

CARS Activity Report 2007

1. Creation and basic information

1.1. On 21 February 2007 the Council of the Warsaw University Faculty of Management (*Wydział Zarządzania Uniwersytetu Warszawskiego* hereafter, WZ WU) created **the Centre of Antitrust and Regulatory Studies** (*Centrum Studiów Antymonopolowych i Regulacyjnych* hereafter, **CARS**) in the form of “another ... unit crucial to the realisation of the faculty’s tasks” in accordance with Paragraph 20 (1), (2) of the Statute of the Warsaw University.

1.2. The creation of CARS was primarily warranted by the need to co-ordinate academic and market-based teaching, research and consultancy activities undertaken by a large number of the staff of WZ WU whose interests relate to antitrust issues and regulation. CARS was created upon the belief that WZ WU is a body particularly well equipped to act as a coordinator for the teaching, research and publishing activities of the whole Polish academic community in the field of antitrust and regulation, primarily in the light of the exceptional intellectual potential and academic achievements of its staff.

1.3. CARS’s field and type of activities as well as its membership criteria were set out as follows.

1.3.1. It was decided that CARS’s activities will primarily focus on:

- the processes of **competition** as well as general and sector-specific competition protection;
- sector-specific **regulation** of companies functioning under conditions of dominance or monopoly;

1.3.2. It was decided that the activities of CARS will take the form of:

- **academic research and development**, including implementation projects that will encompass research sponsored or commissioned by the private sector as well as projects financed by public grants (EU or Polish);
- **publishing** of individual books, as part of the ‘Studies and Monographs on Antitrust and Regulation’ series (*Monografie i Studia Antymonopolowe i Regulacyjne*) in particular, as well

as periodicals including the English language publication of the **Yearbook of Antitrust and Regulatory Studies**, the publication of its first issue is planned for autumn 2008;

- national and international **conferences, academic seminars and workshops** directed at practitioners dealing with competition protection and sector-specific regulations;
- **teaching** including post-graduate studies, seminars for PhD students, consulting and training activities exemplified by the so-called 'compliance program' for business;
- **co-operation** with similar academic units in Poland and abroad.

1.3.3. The possibility to become an active member of CARS was offered to:

- professors as well as other academic staff of the WZ WU provided that they have a doctorate; they were offered the chance to become Regular Members of CARS;
- academic staff of other universities, including foreign universities; they were offered the possibility to become Associate Members of CARS;
- others, in particular PhD students, civil servants, officials of national and international organisations, the staff of large companies, legal practitioners and consultants; they could become Permanent Cooperators of CARS.

1.4. CARS began its activities in the spring of 2007. One year after it was formally created, CARS had gained 25 Regular Members, 35 Associate Members and 33 Permanent Cooperators. At that time, almost half of its members had already taken part in at least one of the academic initiatives carried out by CARS. In its first year, CARS has: carried out two research projects (the publication of their results was planned for 2007/2008); organised two academic seminars and co-organised a conference; arranged one workshop (the publication of its results was planned for 2008; and, held two seminars for PhD students. Additionally a co-operation agreement with a sectorial regulator was initiated.

2. The research project 'Regulating telecommunications markets'

A major research project concerning the practice of regulating Polish telecoms markets was completed in 2007. The project was headed by Prof. Stanisław Piątek, a Regular Member of CARS and the director of the Chair on Economic Law which is part of the Legal Problems of Management and Administration Department of the WZ WU. The project had an interdisciplinary character, among its fourteen contributors were: economists, telecoms and management specialists, researchers, employees of telecoms providers (both dominant and not), lawyers employed in law firms in the country and abroad, as well as employees of the EC Commission dealing with the regulatory processes on the EC level. Most of the

contributors were either Regular Members, Associate Members or Permanent Cooperators of CARS.

The research project covered the regulatory efforts undertaken by the Polish National Regulator, the Office of Electronic Communication (*Urząd Komunikacji Elektornicznej* hereafter, UKE), that have affected Polish telecoms markets (eighteen in total: seven retail and eleven wholesale markets). Sectorial regulation was considered to be a crucial component of the wide ranging competition-creating program applied at that time to the Polish telecoms sector. The project analysed the basis, conditions, processes and outcomes of individual regulatory decisions taken by the President of UKE which imposed regulatory obligations on telecoms services providers holding a significant market position.

The research that was carried out considered the regulatory process from two different perspectives. On the one hand, particular groups on telecoms markets were analysed; this approach mostly illustrated the differences between retail and wholesale markets and the technological issues involved. On the other hand, the main regulatory problems were assessed in a cumulative horizontal context encompassing all markets concerned. This specific analytical framework was not meant to align the opinions of its participants and yet, the same issues were often brought to light by several researchers. Nonetheless, particular assessments sometimes contained very divergent opinions that reflected their author's experience and opinions. Although the project indeed managed to create an organised and comprehensive body of knowledge on the subject of telecoms regulation in Poland, conclusive answers to the questions posed in the project will be found only after the sector, and those in the EU, becomes competitive.

The project's findings were published under the title: "Regulating telecommunications markets" (*"Regulowanie rynków telekomunikacyjnych"*), edited by S. Piątek, Faculty of Management Scientific Press, Warsaw, 2007. This book commences the "Antitrust and Regulatory Studies and Monographs" series published under the patronage of CARS.

The project's findings were also discussed during a conference entitled: "Regulating Telecommunications Markets" which was held by CARS on 23 April 2008; a full Conference Report will be published in YARS vol. 2009, 2(2).

3. The research and implementation project: 'Block exemptions from the prohibition of competition restricting agreements'

Also completed in 2007 was an extensive research and implementation project concerning the justification and potential content of issuing in Poland new domestic block exemptions from

the prohibition of competition restricting agreements. The project was commissioned by the Office of Competition and Consumer Protection (*Urząd Ochrony Konkurencji i Konsumenta* hereafter, UOKiK). CARS was given the specific task of preparing four draft regulations of the Council of Ministers, specifying the extent and conditions of block exemptions for particular types of agreements from the prohibition contained in the Polish equivalent of Art. 81 EC. The project was carried out by Prof. Andrzej Jasiński, Prof. Tadeusz Skoczny and Dr. Agata Jurkowska (Regular Members of CARS), Dr. Dawid Miąsik and Dr. Rafał Stankiewicz (Associate Members of CARS) and Dr. Ewelina D. Sage (Permanent Cooperator of CARS). The results of the project were officially implemented in the form of four Regulations of the Council of Ministers, published in the Polish Journal of Laws (JoL):

- a) the Regulation of the Council of Ministers of 30 July 2007 concerning the exemption of certain types of technology transfer agreements from the prohibition of agreements restricting competition (JoL 2007 , Nr 137, paragraph 963);
- b) the Regulation of the Council of Ministers of 30 July 2007 concerning the exemption of certain types of agreements between companies in the insurance sector from the prohibition of agreements restricting competition (JoL 2007 ,Nr 137, paragraph 964);
- c) the Regulation of the Council of Ministers of 19 November 2007 concerning the exemption of certain types of specialization as well as research and development agreements from the prohibition of agreements restricting competition (JoL 2007, Nr 230, paragraph 1691);
- d) the Regulation of the Council of Ministers of 19 November 2007, concerning the exemption of certain types of vertical agreements from the prohibition of agreements restricting competition (JoL 2007, Nr 230, paragraph 1692);

The assignment that was received by CARS from UOKiK extended beyond the preparation of the draft regulations. CARS was also expected to conduct an extensive research project on the validity of issuing new domestic block exemption as well as on their necessary content. The research concluded that the issuing of the aforementioned acts was indeed justifiable in the Polish context. Keeping up with the developments of Community legislation and jurisprudence was found to constitute one of the main arguments in favor of domestic block exemptions. Among the other reasons supporting the issue of new legislation were found to be:

- a) the fact that even if the agreements at stake do restrict competition, the majority also simultaneously affect competition in a positive way (through improvement of efficiency);
- b) the reduction of legal barriers for co-operation in distribution, technology transfer and co-operation in the insurance sector in Poland;

c) the provision of a predictable and stable legal climate for Polish businesses that would encourage them to co-operate within a clearly defined framework.

The research project determined the permissible extent of the exemptions in relation to each of the types of agreement. It also defined the essence of: co-operational agreements in general and those in the insurance sector in particular; vertical agreements, with emphasis on distribution agreements, selective distribution amongst them; as well as technological transfer agreements, license agreements in particular. Moreover, it specified what the appropriate market share thresholds should be for each type of the agreements and which contractual clauses should completely foreclose the possibility of the application of an exemption.

All of the findings of the research project were submitted to the UOKiK in the form of a 230 page long report entitled “Group exemptions from the prohibition of agreements restricting competition. Final report” (*Wylączenia grupowe spod zakazu porozumień ograniczających konkurencję. Raport końcowy*).

The report later became the foundation for a book entitled “Group exemptions from the prohibition of agreements restricting competition in the European Union and in Poland” (*Wylączenia grupowe spod zakazu porozumień ograniczających konkurencję we Wspólnocie Europejskiej i w Polsce*) which was edited by Agata Jurkowska and Tadeusz Skoczny and published in 2008 as the second publication from CARS’s “Studies and Monographs on Antitrust and Regulatory” series. This book, also containing a chapter on block exemptions existing only under the EC competition law regime as well as the text of relevant Polish and EC legislation, will be reviewed in YARS 2009, vol. 2(2).

4. The Small Insurance Forum I – Seminar on Horizontal co-operation in Insurance

On 4 June 2007 the first meeting of the Small Insurance Forum took place that was organised by CARS with the help of the Polish Insurance Chamber. The meeting had the character of an academic seminar concerning the issue of horizontal co-operation of insurance companies in the context of the block exemption of agreements in the insurance sector. A full seminar report can be found in the current volume of YARS.

5. Antitrust Private Enforcement. CARS Seminar

On 20 June 2007 a meeting took place that marked the creation of CARS as well as the publication of a book entitled: “The Jurisprudence of the Community courts in competition-related cases 1962-2004” (*Orzecznictwo sądów wspólnotowych w sprawach konkurencji 1962-2004*), edited by Tadeusz Skoczny and Agata Jurkowska, Kluwer, Warsaw, 2007. Dr

Jurkowska (Department of European Economic Law, Regular Members of CARS) presented a paper on the subject of the application of the EC and Polish prohibition of competition restricting actions by Polish courts; practical problems of private enforcement were also discussed. A full seminar report can be found in the current volume of YARS.

6. Faculty conference ‘Competition and regulation in the economy’

On 24 September 2007 the annual WU WZ conference took place. It was organised jointly by the WU WZ Chair of Legal Problems of Administration and Management and CARS and gathered around a hundred WU WZ staff and invited guests. The subject matter of the conference surrounded pro-competition public intervention into the economy. Five papers and several scientific reports were presented. In addition, representatives of public bodies dealing with competition protection and pro-competition regulation were invited to participate in a panel discussion moderated by Prof. Tadeusz Skoczny. Among them was: Marek Niechciał, President of UOKiK; Anna Streżyńska, President of UKE; Dr. Włodzimierz Antonowicz, Deputy President of the Office of Rail Transport; and Prof. Lesław Gajek, Chairman of the Department of Insurance Inspection of the Polish Financial Supervision Authority. The participants of the panel shared their experiences concerning the protection of competition in general, and regulatory actions supporting competition in particular. They spoke of regulatory aims and strategies as well as the difficulties and problems in their implementation resulting from imperfect laws and shortage of well-trained staff. They stressed the role, expectations and conditions of co-operation with each other as well as with bodies concerned with competition protection and sectorial regulation in other EU countries and with the European Commission. Past successes were presented as well as future tasks. The members of the panel also answered numerous questions from other participants of the conference.

The papers and reports presented during the conference were published in the WU WZ’s periodical entitled: “Management Problems” (“*Problemy Zarządzania*”) edited by Stanisław Piątek and Tadeusz Skoczny, Faculty of Management Scientific Press, Warsaw, 2007.

7. Workshop: ‘The Judgment of the Court of First Instance in the *Microsoft* case – effects on innovation in the new technology sectors’

On 7 November 2007 a workshop took place organised jointly by CARS and the law firm CMS Cameron McKenna entitled: “The Judgment of the Court of First Instance in the *Microsoft* case – effects on innovation in the new technology sectors.” It was the first of a series of workshops that CARS intends to organise, each time together with a different law or

consulting firm. The workshops will take the form of a discussion concerning key up-to-date issues in the field of competition protection (anti-trust workshops) or sector-specific regulation (regulatory workshops). The organisation of a particular workshop is intended to follow: a judgment of an EU or Polish court; a decision of the EC Commission, the President of UOKiK or one of the Polish National Regulators; the publishing of an important document affecting this field (for example: guidelines, a White or Green Paper, a draft of a regulatory act, a research report etc.) by the EC, by UOKiK or by Polish regulators; or the issue of new legislation etc.

In this case the workshop was organised after the issue by the Court of First Instance in Luxembourg on 17 September 2007 of its long awaited judgment in the *Microsoft v. Commission* case. This case has stirred up a lot of controversy concerning the boundaries of public intervention by antitrust bodies into the freedom of dominant firms to use the fruits of their innovation. The aim of the workshop was not only to elaborate on the main arguments presented in the judgment but, most importantly, to attempt to initiate a wider debate on the future use of laws and regulations prohibiting the abuse of dominance, on the conflict between competition law and intellectual property law and on the implications of the verdict for firms in the information technology sector.

The main discussion was preceded by the presentation of three academic papers:

- a) “Refusal by Microsoft to supply its competitors with the information necessary to ensure interoperability of their servers” by Małgorzata Surdek (Partner at CMS Cameron McKenna, Permanent Cooperator of CARS);
- b) “Tying sales of the Windows operating system to the Windows Media Player application” by Dr Dawid Miąsik (Department of Competition Law, Institute of Legal Sciences of the Polish Academy of Sciences, Associate Member of CARS);
- c) “The practical implications of the *Microsoft* judgment in relation to Article 82 TWE” by Prof. Tadeusz Skoczny (Director of CARS).

The workshop has generated a great response from the information technology sector as well as the Polish legal practitioners and consulting field. As a result, its key materials, complemented by several additional papers concerning the subject matter of the *Microsoft* judgment, were edited by Dawid Miąsik, Tadeusz Skoczny and Małgorzata Surdek and published in 2008 as the third publication from CARS’s “Studies and Monographs on Antitrust and Regulatory” series. This book, which also contains the text of the *Microsoft* judgment, will be reviewed in YARS 2009, vol. 2(2).

8. Seminars for PhD students

In the autumn of 2007, an academic seminar series for PhD students was initiated within the framework of the activities of CARS under the patronage of Prof. Tadeusz Skoczny. The seminar was directed primarily to graduate students supervised by WZ WU professors who are Regular Members of CARS. Whenever possible, participation in the seminar was also made available to other students aiming for a PhD degree in law or management supervised by Associate Members and Permanent Cooperators of CARS.

The seminar takes the form of a discussion concerning the specific assumptions, arguments or even particular fragments of a PhD thesis prepared by its participants. The first meeting took place on 27 November 2007 during which a paper on sanctioning violations of the prohibition of competition restricting actions was presented by Judge Marek Sachajko, supervised by Prof. Tadeusz Skoczny, who was at that time preparing for his final PhD viva. Participants of this seminar also included Prof. B. Popowska (Faculty of Law, University of Adam Mickiewicz in Poznań) and Prof. K. Strzyckowski (Faculty of Law, University of Kardynał Stefan Wyszyński in Warsaw).

9. Cooperation with regulators

In 2007, CARS offered to enter into a close co-operation agreement with UOKiK, which successfully began with the research and implementation project concerning block exemptions, as well as with all Polish National Regulators. The basis of such co-operation with the Office of Rail Transport and the Office for Energy Regulation (URE) was established.

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