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The Road to Prosperity. Reflections on Polish Antitrust in Turbulent Times

Table of contents

Summary

The “end of history”, which was once speculated, did not happen. In international politics, this resulted in much turbulence, in particular in 2022. In antitrust, in turn, there is a renewed interest in discussing its goals and assessment methods. When it comes to international politics and military reforms, Poland has taken important actions to ensure that in spite of the turbulent times, it will still take further steps on the road to prosperity, on which it had embarked in 1989. Less has been said about economic policy. Yet, it is economic policy that provides a solid base for an active international policy and the creation of a prosperous society. This article constitutes part of a “scoping exercise” aimed at facilitating a debate over antitrust policy in Poland. As a discursive

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text, it considers a number of more technical proposals that have been made in the last few years, and highlights some systemic issues that deserve further discussion. It concludes that even if none of those issues currently attract the attention of the general public in Poland, this does not mean that no discussion should take place.

Key words: antitrust enforcement; antitrust policy; antitrust reform; economic policy; effective enforcement; due process; non-economic goals.

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Droga do pomyślności. Refleksje na temat polskiego prawa antymonopolowego w trudnych czasach

Spis treści

Streszczenie

Zapowiadany kiedyś „koniec historii” nie nastąpił. Skutkiem powyższego, w szczególności w 2022 r., stały się istotne zawirowania na arenie międzynarodowej. Z kolei w prawie antymonopolowym odżywa zainteresowanie dyskusjami na temat jego celów oraz metod oceny. W odniesieniu do polityki międzynarodowej i reform wojskowych, w Polsce podjęto istotne kroki, mające sprawiać,

że mimo trudniejszych czasów, Polska nadal będzie podążać obraną w 1989 r. „drogą do pomyślności". Mniej mówi się jednak o polityce gospodarczej. Niemniej to polityka gospodarcza dostarcza solidnych podstaw dla bardziej aktywnej polityki międzynarodowej i tworzenia prosperującego społeczeństwa. Niniejszy artykuł stanowi próbę ustalenia zakresu możliwej debaty na temat polityki antymonopolowej w Polsce. Będąc tekstem dyskursywnym, artykuł porusza temat kilku bardziej „technicznych" propozycji, które przedstawiane były w ostatnich latach, a zarazem wskazuje na bardziej systemowe kwestie, które zasługują na dyskusję. Artykuł wskazuje, że nawet jeżeli tematy te nie koncentrują dziś uwagi szerzej pojętej opinii publicznej w Polsce, nie oznacza to, że dyskusja w tym zakresie nie powinna się toczyć.

Słowa kluczowe: wdrażanie prawa antymonopolowego; polityka antymonopolowa; reformy antymonopolowe; polityka gospodarcza; skuteczne wdrażanie prawa; sprawiedliwość proceduralna; cele pozaekonomiczne.

I. Introduction

Shortly after the adoption of the 2014 amendment to the Polish Competition Act, Tadeusz Skoczny remarked that each legislative change paves the way for further improvements.[1] Taking into account that in March 2023 the Polish parliament adopted an amendment implementing the ECN+ directive, it is a good moment to start reflecting on what improvements might still be needed. It is also a good opportunity to respond to Aleksander Stawicki's (2021a) invitation to a discussion about the direction into which Polish antitrust should go.

In this article, I allow myself to comment on some of proposals made by Stawicki and to share my own thoughts. While the topic concerns Polish antitrust and issues that are mostly national by nature, I suggest to continue this discussion in English. First, because this will make it easier for non-Polish researchers interested in national developments to keep track on what is happening in Poland. Second, the Polish NCA, along with other Polish government actors, is making attempts to strengthen regional cooperation (Cseres and Mazaraki, 2023) – having this discussion in English might be of help to all those who are also making efforts to improve their antitrust enforcement at national levels.

However, writing this article in English, I need to make a reservation: to keep the discussion dynamic, I do not explain all peculiarities and technicalities of Polish antitrust. In other words, this text takes the point of view of a person who is well-acquainted with the Polish legal framework and practicalities of antitrust enforcement in Poland. This might be an inconvenience for a non-Polish reader, yet still a step forward in making the Polish point of view more accessible.

Since Stawicki's original article was more discursive rather than descriptive, I proceed in a similar way. In consequence, this article is not intended as a thorough academic analysis of all issues covered further on. It is instead part of a "scoping exercise" aimed at facilitating a debate over Polish antitrust. Being a form of such a scoping exercise, the article does not follow a classic structure of a step-by-step analysis, but is rather divided into three parts which serve following

[1] This remark was made during a 2015 conference hosted by the Polish NCA, and while I quote it from memory, a written report from the conference was published by Aziewicz and Szwedziak-Bork (2015).

purposes. First, I reflect on where we are with antitrust enforcement as of today – I try to capture what seems to me as a more elusive issue with Polish antitrust. The reader is invited to disagree on this snapshot of the status quo, as this part of the article is more rooted in my general perception of global trends and the zeitgeist of Polish antitrust enforcement during more or less the last decade. Based on this overview, I then discuss examples of possible changes (negative, positive, and more ambiguous) that could be brought to Polish antitrust with relatively low costs and considerable benefits, i.e. a proper net outcome. In the last part, I touch upon two more fundamental issues, which are however left with a more open-ended conclusion – this part is supposed to serve as a reminder and an invitation to look at Polish antitrust in a broader perspective than is often the case when concrete proposals of changes appear on the table.

II. Roads ahead

1. Where are we?

In his article, Stawicki asks: "where are we and where are we heading?". Asked in 2021, this question felt different already in 2022, and it sounds even more different in 2023.

In my 2020 article on Neobrandeisianism (Polański, 2020a), to which Stawicki refers, I suggested that at least insofar the Neobrandeisians are concerned the answer to the question "where are we?" was "in a bad place", and the answer to "where should we head?" was "somewhere else", without the final destination being clearly defined.

I also pointed out that it might be that the discussions over antitrust that had started a few years ago are more special than similar discussions before. I argued that apart from internal factors (such as the validity of the Chicago interpretation of antitrust goals), those discussions might have been influenced by external factors and be part of broader global changes, both economic and political. I was pointing at domestic economic issues in the United States and growing geopolitical tensions between the United States and China.[2]

In his 2007 alternative history novel, *Ice*, Jacek Dukaj – a writer and thinker, whose scope of interest resembles that of Stanisław Lem – pictured a frozen world.[3] A world that was covered in ice not just literally, but also in a "the end of history" type of feeling, with tsarist Russia still existing in the 1920s, Poland and other nations of the region never regaining (or gaining) their independence, and European powers remaining interlocked in their power struggle.[4] Yet, ice started to melt. This process of melting described by Dukaj in 2007 feels very accurate in 2023.

There are "*decades where nothing happens; and there are weeks where decades happen*".[5] In February 2022, we likely witnessed decades happening when Russian troops advanced on Kiev and failed to capture it. Furthermore, in just last two years, a number of unprecedented developments took place. The United States imposed extraordinary measures with regard to semiconductors, which restrict trade with China (Yoon, 2022).[6] The European Union proposed

[2] Tim Wu's recent interview, which he gave after leaving the White House, provides valuable insights on the US perspective on the US-China rivalry (Foroohar, 2023a). More recently, the impact of geopolitics on economic and antitrust policy has also been noticed by e.g. Schrepel (2023).

[3] The novel is unavailable in English as of 2023, yet it is expected to be published. Ukrainian, Russian, Bulgarian, and Czech translations are already available.

[4] About "the end of history" in antitrust, see Khan (2020); Polański (2020a, p. 45); Polański (2021, p. 53).

[5] Since this quote comes from Lenin, it might be prudent to point out that accurate observations are sometimes voiced by questionable authors; this reference should thus not be taken in any different way than e.g. Friedrich Hayek quoting Lenin in *The Road to Serfdom*.

[6] On semiconductors, see also FP (2021).

its own Chips Act (Cerulus, 2022). Further, the United States enacted the Inflation Reduction Act, causing a negative reaction in those EU member states that so far have been expanding their position in the US market (Reuters, 2023). The European energy market undergone a shock therapy. Nord Stream, which in 2020 led to the imposition of the highest ever antitrust fine by the Polish Competition Authority, was (partially) blown up in 2022. Following economic sanctions imposed on Russia, dedollarisation might become a stronger trend (Rovnick and George, 2023). In the United States, it is discussed whether certain Chinese companies should be excluded from the US market for security reasons (Maheshwari and Holpuch, 2023). There is also a stronger push within the EU to relax state aid rules (Stolton, 2023).

Each of these developments could serve as a topic for a discussion on its own. However, one issue in particular appears to often remain under the radar. Less free trade might require more robust antitrust enforcement. Global free trade is a strong driver for competition – it is harder to cartelise a market, if there is competition from abroad.[7] It is harder to be a monopolist, if markets are not protected by tariffs and other trade restrictions.

There is also a more elusive side to this issue. We might be entering a period when questions over optimal political and economic systems are more frequently asked. Aside from geopolitical tensions, this is influenced by technological changes (Orbach, 2017, pp. 11–24) and what can be seen as a crisis of democracy.[8]

While each generation's feeling that it lives in extraordinary times might be generally false (had everyone lived in extraordinary times, no one actually would), it might be true in the sense that each generation faces the same dilemma: are we heading in the right direction or not? Should we change something or ensure that nothing changes?[9] Against this backdrop, the answer to the question of "where are we?" might be that we are at a crossroads – whether it is just one of many insignificant crossroads or a major one will likely be for history to tell. Still, while antitrust policy can only be understood backwards, it must be made forwards – and with this Kierkegaardian conclusion in mind, it would indeed be prudent to reflect on possible roads ahead.

2. The role of antitrust

It would be an overstatement to say that antitrust will have the most important role to play in the next few years. In particular from the point of view of Poland and other Central and Eastern European countries, security, military, and international factors might attract far more attention. Yet, the role of antitrust should not be underestimated. While Robert Bork has recently received much criticism, his account of the role of antitrust remains up to date: "*its mystique, its legends, its celebration by all branches of the federal government constitute an exceptionally potent educative*

[7] The issue of free international trade is also closely linked to geopolitics. The 1907 memorandum by Eyre Crowe is probably the most well-known example of dilemmas faced by maritime powers (the UK in 1907, the US today) in the context of the system of free trade becoming an important source of growth for a competing power. On Crowe's memorandum see generally e.g. Kissinger (2012, pp. 514–527).

[8] Insofar antitrust is concerned, the topic of democratic deficit in antitrust has been covered by e.g. First and Waller (2013) and Waller (2019). The issue of antitrust and democracy is often covered by Eleanor Fox, see e.g. Fox (2019). More recently, it has also been discussed by Crane (2022); the Polish reader might also be interested in an outline by Molski (2018). Bernatt (2022), on the other hand, discusses it from the point of view of illiberal democracy. My own use of the term "crisis of democracy" does not refer to what is often labelled as "populism" rather to the fact that political systems in a number of countries considered democratic proved to be unsustainable in the sense that they generated strong social tensions.

[9] This dilemma might be extraordinary also in the sense that being unable to escape what Milan Kundera called the "*Einmail ist keinmal*" problem, each generation learns about its challenges on its own and has only one chance to make a decision.

force that affects our thought, for better or for worse in ways we do not fully realize, about all the aspect of society the law touches" (Bork, 1978/2021, p. 8).

Such issues as the role of competition, market power (or even private power more generally), the role of government with regard to markets, all present and fundamental in antitrust, impact the perception of other policies. In turbulent times, such as those as we see today (and might still see in the future), ensuring that antitrust plays an educative role is important.

It can be questioned though to what extent this educative role has been so far fulfilled in Poland and whether as of today antitrust is ready to play it (this, in fact, also concerns Europe in general, although Poland is my main focus in this article). Antitrust in Poland is hermetic and competition culture is not widespread. While e.g. Martyniszyn and Bernatt (2019, p. 58) note that one of the most significant successes of Polish antitrust is its vibrant antitrust community, it might also be that one of its largest failures is that antitrust remains a niche (this is not to cast blame, merely describe the situation).[10]

There are obviously many reasons for this. Partly, this has been a global trend (recall Hofstader's (1965/2008, p. 189) observation from the 1960s that the United States used to have an antitrust movement without litigation, but then happened to have antitrust litigation without a movement). Partly, it became overshadowed by consumer protection. There are likely other reasons as well.[11] Still, it can be argued that the way antitrust is "sold" to the wider public is ineffective.

A common way of explaining to the public why antitrust matters is by pointing out that it leads to lower prices and consumer welfare. This is true and important, but in the long run, this hardly sparks any emotion. While some argue that antitrust should operate "without romance" (Schrepel, 2020), this does not seem to be an effective way to build popular support or interest.[12]

[10] There are, however, unexpected benefits from being a niche subject: remaining a niche area of interest, Polish antitrust managed to be largely insulated from interference that could bring it into a wrong direction.

[11] For instance, it can be argued that antitrust had to become a hermetic field, since it matured, see generally: Hovenkamp (2018, p. 636), saying e.g. "*This Article began with a historical question about whatever happened to the antitrust movement. The short answer is that antitrust grew up. It ceased to be the stuff of political banners and loose rhetoric and turned into a serious discipline, applying defensible legal and empirical techniques to problems within its range of competence*". From a more Polish-centric point of view, one could also consider a suggestion made by Bernatt and Janik (2023, pp. 5, 39), which however does not directly concern the problem of antitrust being a niche, but a connected issue of the intensity of antitrust enforcement. In their 2023 working paper (which, obviously, should not be treated as a final product), Bernatt and Janik appear to suggest that weak antitrust enforcement is linked with what they call: "*the political change that brought an illiberal party to power and resulted in significant personnel changes*" and that enforcement reached its lowest level in 2016–2019. I do not share this reasoning in scientific terms. First, it appears to rest on a premise that the intensity of enforcement is properly reflected in the number of infringement decisions. In general terms, this is wrong – one can imagine a jurisdiction with very intense enforcement and no infringement decisions (in fact, if deterrence was perfect, there would be no infringements at all and hence no infringement decisions; still to achieve perfect deterrence, one might pursue a very intense enforcement policy). Furthermore, infringement decisions are in fact a glimpse into a more distant past, not the year in which a decision was issued. In other words, since investigations take considerable amount of time (let it be 3–4 years), the number of infringement decisions reflects the intensity of enforcement 3–4 years earlier. A more reliable marker of enforcement intensity would be e.g. the number of dawn raids, or a combination of a number of markers. Second, if one looks at the number of dawn raids, this picture becomes different: since around 2017, the number of dawn raids has grown to record levels, even despite unfavourable case law developments in 2017 and 2019 (for a discussion of some of those developments, see Polański, 2020b). Third, Bernatt and Janik do not take into account that significant personnel changes had taken place also before November 2015. This includes the highly unexpected removal of Małgorzata Krasnodębska-Tomkiel from the position of the head of the authority in 2014 by (then) prime minister Donald Tusk, and the appointment of Adam Jasser to the position. In 2014, the (former) Deputy Director Agata Zawłocka-Turno moved from the Antitrust Department to the Legal Service, which left her previous post unoccupied. In 2015, the (former) Director of the Antitrust Department, Grzegorz Materna, left the authority to soon join Krasnodębska-Tomkiel's law firm.

[12] There is an interesting parallel between effective antitrust advocacy and free market advocacy. For instance, faced with vanishing support for free market and liberal policies in the 1940s, Hayek was concluding that free market ideals lack a utopia (Burgin, 2012, p. 107). Such a utopia was soon depicted by Rand in her novels that promoted romantic heroes and an idealised vision of free market capitalism – a style which she discussed in more detail in her "The Romantic Manifesto" (Rand herself despised Hayek, as well as antitrust, but the point here is about argumentation styles). This further led to growing interest in free market policies under a phenomenon known as: "it usually begins with Ayn Rand" (for a general discussion of the phenomenon, see: Burns, 2009, pp. 247–278). Friedman, in turn, considered it desirable to picture some utopia, but distanced himself from the methods adopted by Rand (and Mises, whose method of argument was academic, yet based on "a priori" arguments), concluding that her abstract and romantic arguments make her an ineffective and marginalised advocate; he instead preferred combining a reference to some utopia with partial solutions that are politically achievable at a given time (Burgin, 2012, p. 196). Discussing this issue in a somewhat different context, Mirowski (2015, p. 441) argues that there have been two groups of neoliberal free market advocates: the "Pragmatists" and the "Romanticists", forming a "Friedmanite and Hayekian wing" and/or two camps: followers of the Chicago School and followers of the Austrian School.

It is interesting to see how this perception of antitrust changed in Poland itself. If one looks into for instance an explanation of why antitrust matters included in one of Tadeusz Skoczny's works from the 1990s, his argument back then was that: "*this transformation* [that takes place in Central and Eastern Europe following the fall of communism] *consists in eliminating the causes and symptoms of centrally planned economies, and in creating foundations for a market economy based on competition, which in turn serves not only economic aims, but which also neutralises power. This is possible since competition in the market prevents the emergence of a position of economic power that threatens or even eliminates the freedom of others, in the first place just in the economic sphere, and then also when it comes to political rights*" (Skoczny and Janusz, 1995, p. 11).[13] And yet, today a common narrative about antitrust in Poland is that: "antitrust is a restriction of freedom that is necessary to attain public goals".[14] Surely, arguing that antitrust is a restriction of freedom is interesting on a theoretical level. Still, to see antitrust lawyers arguing that antitrust is desirable yet at the same time is a restriction of freedom is surprising, as it comes across almost as saying that: "we will take your freedom, but we will give you some glass and ceramic beads in exchange".

In the United States, scholars, like Luigi Zingales (2014), and advocates like Barry Lynn (2010, 2020), take a different route. They argue that antitrust is ultimately part of the American political tradition of liberty, with the American Revolution being a revolt against crony capitalism and monopolies, such as the East India Company.[15] The US Supreme Court itself once remarked that antitrust is the Magna Carta of free enterprise.[16] In the Polish political tradition, which prided itself on the concept of the Golden Liberty, and a system of *forma mixta*, one could attempt making a similar parallel with regard to antitrust serving as a contemporary balancing mechanism, yet one directed at private power.[17] In any case, however, to fulfil its educative role not just within the hermetic circle of competition lawyers, but also outside it, **antitrust needs a story** – and the story that has been so far told is not the most appealing, taking into account what antitrust stands for.

3. Antitrust dead-ends

There are also perspectives, which I believe are ultimately unproductive when it comes to discussing current antitrust issues. In his article, Stawicki (2021a, p. 50) points out that: "*for a long time, there has been an ill-advised belief on the part of the legislator* [parliament] *that the fewer of those* [defence] *rights* [afforded to undertakings]*, the better it is. I believe it is the other way around*". With much of Polish antitrust literature being developed by private practitioners, the "more rights are always better" position seems to be dominant in the Polish antitrust community; not to mention that arguing against such rights can be easily vilified.

[13] A similar point with regard to political and economic transformations of the 1990s is made by Waller (2019, pp. 811–812).

[14] I discussed this issue in Polański (2020a, pp. 65–68). See also, Bernatt (2011, p. 23).

[15] As part of this approach, one could also see the popularisation of antitrust and making it a kitchen table topic, see Foroohar (2023b). On the popularisation of antitrust, see also Waller (2022), observing that: "*Pop culture and the depiction of the industrialists of the Gilded Age were an important part of the forces that created state and federal antitrust law in the first place*".

[16] 405 U.S. 596, 610 (1972), *Topco*.

[17] Tim Wu makes similar parallels in relation to the United States and its strong attachment to "checks and balances" in his arguments concerning regulation (Wu, 2011, pp. 300–321) and antitrust (Wu, 2018, p. 54). A non-Polish reader unfamiliar with Polish political tradition, and the fact that at its classic core it is often more similar to that of the English-speaking world rather than continental Europe, may find interesting following research: Wagner et al., 1958; Cole, 1999; Baluk-Ulewiczowa, 2009; Urbaniak et al., 2021; Frost, 2022.

Still, such a perspective fails to address any of the existential issues of antitrust policy. It does not offer any comprehensive framework to investigate antitrust issues, aside from creating a kind of presumption and expectation that further and further procedural rights will be granted.

This is not to say that this perspective is irrelevant, rather that there are no major, systemic problems with rights of defence in antitrust cases in Poland. In consequence, there are no obstacles that could be solved in that regard and lead to any major qualitative changes in antitrust enforcement.[18] It is understandable that opinions are often presented in simplified ways (and there are surely claims made in this article itself that are simplified and not presented in a fully precise way), but it nonetheless seems relevant to point out that the position quoted above, if taken literally, is wrong.

An example might help illustrating why. The right to appeal is one of fundamental elements that reduce the risk of a wrongful finding of infringement. Thus, an undertaking may appeal an infringement decision to a court. And then to a second instance court. And subsequently to the Supreme Court. Yet, what about granting undertakings an even further right to appeal? And then a further and further one? Surely, there would be more rights and a very low risk of false positive errors, yet this would hardly be a good development for antitrust.

The point here is that enforcement systems are complex and they should be assessed **on a net basis**: what are the benefits of a particular change and what are possible costs and risks?[19] There might be powers that are granted to an antitrust authority which generate small risks and/or prevent large losses; it might also be that certain rights afforded to undertakings make law ineffective thus increasing the risk of under-enforcement. This is not a simple tit-for-tat process that would result in e.g. granting another defence right, if a new power is granted to an authority ("the authority may now impose higher fines, so in exchange we want to have a broader legal professional privilege").[20] A combination of the narrative that antitrust restricts freedom with the "more rights" narrative is a one way street towards marginalisation of antitrust. Such marginalisation, in turn, may create an antitrust vacuum that generates its own risks, since at the end of the day "*ideas have consequences*" (Polański, 2020a, p. 72).[21]

Against this backdrop, my view is that a discussion about the future of Polish antitrust should start with a recognition of why antitrust enforcement matters.[22] From this follows the next step: achieving this goal at a possibly low cost, with the assessment of possible actions being made

[18] Here, again, it should be stressed that it does not follow from this that no concerns over rights of defence are voiced by some authors. For instance, the issue of the privilege against self-incrimination was discussed at length in Polish literature (see e.g. Turno, 2009; Bernatt, 2011; Turno and Zawłocka-Turno, 2012; Stawicki, 2021b). Yet, any changes in that regard – even if deemed useful – cannot be seen as "major" or concerning "systemic" problems. As pointed out even by the advocates of introducing explicit anti-self-incrimination provisions into the Polish Competition Act, the privilege against self-incrimination is applicable in Poland as it follows from e.g. the European Convention on Human Rights (Stawicki, 2021b, p. 89). See also Section IV of this article in which the issue of more open-textured legislation and of the interplay between the legislative, executive, and judiciary branches is discussed.

[19] Stawicki also remarks that "*certain equality of arms*" is advisable. This could be taken as an acknowledgment that a balanced approach is needed. Yet, he makes this point following the passage quoted earlier and it seems to be that it was not meant as an argument for a balanced approach, rather that "equality of arms" was used in the sense of defence rights.

[20] In his article, Stawicki asks whether a broader discussion about antitrust goals is taking place in Poland and if not, whether such lack of a discussion should be seen as "*shameful*". It is noteworthy that while in many jurisdictions discussions are taking place regarding the role of antitrust in a changing world, the most hotly debated issue in Poland in 2023 was whether cursory look during dawn raids should be allowed; only a handful of private practitioners were pointing out that perhaps cursory look does not deserve the level of attention it received.

[21] One of such risks is that once social tensions grow to the point where "something has to be done", direct and more burdensome forms of regulation may become a tool to go. For a similar point being made by the Polish NCA, see OECD (2023c, pp. 15–16).

[22] A recent background note prepared by the OECD (2023a) provides a useful overview of possible reasons for which antitrust might matter.

on a net basis.[23] Sticking to such a "net" approach, the next section discusses some of possible further changes to Polish antitrust. Most of them are of more technical nature. More fundamental issues are covered in Section IV.

III. Changes

The number of possible changes to Polish antitrust is large (in fact, it is infinite, insofar we speak about "possibilities"). Since this article is meant as an overview stimulating possible future discussion, this section includes a selection of changes that could be looked at under the net assessment approach outlined earlier.[24] It first outlines two negative changes that would likely bring fewer benefits than one can expect, and then three positive changes that might contribute to enforcement without possibly generating much controversy outside (or inside) the Polish antitrust community. The section closes with two proposals that would likely require more debate before being more seriously taken into account.

1. Negative changes

1.1. Collective body

The most revolutionary proposal covered by Stawicki is the idea of an overhaul of the Polish institutional system. This could consist in replacing the current monocratic system with a collective body that issues antitrust decisions – something akin to the US Federal Trade Commission. More independence and more expertise are put forward as the main arguments for such a model (Podrecki et al., 2019).

I think that in the context of the implementation of the ECN+ directive, this proposal should remain out of question until 2028. Any attempts to introduce this model earlier would go against the idea of independent antitrust authorities and would create a dangerous precedent of overhauling the whole institutional system during the term of an incumbent head of the competition authority.[25]

In any case, however, the significance of this change in terms of increasing effectiveness might be overrated. The idea is based on a false premise that having more members (possibly with diverse backgrounds) at the top level of a competition agency would significantly alter the quality of output (i.e. mostly infringement decisions). Yet, everyone acquainted with how large bureaucratic institutions work (and there is nothing inherently wrong with antitrust authorities being large and bureaucratic) likely knows that the contents of infringement decisions cannot be realistically reviewed by top members of any organisation. A decision which is based on hundreds or

[23] Making a "net assessment" does not necessarily mean conducting some sort of quantification of all possible costs and benefits. There is no reason to believe that attempts to *quantify* such costs and benefits would lead to any better results than "economic extravaganza" in antitrust analysis (on "economic extravaganza", see Bork, 1978/2021, p. 125). Still, a net assessment would be a step forward even if it came down to just analysing possible costs and benefits in a more structured way, i.e. listing them and trying to outline risks and profits. In fact, most people likely unconsciously perform such exercises, yet there is a difference between doing so unconsciously and in a more structured way – the latter prevents one from accepting too easily assumptions that come to one's attention first.

[24] Being a selection, this review is thus by no means complete. The negative changes discussed further on are linked to two proposals already made by Stawicki and other authors. Positive changes were picked based on my own assessment of net benefits, which is explained further on. A change that would likely significantly alter the dynamics of antitrust enforcement in Poland, yet one which is not discussed in this article, is amending the rules on fine payments in Poland. Fines in Poland are not paid immediately (like at the EU level), but only after they are confirmed by courts. In practical terms, this means that a fine may become final after even 10 years since the time of its imposition. For very brief remarks on this issue, see e.g. Bernatt and Janik, 2023, p. 43.

[25] Of much controversy would also be attempts to relocate the competition enforcement powers from the antitrust authority during the term of its head. On a past idea of large institutional overhauls but in the area of energy regulation, not antitrust, see Piszczatowska and Dolatowski (2017).

thousands of pieces of evidence, and which amounts to hundreds of pages, is typically thoroughly known by the case team, known by direct superiors, generally known by indirect superiors, and accepted by the top hierarchy – in a typical large organisation, draft decisions are also reviewed in a horizontal dimension by additional reviewers, e.g. the chief economist team and legal service, whose specific task is to further ensure the quality of decision-making. The final product is mostly affected by the quality of this institutional process, since this is the nature of large bureaucratic institutions.

1.2. Advisory board

As an alternative to a collective body, Stawicki points out that an advisory body could be considered. This change may be introduced through legislative amendments, but does not require them. In fact, there used to be a form of an advisory board that operated before 2008 and then for a brief period after 2014. There seem to be at least two possible tasks for such a board: (a) to advise on general policy issues; (b) to advise on concrete decisions.

I believe that on a net basis, the utility of such a board in the Polish institutional framework is marginal.

When it comes to concrete decisions, members of an advisory board could hardly have access to file. It is also questionable whether members of such a board would be in any better position to spot deficiencies of an investigation than parties to proceedings, complainants, and regular employees of the authority engaged in a review process (i.e. members of the chief economist team or legal service).

When it comes to policy issues, it is unclear why an advisory board is needed for this and why there should be a group of people somehow “privileged” by the authority to make policy recommendations, without being actually employed by the authority. Taking into account that there are no obstacles to publicly advocating one’s preferred policy, an advisory body appears to mostly serve a function of “distributing respect”.

On the other side of the balance sheet, there are considerable “costs” that need to be taken into account. For instance, how to ensure that the members of an advisory board are impartial? Should they be required to disclose their financial statements in a similar way as civil servants do? Who should verify whether they are free from conflicts of interest? How to prevent their capture by interest groups? Who should be included into the pool of possible candidates to ensure an adequate level of actual market or enforcement expertise, without at the same time involving people who are active as private practitioners? Is the group of qualified candidates, who are not at the same time private practitioners, large enough in a mid-sized country such as Poland?

Any further discussion about this type of board should start with answering these questions and making a net assessment. Generally, there seem to be better and more cost-effective solutions to ensure that an antitrust authority remains well-informed and up-to-date with its information over market issues. An open-door policy and public consultations may serve as most basic examples.

2. Positive changes

2.1. Confidentiality claims

The confidentiality claims system envisaged in the Polish Competition Act is as of 2023 antiquated. It was amended back in 2014, but without introducing any significant changes. It does not take into account that: (a) as of 2023, the file of a typical antitrust case includes much more evidence and information, in particular digital evidence; (b) the number of parties in a typical antitrust case becomes higher, insofar parent-companies, subsidiaries, and managers are more often prosecuted. Furthermore, while confidentiality-related decisions could only be appealed to the first instance court in the past, now they are often appealed further to the court of appeals.

The impact of all these changes on the duration of investigations is negative, and the balance becomes dangerously tipped from "antitrust proceedings" into the direction of "proceedings concerning confidentiality claims, with some antitrust elements". This trend is not unique to Poland. For instance, the European Commission has recently adopted soft law documents that regulate confidentiality rings and data rooms as measures that may facilitate access to file (EC, 2021a; EC, 2021b).

However, it is questionable to what extent such measures are feasible under the current legal framework in Poland. In consequence, introducing confidentiality rings and data rooms directly in the Polish Competition Act might be a useful development. More broadly, however, it could be considered whether all decisions concerning confidentiality claims should be challengeable within the administrative procedure; it might be an option to make some of them challengeable only when an infringement decision itself is challenged. Possible solutions with regard to confidentiality claims can also be combined with the idea of introducing a hearing officer (this will be covered further on).

2.2. Settlements

The Polish settlement system introduced in 2014 is highly faulty. In my view, it was based on a false premise that what matters is the 10% reduction, and since this level of reduction is used at the EU level, it is sufficient to replicate this part of the EU cartel settlement model.

The main problem with the Polish settlement system is that it does not offer any easy way to achieve procedural gains, i.e. quicker resolution of cases. The issue of hybrid procedures is not explicitly covered by Article 89a of the Polish Competition Act, leading to legal ambiguity. So far, the Polish Competition Authority has issued full-length decisions, even if it settled cases.[26] In consequence, there is no cost-reduction in relation to enforcement (aside from no litigation), and there is no gain for undertakings from having shorter decisions (and thus not having their internal affairs discussed thoroughly in non-confidential decisions that become available to the public). The Polish settlement system was criticised from the very start (Bernatt and Turno, 2015, pp. 82–88).

A possible improvement could be following.

Article 89a should be amended in such a way that it explicitly regulates hybrid decisions, streamlined statements of objections, and streamlined decisions. Article 89a could be limited to

[26] For such cases, see: *Brother* (Decision RKR-10/2019); *Vegetables* (Decision RGD-11/2019); *Yamaha* (Decision DOK-4/2020); *Fitness Clubs* (Decision DOK-6/2020); *Walter* (Decision RŁO 11/2020); *Fellowes* (Decision RKR-1/2021); *DBK/Wanicki* (DOK-6/2021); *DAF Dealers* (DOK-8/2021).

infringements that also qualify for leniency.[27] In other words, abuse of dominance should be out of the scope of Article 89a. The 10% level of reduction is, in my view, sufficient. Article 89a should only concern procedural efficiencies and the 10% reduction is adequate in that regard – any other cooperation should be rewarded under leniency. Long story short: Article 89a should become more similar to the EU cartel settlement model.

At the same time, a new Article 89b could also be introduced. Article 89b could cover both procedural efficiencies and other types of cooperation. It would concern all types of cases that do not fall within the scope of (amended) Article 89a. The level of reduction should be higher in such cases, possibly going as far as 50%. This would resemble what the European Commission effectively did in its RPM investigations in 2018.[28] A similar model has been recently introduced in Italy.[29] It is also possible to consider whether settlements should end with a form of a "guilty plea" or allow "*nolo contendere*" submissions. A mixed system is an option too, with e.g. higher fine reductions in case of clear and unequivocal guilty pleas.

On a net basis, there seem to be no negative consequences of such a model in comparison to the current one. Obviously, this does not mean that there are no possible negative consequences at all. For instance, some might argue that more frequent use of settlement decisions will remove positive effects that may come from developing case law through litigation.[30] Also, the public will lose access to thoroughly discussed case facts. However, while true, such possible negative effects cannot be assessed without taking into account positive effects (hence, the caveat "on a net basis").

2.3. Non-leniency whistle-blowers

Since 2017, the Polish Competition Authority has been promoting non-leniency whistleblowing in a more organised and systemic way. However, the position of non-leniency whistle-blowers is not regulated in the Polish Competition Act.

I first argued that non-leniency whistle-blowers should be of interest to competition authorities (almost) a decade ago (Polański, 2014a; Polański, 2014b) – I still believe so. The bare minimum that could be considered would be to introduce a mechanism that would make it easier to protect the identity of non-leniency whistle-blowers, e.g. as an explicit ground to restrict access to file under Article 69 of the Polish Competition Act. A clear regulation in that respect would provide more legal certainty and likely a stronger feeling of safety to whistle-blowers.

There is obviously controversy surrounding anonymous submissions and not allowing defendants to access certain pieces of evidence (without going into details, the infamous Dreyfuss case outlines the most relevant risks). However, insofar anonymous submissions are used in the context of dawn raids (in particular on corporate premises, as opposed to private homes), these risks should be considered lower than in case of using anonymous witness statements to find infringements.

[27] In Poland, this means all infringements that fall within the scope of Article 101 TFEU and its national equivalent, since the Polish leniency programme is broader than the leniency programme used by the European Commission.

[28] *Philips* (Case AT.40181); *Asus* (Case AT.40465); *Denon & Marantz* (Case AT.40469); *Philips* (Case AT.40181); *Pioneer* (Case AT.40182).

[29] *Comunicazione relativa all'applicazione dell'articolo 14-quater della legge 10 Ottobre 1990, N. 287*, para. 25–26 (16.05.2023).

[30] On this last issue, see e.g. Zawłocka-Turno (2019, p. 90), who however makes this point not in relation to formalised settlement procedures, but informal settlements such as those reached by the European Commission in a series of its RPM investigations in 2018. I discussed a similar point in Polański (2013, pp. 65–66).

There is also controversy with regard to providing monetary rewards to informants. My position on this issue has not changed since 2014 (Polański, 2014a; Polański, 2014b): I still believe that in the context of difficulties in ensuring deterrence, many competition authorities will opt for such instruments.[31]

3. To be considered

3.1. Hearing officer

In his article, Stawicki proposes to consider an introduction of the role of a "hearing officer" at the Polish Competition Authority. In my view, the idea of a hearing officer is not inherently wrong. However, introducing such a role should not take place "just because" there is a similar role at the European Commission. The European Commission uses an institutional and procedural model in which a number of actions, which in Poland can be challenged directly to the court, cannot be challenged to EU courts. Introducing a position of a hearing officer just because it is seen as an improvement with regard to due process moves dangerously close to a form of a "cargo cult", i.e. imitating behaviour, believing that just doing so is relevant.

There would generally be more reasons to introduce an office of a hearing officer if e.g. the Polish system of access to file would be significantly changed to resemble that used by the European Commission.

3.2. Non-economic interests

The problem of analysing non-economic interests under antitrust is one of major parts of the current debate over the future of antitrust.[32] Sustainability is the most well-known example of a non-economic interest (see e.g. Monti and Mulder, 2017; Gerbrandy, 2017), which has recently made its way into the horizontal guidelines of the European Commission. Other interests include e.g. free speech and media plurality (Stucke and Grunes, 2001; Day, 2020; Polański, 2022a).[33]

From the point of view of Polish antitrust, media plurality caused much controversy in the context of *Orlen/Polska Press* merger (Banasiński and Rojszczak, 2022; Derdak, 2022; Krzyżewski, 2022). Recently, this has also led to comments being made by the Polish ombudsman that merger laws should be amended to better take into account media plurality issues (Sobczak, 2022).

Taking into account geopolitical and technological developments, it might also become increasingly more controversial how fake news and misinformation are handled (on this issue in general see e.g. Wu, 2018). Cooperation between undertakings can be useful in terms of mitigating risks that come from troll farms, deep fakes, and AI-generated content created for malicious reasons. In Central and Eastern Europe, where geopolitical tensions are currently strongly felt, this has already led to public signalling aimed at promoting more self-regulation.[34] Yet, such cooperation

[31] It is noteworthy that in 2023 the CMA introduced a higher reward for informants in the UK (CMA, 2023). In the United States, non-leniency whistle-blower protection was strengthened in 2020 (see: Criminal Antitrust Anti-Retaliation Act, CAARA) and proposals were also made to introduce informant rewards (see: Senator Amy Klobuchar's proposal for Competition and Antitrust Law Enforcement Reform Act, CALERA), even despite the fact that a decade ago, American enforcers had been somewhat sceptical with regard to rewarding non-leniency whistle-blowers (GAO, 2011, p. 45). The topic has been recently covered also by the OECD (2023b).

[32] The issue of non-economic interests is related to both the goals of antitrust and standards of assessment – the difference between the two has been recently discussed by OECD (2023a), with the Polish NCA contributing to the debate (OECD, 2023c).

[33] The Polish reader might also be interested in brief remarks by Molski (2018, pp. 588–589).

[34] The Chancellery of the Prime Minister of Poland, "An Open Letter to Big Social Media Tech", https://www.gov.pl/web/primeminister/an-open-letter-to-big-social-media-tech, accessed 10 June 2023.

might also lead to free speech and antitrust concerns (Douek, 2020; Polański, 2023).[35] Private censorship implemented through unilateral actions is also a subject of controversy (Polański, 2021; Polański, 2022a; OECD, 2023c, pp. 8–9).

IV. Antitrust and the "longue durée"

There are two larger topics worthy of a discussion that are more "philosophical" and more relevant in a long term than those discussed earlier. In Poland, both of them have been overshadowed in the last few years by economisation and procedural fairness issues. The first one concerns antitrust and its relation with power and power distribution, the other one institution-building.

1. Antitrust and power

In the introduction to his article, Stawicki makes in passing a comment which touches upon an issue far more important than it may seem at first glance. He argues that while Polish antitrust was largely modelled upon the EU model, with much room for case law to develop organically, this is not necessarily a desirable outcome. The argument is that in civil law jurisdictions (i.e. in all continental European jurisdictions), obligations imposed on undertakings should follow from statutes.[36]

While this might seem like a technical issue, it is part of a much larger topic of power distribution and decision-making. It falls within the scope of currently ongoing discussions concerning antitrust, or more broadly market regulation. These discussions often share a common concern: "who governs?". While not stated explicitly, this issue can be seen in e.g. Eleanor Fox's narrative, insofar she asks about how many decisions should be left to "the market" (Fox, 2023). Wu appears to be planning to frame this issue in terms of distribution of economic power (Foroohar, 2023a). Lynn (2020) argues for "liberty from all masters". Shoshanna Zuboff (2019, p. 521) asks this question directly: "*who decides?*", and so do Whish and Bailey (2015, pp. 24–25), recalling also Amato's (1997) discussion. The question goes back to a similar question of "*who governs?*" being directly asked by Bork in *The Antitrust Paradox* (Bork, 1978/2021, p. 8). In *The Road to Serfdom*, Hayek (1944, p. 76) phrased a similar question as "*who, whom?*", after it had been first asked by his intellectual opponents.

This question can be seen in three areas today. Each of them is present in antitrust, each shows its educative side, and it would be prudent not to lose sight of any of these areas when discussing the future of Polish antitrust. These three levels are: (a) public and private power; (b) legislature-executive-judicature; (c) states' rights vs federalism.

Public and private power. This first area is one of the main subjects of interest nowadays. Stawicki mentions this issue as the problem of the "invisible hand of the market" being responsible for finding solutions or governments (and undertakings acting collectively) being more responsible. Many of those discussions take place in the United States. Surprisingly, in Poland, which is

[35] This issue is in fact related to a far greater problem of whether certain decisions should be made collectively by corporations or by public institutions and elected officials. On the legitimacy of corporate social responsibility from the point of view of antitrust, see generally e.g. Claassen and Gerbrandy (2018), Goldman (1995). See also Section IV and the issue of balancing private and public power there.

[36] This argument does not appear to be correct, since even in common law jurisdictions antitrust laws are enacted through statues, although there was a brief period of pre-Sherman antitrust litigation in the United States (Amato, 1997, pp. 7–10; Grady, 1992). Likewise, also in continental Europe, all obligations of undertakings follow from statutory law – it is simply that antitrust laws are phrased in broad terms and require more interpretation. Since this issue appears to be based on a misunderstanding, in the main text I focus instead on a more interesting problem related to Stawicki's argument.

a mid-sized country with a mid-sized economy, there still seems to be far more concern over public power among Polish commentators than about the rise and vastness of private power.[37]

Legislature-executive-judicature. This is the area mentioned at the outset of this section; it extends into a far greater question than simply whether it is better to have wide and flexible competition rules and develop them through case law, or to have a more active legislator.

Antonin Scalia's views may serve as a starting point for a brief outline of this issue. When commenting on legal developments in the United States, Scalia (2009) once pointed out that in the early twentieth century, the United States had become focused on the idea of independent agencies and governance by experts. Hence, for instance the Federal Trade Commission and a number of other agencies had been established, all free from supervision by the president, i.e. the actual executive. The ECN+ implementation strengthens a similar model with regard to Polish antitrust by introducing a term of the head of the Polish NCA, albeit admittedly similar models were already in place in relation to telecommunication and energy regulation.

According to Scalia, the independent agencies model of governance largely failed in the United States, and caused much controversy over its legitimacy.[38] Today, these concerns in the United States are present again in the context of the FTC making attempts to use its powers to regulate unfair methods of competition (see e.g. Merrill, 2022; for an opposite viewpoint see: Chopra and Khan, 2020). Other authors, more specialised in the area of market regulation, for instance Phillipon (2019), argue the opposite than Scalia: the US economic model started to underperform, since it gave up on the idea of regulated competition ensured by independent agencies. Conversely, the EU internal market overperformed insofar it was subject to independent regulation that ensures competition.

A further point made by Scalia is that while the United States had been focused on independent regulators in the early twentieth century, subsequently the role of judges started to grow. His concern was that judges started to become the "*mullahs of the West*", making complex political decisions without much democratic legitimacy. This is also a concern that can be seen throughout Bork's *The Antitrust Paradox*, with very explicit foreshadowing in the introduction itself (Bork's "*who governs?*" refers to judicial activism). This is a controversial topic, in particular in Poland – an interested reader might be surprised with Bork's views in that regard.[39] Not long ago, some controversies surrounding this subject were covered during a conference organised by CARS,

[37] Due to the size and vastness of private power in the modern world, some even argue that it is a new type of "bigness", see: Gerbrandy and Phoa (2022). An interesting (and publicly known, as opposed to possible lobbying efforts behind closed doors) example of a direct clash between public and private power took place in Australia (Meaker, 2022). In Poland, many controversies were caused when the US ambassador to Poland reportedly intervened in favour of US companies operating in Poland, leading subsequently to criticism both by the Polish alt-right (DGP, 2020) and alt-left (RP, 2020).

[38] In Europe, some authors made attempts to re-conceptualise the legitimacy of antitrust authorities (see e.g. Gerbrandy and Polański, 2013). The concern over making the mandate of independent agencies too broad is, however, ongoing (Tirole, 2023).

[39] While Bork comments on the role of judges in a democratic society in *The Antitrust Paradox*, he makes his views more clear in other of his works, e.g. *Slouching Towards Gomorrah*. Bork (1996/2010, p. 169) argues, for instance, that: "*Any more serious efforts to limit the powers of the courts will run into the familiar refrain that this would threaten our liberties. To the contrary, it is now clear that it is the courts that threaten our liberty…the liberty to govern ourselves…more profoundly than does any legislature*", and that: "(…) *For sheer chutzpah that is hard to beat. It is the judiciary's assumption of power not rightfully its own that has weakened, indeed severely damaged, the constitutional structure of the nation. It has been the judiciary, and not its critics, that has misled the public as to the role of judges in a constitutional democracy*". He further adds that: "*Robert LaFollette, if I recall correctly, proposed amending the Constitution to allow the Senate by a two-thirds vote to override Supreme Court decisions. Learned Hand, considered to be America's premier appellate judge, was nearly apoplectic at the Supreme Court of his day. In 1914, Hand wrote to Felix Frankfurter denouncing "the fatuous floundering of the Supreme Court which goes by the name of Constitutional Law. Am I perverted that I alone of those who touch it have acquired such a contempt for the subject? I can scarcely think of a matter to which the human mind has been applied with less credit to itself than that." He referred to the Court and its constitutional rulings as "that solemn farce"*."

although without going too much into the issue outlined above, aside from Kent Barnett's discussion of the logic of the *Chevron* doctrine.[40]

A possible answer to this issue could simply be to "*turn back time to the good old days*" and expect more activity on the part of legislators. Yet, social and legal trends typically do not happen without reason, and both the move towards passing more powers to the executive and to the judiciary might have been caused (at least partly) by the inability of legislators to regulate increasingly more complex issues, and thus preferring to leave them to be "sorted out" by other branches of the government.[41] The problem of power distribution in this area might at first glance be most closely linked to the crisis of democracy mentioned in Section II. Still, insofar one might blame this crisis solely on e.g. attempts to limit the power of judiciary or vanishing power of legislators, this too might be an oversimplification, as social tensions that generate less stability of political systems might also be caused by power shifts in relation to private actors (see above) and supra-national entities (see below).

States' rights vs federalism. In the European Union, antitrust introduces an interesting dynamic between federalism and member states' sovereignty. This is mostly because Article 101 and 102 TFEU are also enforced by national competition authorities, insofar there is an "effect on trade" within the internal market. In the past, in particular under the Article 101 TFEU notification system, the effect on trade criterion provided a useful way of reducing the risk of overburdening the European Commission. As of today, however, there appear to be stronger incentives on the part of decision-makers to conclude that trade is affected: from the EU point of view this means that EU law is applicable; for NCAs this means that their cases can be easier defended under arguments based on EU law, which puts much emphasis on effectiveness. This indirectly means that the role of EU courts grows.

Furthermore, Regulation 1/2003 itself puts clear limits on what the members states can do when it comes to anticompetitive agreements.[42] Likewise, the ECN+ directive introduced a number of tools that might be useful to NCAs, but which at the same time restrict the ability of the member states to introduce their own legal and institutional solutions. While aimed at ensuring the effectiveness of EU law, the ECN+ directive has also a strong effect on national law – for instance, it is unlikely that the member states will implement different institutional and procedural solutions with regard to the enforcement of national laws, and different ones in relation to EU law.[43] Hence, EU standards effectively become national standards, even if EU law is not applicable.[44] At the level of the ECJ, which partly links back to the issue of the role of judiciary in democratic societies, we saw developments such as those concerning limitation periods or burden of proof,

[40] 467 U.S. 837 (1984), *Chevron*. For a report from this conference, see Zoboli (2019). The above-mentioned is not to say that the Chevron doctrine has not been covered by Polish authors – conversely, the topic has been discussed at length by Bernatt (2016).

[41] If one looks outside the field of legal scholarship, or even outside the area of academic research, there are arguments that the twilight of legislators is a trend that might be a result of broader social changes. In his role of a futurologist, Dukaj (2019, p. 344) for instance argues that law (understood as an abstract set of rules) is dying, because societies are changing. The hypothesis is that we are moving from a civilisation of writing towards a civilisation of experiences. The former valued abstraction, logic, linearity; the latter focuses on feeling(s), emotion, experience. From those subtle changes come larger ones: abstract laws are not in high currency, since people find it increasingly more controversial that individual cases are judged without regard to individual circumstances.

[42] Article 3 of the Regulation 1/2003.

[43] In the Polish context, the ECN+ directive also caused controversy as it required amendments in the area of criminal law – an issue, which led to a rare instance of the Legislative Council being requested to provide its opinion on how such changes can be introduced.

[44] More broadly on the issue of "Europeanisation", as seen a decade ago, see Cseres (2013).

which put further limits on procedural autonomy.[45] The issue of EU institutions assessing the rule of law in Member States is also noteworthy.[46]

Finally, there have been such proposals as the new competition tool. The new competition tool has caused much controversy, yet the states' rights issue has remained under the radar. The new competition tool could result in a vast expansion of the European Commission's mandate, providing it hypothetically with powers to overstep the member states in regulating markets in their jurisdictions, without the usual route of gathering support in the Council for a regulation or directive.

In the context of the review of Regulation 1/2003, which came into force almost 20 years ago, all of these issues might require a more conscious reflection over the role of EU and national institutions.

2. Antitrust and institutions

The last issue is the elephant in the room of Polish antitrust enforcement: resources. The problem of resources is not unique to Poland. For instance, in the context of proposed changes to US antitrust enforcement, Jones and Kovacic (2020) pointed out not long ago that all such proposals often remain blind to the fact that any expansion of antitrust enforcement will likely require considerable resources. Yet, the Polish case is different in the sense that resources have remained a problematic issue for years. It is also linked more broadly to the issue of building effective public institutions.

Agata Zawłocka-Turno's remarks during a 2016 conference on antitrust enforcement illustrate well the issue at hand. Acting at that time as the Head of Antitrust Department, Zawłocka-Turno pointed out: "*It is not possible to fight* [cartels]*, if the agency does not have adequate staff. We have a very young and inexperienced team, since we are unable to offer attractive remuneration that would allow us to retain our staff. This inexperience is not compensated by our staff's excellent education, enthusiasm, and commitment – unfortunately this is not enough*" (PPL, 2016).

This general sentiment is backed by hard data collected by Martyniszyn and Bernatt (2019, pp. 18–20). Based on these statistics, it was pointed out that at least as of 2019, remuneration offered in the area of antitrust enforcement was not even competitive in comparison to sectoral regulators (although it should be noted that the statistics gathered by the authors might have been not fully accurate in the sense that they represented the average remuneration at the Polish Competition Authority as such, and not for antitrust staff). No significant legal changes to the remuneration system have been introduced since 2016, even despite the fact that e.g. Directive ECN+ included independence requirements, and financial independence can be seen as an element of independence principle.

Since the problem of remuneration is linked to the fact that antitrust staff is part of the civil service (with a large portion of remuneration for all civil service positions being adjusted centrally through a so-called "basic amount"), the staff of the Polish Competition Authority could be exempted from the civil service. That could be a by-effect of an overhaul of the Polish institutional design, and making it more similar to the one used in financial regulation (Podrecki et al., 2019, p. 19, insofar they speak about exempting antitrust enforcers from the civil service). This would introduce more

[45] Case C-308/19 *Whiteland* EU:C:2021:47; case C-8/08 *T-Mobile* EU:C:2009:343.

[46] Case T-791/19 *Sped-Pro* EU:T:2022:67.

autonomy to remuneration-setting in the area of antitrust enforcement, yet as argued in Section III, the overall premises behind such an overhaul and its net benefits can be questioned.

In some EU member states, the problem of insufficient resources was by-passed by e.g. introducing financing-mechanisms such as contributions from supervised entities. Greece appears to have implemented a model that generally follows this idea (OECD, 2021). The Italian model, on the other hand, was questioned and led to a preliminary request being directed to the ECJ – the ECJ concluded that the member states have leeway in that regard.[47] It could be discussed to what extent such mechanisms are possible in Poland – a similar mechanism is used in relation to the Polish financial regulator. Nonetheless, such changes also lower the transparency of the tax system and create incentives to introduce similar financing mechanisms in other areas.

A yet different system operates in relation to judges. While the "basic amount" for the civil service is adjusted manually (in practical terms this resulted in e.g. no adjustments to the basic amount from 2008 until 2019), the remuneration of judges is adjusted automatically based on the average pay calculated by the bureau of statistics.

The issue of antitrust resources appears to be one of the most underestimated problems of antitrust enforcement in Poland. Still, while discussing high profile topics such as a complete overhaul of the institutional system of Polish antitrust might be interesting, at the end of the day antitrust cases are pursued by unnamed enforcers who largely determine the quality of the end product.

V. Conclusion

In Shakespeare's *Julius Caesar* there is a passage saying that: "*There is a tide in the affairs of men, which taken at the flood, leads on to fortune; omitted, all the voyage of their life is bound in shallows and in miseries. On such a full sea are we now afloat, and we must take the current when it serves, or lose our ventures*".

From 1989 to 1991, we saw a large tide sweeping over Europe that changed the world order that had been established almost half a century earlier in Yalta. In consequence, many of the Central and Eastern European countries embarked in the 1990s on an unprecedented road to prosperity, both in terms of economic wealth and political liberties. While it has been recently more often questioned, in particular in Poland, whether this transformation was always executed in the best possible way (and rightly so), the idea of enforcing antitrust laws can hardly be objected.

After more than 30 years of moving along this road to prosperity, we might be entering another great tide.[48] Coincidentally or not, from the point of view of Central and Eastern Europe this tide again affects both the economic and political sphere, reminding us that prosperity is not given once and forever, but needs to be built every day.[49]

Aside from military and diplomatic initiatives, it can be questioned though whether this time we enter this period with enough agency and resolve – and ultimately strong political and economic

[47] Case C-560/22 *Ferriere Nord* EU:C:2023:327.

[48] On "tides" in antitrust enforcement, see also Polański (2022b).

[49] A Polish reader who wishes to reflect more broadly and on a more cultural level on the Polish road to prosperity, and on dilemmas associated with making further steps on this road (including the issue of European integration), might be interested in Teodor Parnicki's classic novel *Srebrne Orły* that has recently attracted renewed interest. The preface to the book, penned by Nowak (2018), is available online.

systems contribute to military and diplomatic actions. One could say that while the period of "the end of history" has already ended in Poland when it comes to geopolitics, antitrust lags behind.

This article outlined a number of both more technical and more systemic issues that might be a subject of a further debate. Yet, they are just a tip of an iceberg and the scope of possible challenges is much greater. It is regrettable that the 30th anniversary of the official start of Polish antitrust enforcement took place in 2020 when COVID restrictions put much of our lives at halt. The anniversary could have been a natural starting point for a more structured discussion over what needs to be done to ensure that antitrust plays a proper role in Poland.

Is it possible to start such a discussion today?

Some might say that such a discussion is not needed, as the future of antitrust will be settled elsewhere, and that this belief is also more widely reflected in the lack of interest in the future of antitrust in Poland – why bother, if something will be handled by someone else? Yet, it could be argued that we used to see a similar passiveness (and for similar reasons) when it comes to international politics. Also, Poland is a much bigger and more relevant player than it used to be in the 1990s or 2000s, and with more power comes more responsibility that provides more reasons for having our own discussion on antitrust.

The international climate of opinion is far more conducive to having such a discussion in Poland today. Has the climate of opinion in Poland changed enough to do so? As Dicey pointed out, and Friedman repeated after him: "*a change of belief arises, in the main, from the occurrence of circumstances which incline the majority of the world to hear with favour theories which, at one time, men* (…) *derided as absurdities, or distrusted as paradoxes*". In the worst case scenario of no interest in having a broader debate, this article, as well as the one presented by Stawicki, may serve as a message in a bottle carrying ideas that some day with some luck will be picked up by someone somewhere on the road to prosperity.

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