

CARS Activity Report 2016

1. General Information

The Centre for Antitrust and Regulatory Studies (CARS) continued its regular research, publishing, conference and educational activities in 2016 – the 10th year of its existence.

The granting of the 5th CARS Award for an outstanding academic monograph on the law and economics of competition protection and sector-specific regulation is among the most noteworthy events of 2016. This year, the CARS Antitrust Award honoured **Professor Cezary Banasiński** for his exceptional book entitled *Dyskrecjonalność w prawie antymonopolowym* [*Discretionary Power in Antitrust Law* (Wolters Kluwer, Warsaw 2015)].

As in previous years, the 2016 Award was once again generously funded by PKO Bank Polski, one of Poland's leading banks.

2016 saw also the creation of the CARS Honorary Award – the so-called 'Wielka Sowa' [Big Owl]. The Award was established for exceptional scientific and practical achievements in the field of broadly understood competition law. **Professor Dr Stanisław Sołtysiński** became the first laureate of this Award.

CARS continued also to engage in research and advisory activities. In this context, two research projects were conducted. They dealt with the punishment policy for practices infringing the collective interests of consumers and competition restricting practices – both research projects were commissioned by the Polish Office of Competition and Consumers Protection. CARS also prepared five academic expertises commissioned by external partners; three of them have already been published on the CARS website (www.cars.wz.uw.edu.pl/ekspertyzy).

The year 2016 proved very productive for the CARS Publishing Programme. Four new titles were added to the CARS Publishing Series 'Antitrust and Regulatory Monographs and Textbooks'. It also continued to publish its well established English-language *Yearbook of Antitrust and Regulatory Studies* (YARS) – two volumes of YARS were released in 2016

(YARS 2016, vol. 9(13) and 9(14)). At the same time, CARS published eight volumes of the Polish-language journal *internetowy Kwartalnik Antymonopolowy i Regulacyjny*, iKAR [‘internet Quarterly on Antitrust and Regulation’].

Moreover, in 2016, CARS organize four Polish scientific conferences and seminars as well as noticeably expanded the CARS ‘guest lecture’ programme. Two outstanding foreign professors dealing with antitrust policy and law visited CARS in 2016.

Throughout 2016 CARS continued to organize workshops for employees of the Office of Competition and Consumer Protection (Polish abbreviation – UOKiK) and judges from the Court of Competition and Consumer Protection (Polish abbreviation – SOKiK). Additionally, CARS organized one workshop commissioned by UOKiK.

For the first time, CARS signed cooperation agreements with national scientific institutions and an outstanding entrepreneur.

A completely new element of CARS activities is the creation of sector-specific laboratories, which have a research and educational character. Since 2016, three such laboratories have been established.

2. Research projects

In autumn of 2015, CARS was commissioned by the Office of Competition and Consumers Protection to prepare (until 30 June 2016) two separate, albeit related research projects:

- a) *‘Complex [Comprehensive?] analysis of the decisions of the President of UOKiK and the resulting judgments of the courts examining appeals against those decisions (Court of Competition and Consumers Protection (SOKiK), the Appellate Court in Warsaw and the Supreme Court) with respect to fines imposed by the President of UOKiK in cases of practices infringing the collective interests of consumers’;*
- b) *‘Complex [Comprehensive?] analysis of the decisions of the President of UOKiK and the resulting judgments of the courts examining appeals against those decisions (Court of Competition and Consumers Protection (SOKiK), the Appellate Court in Warsaw and the Supreme Court) concerning the fines imposed by the President of UOKiK in cases of competition restrictive practices’.*

Both reports were submitted to the Commissioner [?] within agreed time but were not accepted by the UOKiK by the end of 2016 due to a conflict that arose between UOKiK and CARS over the payment for these projects.

3. Academic expertises (expert opinions)

3.1. Expert opinion concerning amendments to Romanian Law No 321/2009 regarding the sale of food products in the context of its compliance with EU law and Polish experience

This academic expertise was commissioned by IMS Consulting (Cracow) acting on behalf of the Rumanian Network Retailer CEO PROFI Rom Food srl. The opinion was prepared based on Annex No 1 (Accepted amendments) to the Rumanian Law No 321/2009 regarding the sale of food products. The aim of the expertise was to assess the above amendments in the context of EU law and Polish experiences concerning the application of supply chain regulation in retail trade of food products. The results of the analysis were delivered in the form of an expert opinion on the compliance of Romanian Law No 321/2009 regarding the sale of food products with EU law. The project included also a workshop discussion between Polish experts and the representatives of the Purchaser, as well as an additional report presenting the conclusions drawn from this discussion. The project was prepared by Dr Dominik Wolski (JM Polska) with co-operation of Professor Dr Tadeusz Skoczny (Department of European Economic Law, Faculty of Management of the University of Warsaw), Dr Maciej Bernatt (Department of European Economic Law, Faculty of Management of the University of Warsaw), Dr Jan Markiewicz (Wardyski @ Co. Law Firm), legal advisor Jarosław Sroczyński (Markiewicz Sroczyński Law Firm) and Dr Jan Walulik (CARS, Faculty of Management of the University of Warsaw).

3.2. The status of a spin-off company established by a special-purpose entity of a university in the light of the definition of SMEs in the context of public aid applications

This expert opinion was commissioned by the Institute of Applied Research of the University of Technology. Its goal was to specify the status of a spin-off company established by a special-purpose entity of the university in the light of the definitions of SMEs in the context of applying for public aid. The aim of the expertise was, in particular, to answer the question whether the establishment of a new (spin-off) company, with the participation of a special-purpose entity of a university (set up on the basis of Article 86a of the Higher Education Act, in order to carry out indirect commercialization) and other entities with the status of micro, small and medium enterprise, in the situation when the newly established company fulfills the SME criteria, will allow the new company to keep the SME status despite the participation of a university's special-purpose entity at the level not exceeding 25% of the capital or 50% of the votes.

The argumentation presented in this expertise lead to the conclusion that a spin-off company established by a special-purpose entity of a university can be recognized as a SME under the following conditions: the spin-off fulfills the criteria of an ‘enterprise’ as understood by EU law; the special-purpose entity (treated as a non-profit university) has less than 50% of the voting rights or stocks and shares; and no other circumstances are present listed in Article 3(3) of Annex I to Regulation 651/2014 allowing to identify the link [?]. Moreover, the new spin-off company must fulfill the quantitative criteria of a SME, that is, it cannot exceed the limits of employment as well as the financial limits mentioned in Article 2 of Annex I to Regulation 651/2014, taking into account the relationships with other stockholders or shareholders.

The expertise was prepared by the legal advisor Justyna Kulawik-Dutkowska (PhD Student at the Chair of Legal Problems of Administration and Management, Faculty of Management of the University of Warsaw) with the co-operation and supervision of Professor Dr Tadeusz Skoczny (Head of Chair on European Economic Law, Faculty of Management of the University of Warsaw).

3.3. Assessment of the public financing, including EU sources, of an investment in railway station buildings in the context of the notion of state aid in the meaning of Article 107(1) TFEU (2016)

This expert opinion was commissioned by PKP S.A. (Polish State Railways). Its aim was to assess whether public financing of an investment in the rehabilitation (modernization) of railway station buildings constitutes state aid in the meaning of Article 107(1) TFEU. The purpose of the expertise was also to answer the question whether support for such investments should be notified to the European Commission according to Article 108(3) TFEU as well as according to rules laid down in Regulation 2015/1589.

The expertise was prepared by Dr Stefan Akira Jarecki (Head of Rail and Public Transport CARS Laboratory).

3.4. Legal aspects of number portability in case of subscribers' special services (AUS)

This expert opinion was commissioned by the National Institute of Telecommunications. The report, entitled *Legal aspects of number portability in case of subscribers' special services (AUS)*, will become part of broader expert works prepared by the National Institute of Telecommunications.

The expertise was prepared by Professor Dr Stanisław Piątek (Head of the Chair on Legal Problems of Administration and Management, Faculty of Management of the University of Warsaw).

3.5. Legal aspects of reshaping the principles of numbering usage for the purpose of providing Premium Rate Services

This expert opinion was commissioned by the National Institute of Telecommunications. The report, *Legal aspects of reshaping the principles of numbering usage for the purpose of providing Premium Rate Services*, will become part of broader expert works prepared by the National Institute of Telecommunications.

The expertise was prepared by Professor Dr Stanisław Piątek (Head of the Chair on Legal Problems of Administration and Management, Faculty of Management of the University of Warsaw).

4. Publications

4.1. Adam Doniec, *Imposing Fines in EU and Polish Competition Law in the Light of Human Rights Standards*, CARS 'Textbooks and Monographs' (20), University of Warsaw Faculty of Management Press, Warsaw 2016.

The subject of this book is a legal analysis of norms regulating the application of EU and Polish competition law on financial penalties in the light of the requirements of human rights protection. The basic aim of the book is to answer the question if human rights are being respected in the EU and Polish system on the application of financial penalties in competition law. In order to do so, the author presents the meaning and the scope of selected human rights. After a short analysis of the norms regulating the application of EU and Polish financial penalties in competition law, the author presents potential threats to the protection of human rights which might occur in the EU and Polish systems. The aforementioned analysis lets the author to the conclusion that the existing EU and Polish systems on the application of financial penalties in competition law require changes, and how significant those changes should be in order to meet the protection standards concerning the chosen human rights. The following human rights are being analyzed: principle of legal certainty, principle of equality, right to an effective remedy, right to a fair trial, and right not to be tried or punished twice (*ne bis in idem*/double jeopardy). In the last part of the book, the author considers if the criminalization of competition law might be the right way to remedy the existing deficiencies.

4.2. *Pursuing damages for competition law infringements before Polish courts.* Edited by Anna Piszcz and Dominik Wolski, CARS 'Textbooks and Monographs' (19), University of Warsaw Faculty of Management Press, Warsaw 2016.

The book entitled *Pursuing damages for competition law infringements before Polish courts* is a collective work of authors analyzing the provisions of Directive 2014/104/EU of the European Parliament and of the Council of 26 November 2014 on certain rules governing actions for damages under national law for infringements of the competition law provisions of the member states and of the European Union covered by the national law (the so-called Damages Directive) and their transposition into Polish law.

The authors sum up the hitherto state of knowledge on competition law enforcement by way of private law, and tend to [try to?] solve the essential problems of transposing the provisions of the directive into Polish law. The individual chapters include a critical analysis of the provisions of the Directive, their substantial part is dedicated to recommendations to the national legislator. The authors expect for the book to be of significant use in the substantive discussion about the changes of Polish law related to the enforcement of competition rules by way of private law. According to the authors, the book could also support the transposition of 2014/104/UE Directive so that it makes it possible to effectively pursue damages resulting from competition law infringements in Poland.

4.3. *Economics of Competition Protection. Vertical Restraints,* Edited by Anna Fornalczyk and Tadeusz Skoczny [in Polish: *Ekonomia ochrony konkurencji. Ograniczenia wertykalne.*], CARS Textbooks and Monographs (19), University of Warsaw Faculty of Management Press, Warsaw 2016.

This book presents the contributions to an international conference co-organized by the Polish Office of Competition and Consumer Protection (UOKiK) and the Centre for Antitrust and Regulatory Studies (CARS) of the University of Warsaw, Faculty of Management. The conference took place on the 13th and 14th October 2015 in Warsaw and gathered competition law practitioners from the US, the European Commission and a number of national competition authorities from several EU Member States. Many representatives of the academia from both Poland and abroad were also present. The participants of the conference took an active part in panel discussions, presented scientific papers and benefited from the possibility to attend many interesting exchanges of professional opinions and practical experiences. What characterizes this publication is that it represents both the theoretical as well as the practical approach to the application of economics in competition law

enforcement. This book was, at the same time, the first publication in Poland that offered both Polish and foreign economic and legal contributions which look for the optimal solution to the use of economic analyses and tools in the administrative decision-making process by competition authorities as well as in the judicial review process following such decisions.

4.4. *Changes in the Polish postal services sector*, Edited by Tadeusz Skoczny, [in Polish: ...] CARS ‘Textbooks and Monographs’ (23), University of Warsaw Faculty of Management Press, Warsaw 2016.

This book is the result of the I National Scientific Conference entitled *Changes in the Polish postal services sector*. The conference was organized by the Scientific Organization of the Energy Law and other Infrastructural Sectors of the University of Lodz; it was held under the honorary patronage of the President of the Office of Electronic Communications (UKE) and CARS, the National Chamber of Legal Advisers, the Lodz Scientific Society as well as the National Employers Union of Non-Public Postal Operators.

The book includes the conference presentations as well as additional texts that discuss, among others, such issues as: non-regulatory state interference in the postal services market, including issues of state aid for postal sector companies; financial and regulatory conditions for the liberalization of the postal services market or; the provision of universal postal services. The book includes also the ‘Programme’ of the conference and the ‘Bibliography of Postal Law in Poland’.

4.5. *Yearbook of Antitrust and Regulatory Studies (YARS)* (www.yars.wz.uw.edu.pl)

Both volumes of YARS issued in 2016 – that is, 2016, vol. 9(13) and 2016, vol. 9(14) – were regular numbers. They contained academic papers from authors from Albania, Georgia, Kosovo, Poland, Slovakia, Ukraine, Hungary and the United States.

4.6. *Internet Quarterly on Antitrust and Regulation (internetowy Kwartalnik Antymonopolowy i Regulacyjny, iKAR)* (www.ikar.wz.uw.edu.pl)

The year 2016 proved to be another expansion period for the *internet Quarterly on Antitrust and Regulation*. Eight separate volumes of iKAR were published that year. Four of them had a general nature containing varied contributions on competition and consumer protection matters (volumes 1(5), 3(5), 5(5), 6(5)). The remaining four volumes were dedicated to specific regulated sectors: air and railway transport (No 2(5)), energy and air transport (No 4(5)), telecommunications (No 7(5)) and science (pharmaceuticals and healthcare (No 8(5))).

5. Conferences

5.1. CARS scientific conference on *Pursuing damages for competition law infringements before Polish courts*

On 20 April 2016, the Centre for Antitrust and Regulatory Studies (CARS) organized a scientific conference entitled *Pursuing damages for competition law infringements before Polish courts*. The conference provided the opportunity to discuss selected assumptions and problems related to the implementation of the Damages Directive (2014/104/UE) – an issue broadly analyzed in the aforementioned book of the same title edited by Anna Piszcz and Dominik Wolski and published as CARS ‘Textbooks and Monographs’ (21).

The conference was composed of two sessions moderated by Professor Stanisław Sołtysiński and Judge Katarzyna Lis-Zarrias. The authors of the book presented their contributions as well as implementation suggestions, which were then publicly discussed.

5.2. Polish Consumer Conference

The Polish Consumer Conference was the key event of 2016 within the area of competition and consumer protection law in Poland. The conference was organized by CARS and the University of Economics in Katowice in cooperation with the Office of Competition and Consumer Protection (UOKiK). Tauron Sprzedaż acted as the patron of the conference. The conference materials were published in a book entitled *Consumption law in practice* edited by Marzena Czarnecka and Tadeusz Skoczny (C.H. Beck, Warsaw 2016).

The Polish Consumer Conference took place on 9-10 May 2016. Its goal was to provide the participants with the opportunity to exchange their experiences. It was also meant to help those present – entrepreneurs, practicing lawyers and economists – to establish contacts with representatives of the most important organizations involved in the protection of consumer rights in Poland, including courts. The conference was an opportunity to sum up the scientific achievements related to consumer protection. It also helped to point out current and future challenges for academics and practitioners specializing in the law and economics of consumer protection. The conference covered four areas: (1) abusive clauses; (2) prohibition of infringing collective consumer interests; (3) economics of consumer protection; and (4) consumer and competition protection in energy sector.

5.3. Antitrust Aviation Seminar

The Antitrust Aviation Seminar was held on 12 October 2016 at the Faculty of Management of University of Warsaw. The event was organized by the Centre for Antitrust and Regulatory studies (CARS) under the auspices of the Polish Civil Aviation Authority and LOT Polish

Airlines. The principal goal of the seminar was to familiarize its participants with antitrust policy and legal regulations in civil aviation in the American and European environment from both an academic and a practical perspective. The seminar covered, among others: (a) the relationship between antitrust and aviation policy and economic regulations in civil aviation; (b) competition between local and international transportation systems and its impact on airlines' strategy; (c) the impact of antitrust policy on the establishment and activity of airline alliances; (d) antitrust perspectives in the relationships between airlines and airports.

Speeches were given by a number of distinguished experts representing both the academia as well as the aviation sector: Professor Michael Jacobs (DePaul University, Chicago), Professor Marek Żylicz, Dr Izabella Szymajda-Wojciechowska (vice-president, Polish Civil Aviation Authority), Dr Agnieszka Kunert-Diallo (compliance officer, LOT Polish Airlines), Dr Filip Czernicki ('Polish Airports' State Enterprise) and Dr Jan Walulik (CARS).

5.4. Conference on the *Judicial review of the decisions of the President of the Office of Electronic Communications (UKE)*

On 6 December 2016, CARS and the Modzelewska & Paśnik law firm organized at the Faculty of Management, University of Warsaw, a conference dedicated to the judicial review of the decisions of the President of UKE. The conference was composed of two panels.

The first panel covered evidence issues, including: (a) difficulties in determining the reasons for specific decisions of the President of UKE; (b) confidentiality of evidence for the recipients of the decision; (c) burden of proof in court proceedings in the case of an appeal against the decision of the President of UKE, if the appellant seeks the cancellation of the decision; (d) the role of expert witnesses/private experts.

The second panel covered the character of verdicts changing and repealing the decisions of the President of UKE, including: (a) the admissibility of the decision to be repealed if a change is requested; (b) the consequences of the judgment depending on the nature of the repealed decision (that is, whether it is a declaratory decision or not); (c) the effectiveness of the protection of the rights of the appellant; (d) the consequences of a judgment repealing or amending a decision.

6. Guest lectures

6.1. Professor Dr Peter Behrens, *The Continuing Relevance of Ordoliberal Thinking in European Competition Policy and Law*

As a part of the CARS guest lecture series dedicated to the axiology of competition protection, Professor Peter Behrens from the University of Hamburg (1984-2006) and the Europa-Kolleg Hamburg, held on a lecture about the continuing relevance of ordoliberal thinking in European competition policy and law. Professor Behrens is also a guest lecturer at the Central European University (Budapest), University of St. Gallen (Switzerland) and College of Europe (Brugia).

6.2. Professor Dr Michael Jacobs, *Durability of the Chicago School in Antitrust: What Accounts for it?*

As a part of the CARS guest lecture series dedicated to the axiology of competition protection, Professor Michael Jacobs from the DePaul University Chicago held on 11 October 2016 a lecture about the importance of the Chicago School for competition protection. Professor Jacobs is a renowned American antitrust expert, cited by the US Supreme Court, whose articles are published in the most prestigious American journals such as, among others, the *Antitrust Law Journal* and the *Yale Law Journal*. Professor Jacobs works also at universities in Australia and China.

7. Training workshops

7.1. Workshop on consumer and competition protection for judges specializing in competition law and UOKiK employees

From autumn 2015 until the summer of 2016, CARS organized a series of workshops commissioned by the District Court in Warsaw, in cooperation with the Court of Appeal in Warsaw and the Office of Competition and Consumer Protection (UOKiK). The workshops were specifically designed for antitrust judges and UOKiK employees. The goal of the workshops (moderated by CARS employees and co-operators) was to facilitate the exchange of opinions and practical experiences between antitrust judges and UOKiK employees in selected areas of competition and consumer protection. The workshops covered: (1) subjective scope of the application of the Act on Competition and Consumers Protection, including the concept of a single economic unit; (2) fining policy; (3) bid rigging; (4) inspections and searches; (5) evidentiary issues.

7.2. Workshop for UOKiK employees

In the autumn of 2016, CARS organized also a workshop on evidence issues, which was commissioned by UOKiK and designed for its own employees. The workshop was conducted by Dr hab Tomasz Szanciło, Judge of the Court of Appeal in Warsaw.

8. Laboratories

In 2016, CARS established three research and training laboratories – Civil Aviation Laboratory, Postal Market Laboratory as well as Railway and Public Transport Laboratory. The laboratories will fulfill CARS's statutory tasks in the areas of regulated and special sectors. The three units started their activities from building an expert team and preparing action plans. The Civil Aviation Laboratory organized its first aerial seminar, the Antitrust Seminar, and began to work on the International Airline Regulatory and Antitrust Conference to be held in October 2017.

9. National Cooperation

9.1. Cooperation with the Railway Institute

On 28 February 2016, the Faculty of Management (University of Warsaw) signed a Cooperation Agreement with the Railway Institute. CARS will perform most of the tasks arising from this agreement.

9.2. Cooperation with the National Institute of Telecommunications

On 14 November 2016, the Faculty of Management (University of Warsaw) signed a Cooperation Agreement with the National Institute of Telecommunications. CARS will perform most of the tasks arising from this agreement.

9.3. Cooperation with Polish Post S.A.

On 7 November 2016, the Faculty of Management (University of Warsaw) signed a Cooperation Agreement with Polish Post S.A. Tasks arising from this agreement will be performed by CARS and other units of the Faculty of Management.

Warsaw, 31 December 2016