foreign language skills. Poland's accession to the EU brought with it voluntary judicial trainings, including in competition law. It later enabled judges, conversant in foreign languages, to immerse themselves in international judicial networks in the field, creating opportunities to exchange knowhow and share insights.[238] However, the issue of judicial training has not been addressed to date. A judge can begin hearing competition cases without having received any training in this area of law. Further or ongoing judicial trainings are not obligatory. In fact, judges of the competition court and the Court of Appeal did not benefit from any specific or regular training.[239] A recent report reveals that the last training organised for specialised judges took place in 2011.[240] Furthermore, due to judicial turnover, in 2000 Judge Turliński was the only judge on the competition court with relevant expertise,[241] requiring the court to essentially re-establish itself. In effect, calling the competition court a specialised one reflected more on its scope of jurisdiction than the possessed expertise, with judges learning intricacies of competition law and economics on the job. In mid-2000, as outlined below, the court was flooded with non-competition cases. During that period, judges new to the court quite likely could not have devoted the necessary time and effort to training.

Originally, the sole purpose of the competition court was to hear appeals from the decisions of the competition agency. Only 97 appeals reached the court in the first four years of its operation[242] In fact, Judge Gronowski, who was permanently assigned to the court, was asked to help adjudicate disputes in the Patent Office.[243] While the number of cases annually reaching the court steadily increased, it remained within the double-digit territory at the turn of the new millennium.[244]

[235] Stanisław Gronowski, *Ustawa Antymonopolowa w Orzecznictwie* (CH Beck 1996).
[236] Interviews with AT and SG.
[237] Interview with AT.
[238] Ibid.
[239] European Commission, Study on judges' training needs in the field of European competition law (2016), 216.
[240] Ibid, 216-17.
[241] Interview with AT.
[242] Poland's 1994 annual report to the OECD, DAFFE/CLP(94)4, 9.
[243] Interview with SG.
[244] 57 appeal in 1994, 56 in 1995, 62 in 1996, 57 in 1997, 81 in 1998, 87 in 1999, 81 in 2000, as per agency annual reports and Poland annual reports to the OECD.

The light caseload effectively gave Judge Gronowski time to establish the court and develop its expertise in this new area.[245] In his view the role of the court was twofold: (1) to help the agency find its appropriate focus and (2) to help the agency enforce new laws by clarifying potentially ambiguous provisions.[246] For example, in 1990 the agency found that FSO, the dominant car-maker, had violated the law by illegally increasing prices and ceasing production of certain cars.[247] On appeal the case was overturned, effectively disallowing the agency from engaging in price-setting.[248] This result was later upheld by the Supreme Court, which concluded that competition law should not be a hidden mechanism for price control.[249] In a similar fashion in the early years the court helped the agency to find an appropriate enforcement focus. Initially the agency was tempted to investigate cases concerning minor contractual disputes (typically involving unequal bargaining power) of marginal market importance. For example, in 1990 the agency brought a case against a lessor for imposition of onerous terms (excessive rent) on the lessee, finding in favour of the latter. On appeal the court held that the agency did not have jurisdiction, underlining a distinction between protection of competition and protection of individual interests.[250] The court also did not shy away from criticising the agency on policy grounds, for example in relation to a very soft-hearted sanctioning approach.[251] In its early years the court also contributed to the process of harmonisation of domestic law with the law of the EU. In fact, in his judgments Judge Gronowski used an EU-friendly interpretation of law and referred to relevant EU case law.[252]

However, over time the court's competence began expanding. Some of that expansion reflected the growing mandate of the agency, especially its development of broad consumer protection responsibilities. The court began hearing also appeals from decisions of sectoral regulators, in the areas of energy (since 1997[253]), telecommunication (since 2000[254]), railway (since 2001[255]), postal service (since 2003[256]) and water management (since 2018[257]). Moreover, in 2000 the court was vested with jurisdiction over consumer contracts of adhesion.[258]

The court's expanding jurisdiction, growing professionalisation of the practitioners market and the increasing rate of appeals (for example, in 1999 about one third of all agency decisions was challenged[259]) began creating a backlog of cases and delays.[260] The addition of jurisdiction over standard form contracts overwhelmed the court in the later years. The judicial traffic jam arose when the legislature expanded the court's scope to implement the EU Directive on Unfair Terms in Consumer Contracts.[261] In essence, any person who could conclude a contract containing an unfair clause could sue the supplier or seller. The competition court became solely competent in these matters. Such a wide opening of court's doors led to unanticipated large-scale system abuse and the

[245] Interview with SG.
[246] Ibid.
[247] Decision of 24 October 1990, DO-I-644/37/90/HS.
[248] Judgment of 18 December 1990, XV Amr 7/90.
[249] Supreme Court judgment of 29 May 1991, III CRN 120/91, 13.
[250] Judgment of 6 December 1990, XV Amr 5/90.
[251] Poland's 1994 annual report to the OECD, DAFFE/CLP(94)4, 21.
[252] For examples see Stanisław Gronowski, 'Contribution' in *Judicial Enforcement of Competition Law, OCDE/GD(97)200* (OECD 1996) 31-32.
[253] The Energy Law Act of 10 April 1997, OJ 1997, No 54, item 348.
[254] The Telecommunications Act of 21 July 2000, OJ 2000, No 73, item 852.
[255] Act of 8 December 2000 amending numerous acts, OJ 2000, No 122, item 1314.
[256] The Postal Law of 12 June 2003, OJ 2003, No 130, item 1188.
[257] The Water Law Act of 20 July 2017, OJ 2017, item 1566.
[258] Act of 2 March 2000 on the Protection of Certain Consumer Rights and on the Liability for Damage Caused by a Dangerous Products, OJ 2000, No 22, item 271.
[259] Wise, n 5, 114.
[260] Ibid, 114-15, 28.
[261] Council Directive 93/12/EEC of 5 April 1993 on Unfair Terms in Consumer Contracts, OJ 1993 L 95, p. 95.

emergence of law firms specialising in such cases. They held businesses to ransom if they found contracts with prohibited clauses—not filing suit if the ransom were paid.[262] Whether legitimate or abusive, a tsunami of such suits hit the court, reaching its apex in 2013, when over 41,000 such suits were brought, constituting nearly 99% of all matters brought before the court that year (see Figure 13 below). While waiting for a legislative fix, the court sought a practical solution. In 2010 three additional judges joined the court, forming a special unit focusing solely on these cases. Further judges were being delegated to assist. At the crisis's peak eleven judges were adjudicating in the competition court.[263] The system was overhauled in 2016, shifting towards an administrative regime within the competition agency. The enforcers began issuing decisions in such cases, thereby freeing the court of that caseload.[264] However, for about a decade the court had to focus on simply staying afloat. In fact, the court carried a backlog of 2,500 cases in 2017 (including 2,000 cases involving standard form contracts).[265]

Figure 13: Cases reaching the competition court: division into categories of cases.

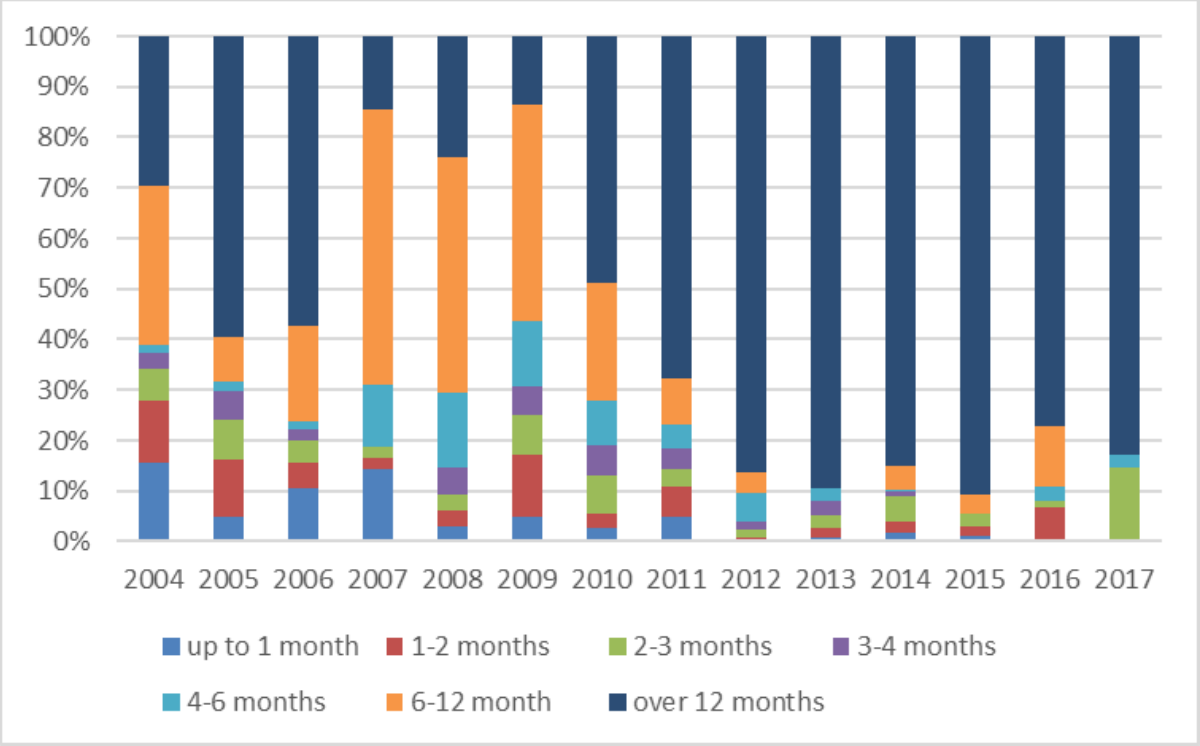
	standard form contracts	% of the total number of cases	competition	% of the total number of cases	energy	railway	communication	other matters	**in total**
2004	115	21.14%	131	24.08%	114		41	143	**544**
2005	178	34.43%	126	24.37%	123		11	79	**517**
2006	90	15.41%	127	21.75%	238		44	85	**584**
2007	349	37.81%	150	16.25%	230	1	93	100	**923**
2008	325	36.60%	127	14.30%	209		130	97	**888**
2009	2066	73.37%	232	8.24%	205		235	78	**2816**
2010	3909	86.14%	236	5.20%	226		61	106	**4538**
2011	5976	91.64%	185	2.84%	196	3	55	109	**6521**
2012	13954	96.65%	135	0.94%	153	12	97	98	**14437**
2013	41016	98.76%	172	0.41%	139	24	86	119	**41532**
2014	3109	86.53%	170	4.73%	150	24	62	102	**3593**
2015	1968	82.21%	73	3.05%	193	15	62	98	**2394**
2016	1859	80.65%	69	2.99%	186	22	60	131	**2305**
2017	269	29.37%	56	6.11%	380	22	42	169	**916**

Source: Data of the Polish Ministry of Justice.

An unsurprising consequence of the consumer-related backlog was significant delays in competition cases. In the late 1990s it took the court typically three to four months since the case was filed to issue a decision.[266] In the new millennium the situation gradually worsened. The period between case filing and the first hearing lengthened (see Figure 14 below). In 2013 it took about two years to have the first hearing of a case,[267] and this continues, despite up to eight judges hearing competition cases.[268]

[262] Anna Oponowicz, 'Niedozwolone postanowienia wzorców umów zawieranych z konsumentami–zmienne tendencje w polskim orzecznictwie sądowym' (2014) 3(4) IKAR 21, 22.
[263] Interview with AT.
[264] Act of 5 August 2015 amending the Act on Competition and Consumer Protection and other Acts, OJ 2015, item 1635.
[265] Competition court 2016 annual report to the Ministry of Justice.
[266] Wise, n 5, 128.
[267] Błachucki, n 25, 77.
[268] Interview with AT.

Figure 14: Competition cases: period between case filing and the first hearing.



Source: Data of the Ministry of Justice.

Another factor hindering the court's work, especially its intellectual capability and focus, is the general system used for evaluation of judicial work. Judges are appraised using a crude system of monitoring the number of cases handled.[269] Hence, whether a judge deals with a small contractual matter or a complex abuse-of-dominance case—her 'statistics' will go up by one. Hence, judges are facing extremely skewed incentives. It is rational to stay away from competition cases (potentially disincentivising talented judges from serving on or permanently joining the competition court). Alternatively, judges are implicitly encouraged to expeditiously adjudicate by reviewing merits superficially.

Another challenge facing the competition court relates to judicial turnover. Judicial salaries in Poland reflect the court's position in the hierarchy. Judges of the competition court, formally a section of the district court,[270] are commonly interested in seeking higher-ranked and better-remunerated judicial appointments. Already in 1996 Judge Gronowski noted that 'unfortunately, a common phenomenon is that, after several years of work and after gaining valuable experience, judges leave the bench to pursue higher-paying legal positions. A limited budget is not sufficient for gathering a qualified group of judges.'[271] Judge Gronowski himself moved a rung up the ladder, in 2000, when he was appointed a judge of the Supreme Administrative Court.

It is of no surprise that, from the start of the new millennium, the court was criticised for focusing excessively on procedural aspects instead of merits. Similar tendencies have been observed in other civil law jurisdictions where judges without competition law expertise were called upon to hear such cases.[272] However, it prompted the Supreme Court, in 2004, to clarify the role of the court, effectively

[269] Interview with AT.

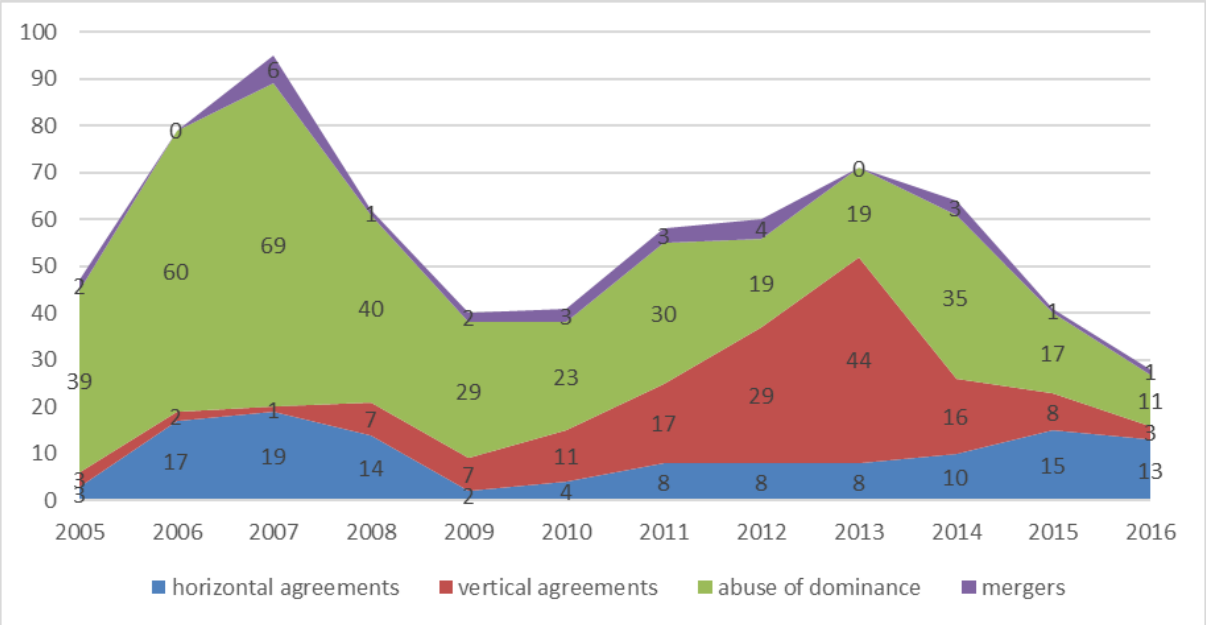
[270] District courts are courts of common jurisdiction, which are the courts of first instance in commercial cases where the claim has a value greater than 75,000 PLN. Claims of a lesser value are brought before regional courts. See the Judicial System in Poland <http://bip.warszawa.so.gov.pl/artykuly/436/the-judicial-system-in-poland>.

[271] Gronowski, n 252, 33.

[272] Kovacic and Lopez-Galdos, n 3, 107.

suggesting that procedural issues should not be a competition court's focus.[273] This clarification moved the court to another extreme—to stop reviewing procedural objections.[274] This changed in 2013 when the Supreme Court acknowledged the competition court's obligation to deal with such matters.[275] However, no significant improvement in review on merits has been noted and the court continues to be criticised for the superficiality of its assessment on merits.[276] This is reflected in judgments being annulled and remanded for further proceedings, further extending the length of the proceeding.[277]

Figure 15: First instance judgments in competition cases: division into key categories of cases.



Source: Agency annual reports.

[273] Judgment of 13 May 2004, III SK 44/04.

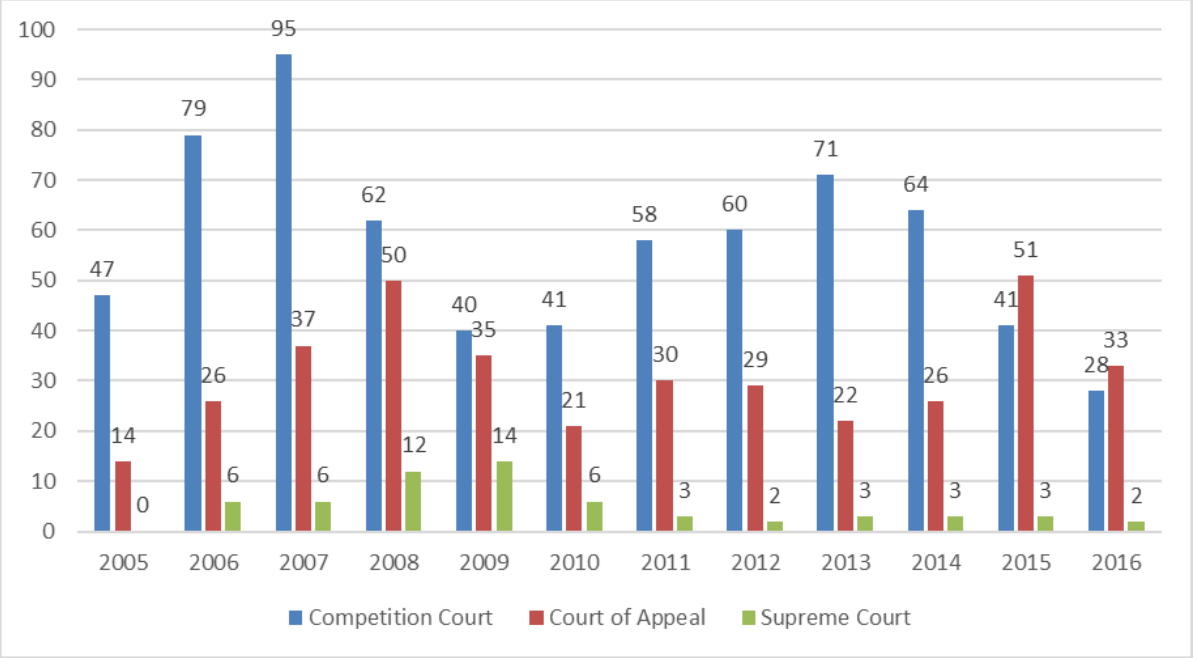
[274] See, eg, judgment of 14 May 2012, XVII Ama 41/11.

[275] Supreme Court judgment of 3 October 2013, III SK 67/12.

[276] Such critique was expressed by both the Court of Appeal and the Supreme Court. See, eg, Court of Appeal judgment of 16 December 2015, VI ACa 1799/14; Supreme Court judgment of 25 October 2017, III SK 38/16. Maciej Bernatt, 'Effectiveness of Judicial Review in the Polish Competition Law System and the Place for Judicial Deference' (2016) 9(14) Yearbook of Antitrust and Regulatory Studies 97, 103-106.

[277] For example, proceedings in the cement cartel case (n 184), and in the abuse-of-dominance case involving Marquard Media (decision of 2 June 2006, RKT-35/2006) took seven years. In the interchange fee case, 11 years have passed and the case is ongoing.

Figure 16: Judgments in competition cases across courts.



Source: Agency annual reports.

The holistic assessment of Poland's competition court is mixed. In the first ten years of its operation the court was an important contributor to the competition system. Since the start of the new millennium that has changed, largely due to various systemic design flows. Due to delays and superficiality of review, the court might now be perceived as a liability rather than an asset to the system. Successful addressing of the consumer-related caseload brings hope that the court will now be able to devote the necessary focus to competition matters and that the delays will shorten. However, if judges are not properly supported with training and if appraisal system remains in place, it may be overly optimistic to hope that the court will play a more prominent and constructive role as the system co-producer.

C. Competition law practitioners and broader epistemic community

This part analyses the development of the practitioners market and of the broader epistemic competition community.[278] These areas tend to be under-researched, probably due to difficulties in identifying relevant dynamics. However, they warrant attention and directly reflect on the evolution of the competition system. In fact, analysis of the growth of the practitioners market allows us to distinguish distinct phases in that process.

Practitioners collectively constitute an important co-producer of the system. They interact with the agency and the judiciary, representing clients who face charges, are affected by conduct of other market players, or want to merge. With the unveiling of private enforcement, their role may increase further, due to competition-law-related bargaining in the shadow of the law (for example, in relation to out-of-court settlements) and litigation. Moreover, as the system developed, practitioners contributed to advocacy by offering advisory and compliance services. They have a self-interest in violations' prophylaxis, which serves the system and the economy by increasing market participants'

[278] Epistemic community is a knowledge-based network of professionals who have a shared set of beliefs and common policy goals. Such communities are able to impact policy debates, especially in so far as expert input is required. See further, Peter M. Haas, 'Introduction: Epistemic Communities and International Policy Coordination' (1992) 46(1) International Organization 1, 3.

awareness of competition law. They also provide input to legislative reforms and help shape competition policy.

From the practitioners' perspective, it does not matter what the agency does (that is, whether it reaches 'right' or 'wrong' decisions) as long as it is active. In such an agency-centred regime, with initially non-existent private enforcement, the scope for co-producers' contributions (both the practitioners and the judiciary) is a function of the agency's operation. The agency effectively feeds or starves the co-producers.

At the point of system transformation, in 1989, there were only a few practitioners in Poland knowledgeable about competition law (typically thanks to studying or researching in the West). In the mid-1990s the new generation of practitioners with an interest in competition law began emerging. At that stage competition law was not taught in law schools in Poland and many of them continued studies in Western Europe. These first competition aficionados, interviewed in the scope of this project, all recognized the scarcity of Polish competition law sources at that time (except for the Phare-sponsored series[279] and, later, Judge Gronowski's commentary[280]) and acknowledged reaching for EU jurisprudence to learn. They also noted the importance of foreign-language fluency in their learning. These practitioners currently top the Chambers list for competition law in Poland,[281] showing that the risks taken and effort invested in the then-fledgling area paid off. One of the lessons for new competition agencies is to facilitate competition law and policy learning early on, for example, by liaising with universities, to start developing knowledge and understanding of this field as soon as possible.

The fact that initially only two domestic law firms (Wardyński i Wspólnicy and Sołtysiński, Kawecki & Szlęzak) saw the potential of competition law as a practice area shows how little demand there was for such services at the time. Originally it was not considered an attractive field. There are indications that, unlike in the West,[282] it was perceived as a feminine field, lacking prestige, offering limited career prospects, and requiring considerable investment in learning, with men typically selecting more-established areas.[283] That initial misperception may explain today's strong female representation at the head-of-practice level.

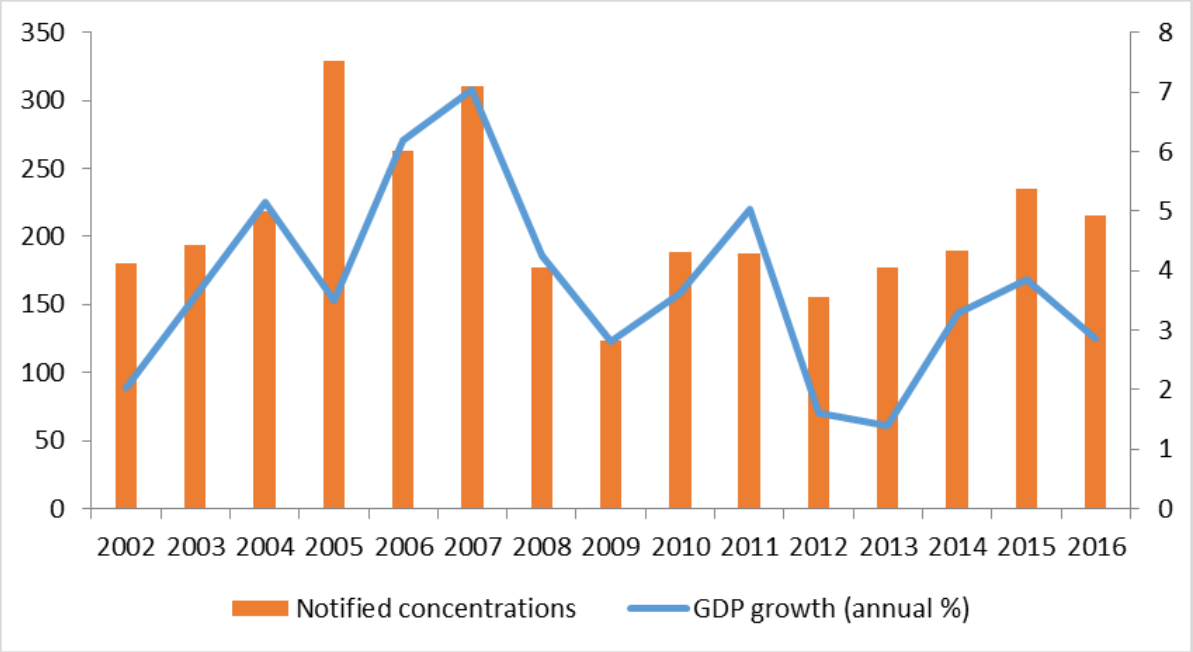
The introduction of modern merger control in 1995 stimulated development of the practitioners market. The relatively low threshold for merger notifications generated an increased workload. That coincided with the inflow of foreign capital, with large Western corporations buying shares in or taking over existing firms. Coming from typically more-established regimes, they were accustomed to competition watchdogs' scrutiny and to a compliance culture. They contributed to the Polish system's development by importing such knowhow and expectations. The 'mergers' phase characterised Polish competition system until the first years of the new millennium. This phase not only effectively created competition practitioners market, but it also taught them and the agency how to, for example, define markets.[284]

The recession of the early 2000s (the dot-com bubble) caused a slowdown in Poland and weakened merger activity. It also marked the beginning of the next stage in the system's development—the

[279] See notes 155-156 and accompanying text.
[280] See n 235 and accompanying text.
[281] For the current listing see <https://www.chambersandpartners.com/173/26/editorial/7/1>.
[282] Cynthia Fuchs Epstein, *Women in Law* (University of Illinois Press 1993) 233; Ulrike Schultz and Gisela Shaw, *Women in the World's Legal Professions* (Hart 2003).
[283] In this vein, for example, MS2.
[284] Interview with ASB.

confident enforcement phase, with the first large-scale investigations and sizable fines. The Polifarb case can be seen as the symbolic end of that phase, with the agency imposing, in 2006, the first-ever fines of more than one hundred millions PLN in a single case (in fact, the office had never before imposed fines even in the range of tens of millions PLN for anticompetitive behaviour).[285] As the agency's enforcement intensified, most large law firms would have added at least one lawyer with expertise in competition law.

Figure 17: Juxtaposition of merger activity and GDP growth in Poland.

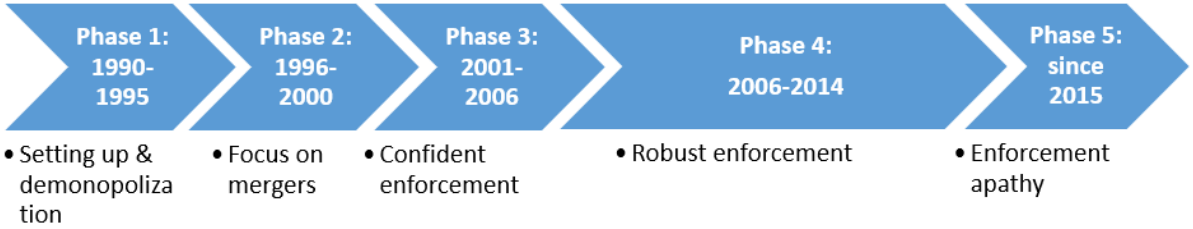


Source: Agency and World Bank data. See also Table 3 above.

One can speak of the system's maturing during Krasnodębska-Tomkiel's tenure (2008-2014). While the number of decisions plateaued at a lower level than in preceding years, the agency began more-assertive enforcement, with fines reaching new levels. In fact, six out of the ten highest fines for anticompetitive agreements were imposed during her tenure (see Table 2 above). The more-expansive enforcement increased interest in compliance, stimulating the practitioners market.[286] During this period competition teams began to emerge in the law firms, reflecting the increased activity of the agency and the growing diversity of cases (especially the increasing number of RPM cases). Around that time in-house competition lawyers and boutique law firms began to emerge. Krasnodębska-Tomkiel's departure in 2014 marks the start of the enforcement stagnation phase, with a fall in the number of decisions to levels unseen before. Recent years witnessed a noticeable fall in the demand for practitioners services, also those related to compliance. However, practitioners acknowledge that the business community's awareness of competition law has not been lost, with firms not betting on the agency's apathy to continue indefinitely.

[285] Decision of 18 September 2006, DOK-107/2006.
[286] Interview with MS2.

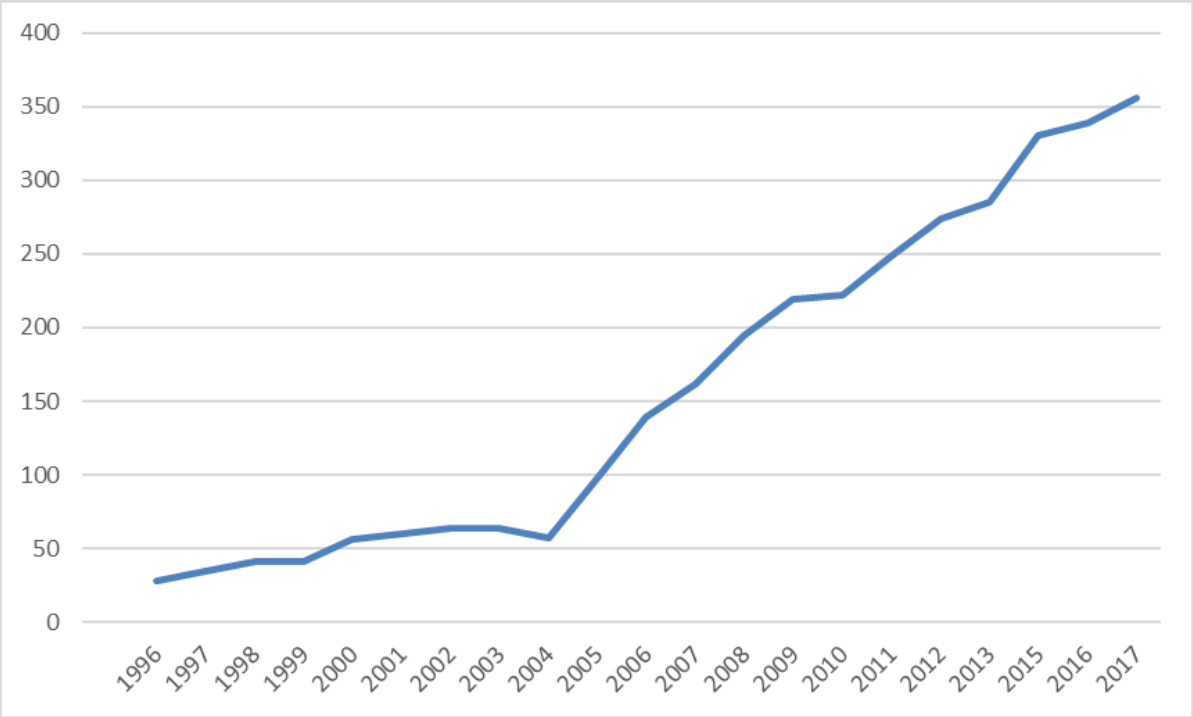
Figure 18: Phases in the development of the Polish competition system.



Source: Own illustration.

The growth of the practitioners market, and indeed the Polish competition community itself, can be inferred also from the growth in the membership of the Competition Law Society (see Figure 19 below). The society is primarily practitioner-driven. Apart from being a networking platform, it organises workshops and makes submissions during legislative consultations or when the agency seeks external input.[287] The society was established in 1994 to promote competition law. For nearly a decade its membership was modest, but since 2004 it expanded considerably, exceeding 300 members in 2015. This expansion reflects both a sustained membership drive and increased interest in competition law following Poland's accession to the EU in 2004.

Figure 19: Membership of the Competition Law Society (total number of Society's members).



Source: Competition Law Society data.

Today's broader competition community in Poland finds its roots primarily in academia. Drafters of the first competition statutes, the first heads of the agency, many of its staff and advisors were academics.[288] In the first decades, academic interest in this area developed organically. The first impactful competition law research centre in Poland was the Centre for Antitrust and Regulatory Studies (CARS), established by Tadeusz Skoczny in 2007, at the University of Warsaw. CARS publishes its own monographs[289] and two peer-reviewed journals (the Yearbook of Antitrust and Regulatory

[287] For more on the society's activities see <http://www.spk.com.pl/en/news-2>.
[288] See notes64-65, 85 and accompanying text.
[289] For listing see <https://www.cars.wz.uw.edu.pl/ksiazki_gb-monografie.html>.

Studies, YARS, Poland's first competition law journal, published in English,[290] and the Antimonopoly and Regulatory Quarterly, iKAR[291]). YARS and iKAR remain the only two competition law journals in Poland.

The growing interest in competition law was also reflected in the launch, in 2011, of the first postgraduate course in competition law in Poland by the Institute of Law Studies of the Polish Academy of Science. This year-long programme, delivered by judges, enforcers, practitioners, and academics runs annually, attracting more than 30 participants each year.[292] Over time, other institutions began offering similar courses,[293] indicating the expanding demand for knowledge in this area of law.

Poland now has a well-developed practitioners market and a vibrant broader competition law community. The agency should draw more heavily on this community to benefit from different perspectives and experiences. In some jurisdictions agencies benefit from such input automatically through the job market's revolving doors (with practitioners moving to work in the agencies).[294] In Poland, however, that way of expertise channelling and cross-fertilisation does not work, largely due to unattractive salaries.[295] This shortcoming magnifies the importance of all other platforms and processes for dialogue between the agency and the broader community, inclusive of practitioners.

V. Conclusions

Unlike many competition systems created in the past two decades, Poland did not have the benefit of learning from its peers because, at that time, no other country had undergone similarly far-reaching economic transformation. Poland was a leader of a group of former communist countries entering the uncharted territory of competition law. That is the lens through which one should assess the system's success in its first decade. However, with the passage of time and the development of a market economy the rationale for making allowances in the system's assessment has faded.

Institutionally, Poland opted for an integrated agency model with a specialised competition court. Despite system's maturing, the issue of the agency's independence remains largely unresolved. Moreover, due to the considerable power vested with its leader, operations of the agency remain excessively dependent on her personality. The agency's head should not be responsible for decision-making. That task should be discharged by a separate body, drawing from relevant international good practice. A take-home lesson for other new regimes is that, by design, an agency—while being accountable—should enjoy considerable autonomy. One should also avoid systemic overreliance on a single individual's input.

In terms of resources the agency is not an attractive employer. Its staff is inadequately remunerated, resulting in elevated turnover and reduced effectiveness. The issue of underfunding must be addressed if the agency is to fulfil its mandate. Agency operations to date must be assessed in light of

[290] See <http://www.yars.wz.uw.edu.pl/>.
[291] See <http://ikar.wz.uw.edu.pl/ikar.php?ikar=501>.
[292] Communications with Małgorzata Król-Bogomilska and Grzegorz Materna, the former and current programme directors, respectively (on file with the authors). See further <http://www.inp.pan.pl/dydaktyka/studia-podyplomowe/studia-podyplomowe-prawo-konkurencji-ix-edycja/>.
[293] For example, Jagiellonian University and the University of Wrocław.
[294] On the benefits of revolving doors see William E Kovacic, 'Competition Policy in the European Union and the United States: Convergence or Divergence?' (Bates White Fifth Annual Antitrust Conference, 2 June 2008), 16.
[295] See notes 90-104 and accompanying text.

this underlying and long-lasting deficiency. A broader conclusion for other jurisdictions is that to attract and retain capable individuals the remuneration should be set, at a minimum, near the top of the civil service pay scales.

The Polish agency's position vis-à-vis government departments is weak, hindering its input into policy-making and curtailing its competition advocacy role. To be a more effective advocate, the head of the agency need to be in a stronger position, for example, by participating in Cabinet meetings to make her voice heard. A take-away for new regimes is that one should seriously entertain the question of who is to be made responsible for competition advocacy within the state. If it is to be the competition watchdog, it must have the standing allowing it to effectively discharge that duty. In such a case, agency's autonomy needs to be strengthened further.

Overall competition law and policy in Poland suffers from unwise mission creep. The agency's remit has continually expanded without sufficient increases in budgetary appropriation. The same applies to the competition court. In a somewhat different context Kovacic and Lopez-Galdos noted that 'doing a lot of things is not the same as doing the right things, or doing them the right way'.[296] This valuable thought should inform future determinations of competence.

The agency's enforcement record is mixed. It did very well in challenging unilateral practices. It brought about largely vigorous and sustained enforcement, challenging violators—both private and state-owned enterprises in local, regional and national markets. Given the broader context of the economic transformation it is impressive, proving that it can be done.

The agency experience with multi-party conduct is very different. While the agency's regional offices proved their usefulness by challenging local and regional agreements, including cartels, cases involving secret and country-wide cartels are virtually absent. The agency lacks ability to detect. Cartelists do not face a credible threat of enforcement. The situation is worsened by the poorly designed leniency programme, which has been used mainly in non-cartel cases. In effect, Poland suffers from a significant yet peculiar enforcement gap. The regional offices tackle local and regional violations. Global violations are dealt with by the European Commission. However, large, country-wide arrangements are the lacuna in Polish competition law. They have largely escaped scrutiny, suggesting that Poland may be a cartel paradise. This experience shows that cartel enforcement requires a serious, long-term commitment and sustained effort, and constitutes the most difficult task for new agencies.

Poland's competition court shows that a sustained long-term investment in judicial training is needed, particularly if competition law is to be embraced as part of a broader paradigm shift in the way the state's economic affairs are organised. Moreover, the judicial work allocation models should provide judges the space and time necessary to invest themselves in adjudication of competition matters, rather than forcing them to provide just a cursory review.

Poland's practitioners market is well-developed and vibrant. The agency should be encouraged to embrace practitioners as valuable system co-producers and a source of market insight. Polish experience shows that establishing a new system requires a considerable educational effort. New agencies may wish to liaise with local educational providers to stimulate and facilitate such learning early on, thereby planting seeds of a wider domestic competition community.

[296] Kovacic and Lopez-Galdos, n 3, 95.

The critical nature of this analysis should not obscure the broader picture. Over the last three decades Poland managed to introduce and develop a sophisticated, robust and quite dynamic system of competition law, making it a leader in the Central and Eastern Europe. While various mishaps were not avoided and there are areas needing improvement, the nearly three decades of Poland's experience with competition law provided solid foundations for the system's future refinement and should be a source of satisfaction for all those who shaped it.