

CARS Activity Report 2017

1. General Information

1. The year 2017 proved to be another – already the 11th – year of intensive activities and developments for the Centre for Antitrust and Regulatory Studies (CARS). The Centre gained new co-operators, including Adam Jasser (ex-President of the Office of Competition and Consumer Protection), who was entrusted with the position of CARS deputy director. Throughout 2017, CARS continued its regular research, publishing, conference and educational activities.

2. Already the 6th competition for the CARS Award took place in 2017, funded by PKO Bank Polski (one of Poland's leading banks). It was the 2nd time that the CARS Award honoured an outstanding academic monograph on sector-specific regulation rather than competition law. The 2017 CARS Award venerated Prof Filip Elżanowski from the Department of Administrative Law and Proceeding of the Faculty of Law and Administration of the University of Warsaw, for his book entitled *Prawnoprocesowa sytuacja przedsiębiorstwa energetycznego w sprawach z zakresu regulacji energetyki* [*The legal and procedural situation of an energy company in energy regulatory cases*] (Wolters Kluwer, 2015) (see www.cars.wz.uw.edu.pl/About us ...).

3. In 2017, also for the 2nd time, CARS presented its Honorary Award (the so-called 'Wielka Sowa' [Big Owl]) for exceptional scientific and practical achievements in the field of broadly understood competition law. **Professor Anna Fornalczyk**, the 1st President of the Polish Anti-Monopoly Office, currently partner and founder of the consulting firm COMPER Fornalczyk and Partners, became the laureate of this Award.

4. In 2017, CARS conducted two (one that continued from 2016 and one entirely new) research projects and prepared two academic opinions commissioned by external partners; the opinions have subsequently been published on the CARS website (see www.cars.wz.uw.edu.pl/consulting...).

5. The year 2017 proved also very productive for the CARS Publishing Programme. Two new titles were added to the CARS Publishing Series ‘Antitrust and Regulatory Textbooks and Monographs’ – both in English. CARS continued to publish its well established English-language *Yearbook of Antitrust and Regulatory Studies* (YARS[®]) – two volumes of YARS[®] were released in 2017 (YARS[®] 2017, vol. 10(15) and 10(16)). 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*’].

It is worth emphasising that a new series was added in 2017 to the CARS Publishing Programme entitled ‘CARS Working Papers’. This series will be published only in an electronic form and will contain high quality, original texts of about 30-50 pages. Such working papers deal with issues not yet fully dealt with by literature, which rise however practical problems that tend to have so far escaped judicial scrutiny. The first two CARS Working Papers can already be found on the CARS website (see www.cars.wz.uw.edu.pl/publications).

6. Three international and three national conferences or seminars were organised in 2017. CARS members could also attend two guest lectures dealing with antitrust policy and law given by outstanding foreign scholars invited by CARS .

7. Further two co-operation agreements were signed in 2017 – one with a national academic institution and one with an entrepreneur. An additional – already the 4th – sector-specific laboratory was established as well.

2. Research projects

2.1. Research project ‘*Harmonisation of Private Antitrust Enforcement: A Central and Eastern European Perspective*’

1. The comparative research project entitled ‘*Harmonisation of Private Antitrust Enforcement: A Central and Eastern European Perspective*’, implemented in the framework of CRANE (Competition and Regulation. Academic Network. Europe (see www.cars.wz.uw.edu.pl/cooperation ...)), was completed in 2017. It is worth emphasising that national reports on the implementation of the Damages Directive in the eleven newer EU Member States from Central and Eastern Europe, which were prepared in its framework, were published in a form of a monography already in 2016.

2. In 2017, a comparative analysis of the legislation and harmonisation practice related to the EU Damages Directive was conducted; its results were presented during an international

scientific conference organized by CARS and the Faculty of Law of the University of Białystok in Supraśl (PL) (see below). They were published in the *Yearbook of Antitrust and Regulatory Studies* (YARS^R 2017, vol. 10(15)) (see below).

2.2. Research project ‘*Instruments and effects of combating the unfair use of superior power in trade of agriculture and food products*’

1. 1 October 2017 saw the commencement, started on CARS’s initiative, of a research project entitled ‘*Instruments and effects of combating the unfair use of superior bargaining power in trade of agriculture and food product*’ (www.cars.wz.uw.edu.pl/research ...). This project is ‘open’ in nature – not only it is open to all interested researcher but they can present their research results in a multitude of forms. The research team is lead by Adam Jasser, CARS deputy director.

2. The first product of this project was the 8th volume of the ‘*internet Antitrust and Regulation Quarterly*’ (iKAR 2017, vol. 8), devoted to selected problems of combating the unfair use of superior bargaining power, edited by Maciej Bernatt (www.ikar.wz.uw.edu.pl). Its first event – a one-day seminar on ‘*Statute on combating unfair use of superior power – interpreting and applying; important challenges*’, is planned for the first week of March 2018. In the framework of CRANE (Competition and Regulation. Academic Network. Europe (see www.cars.wz.uw.edu.pl/cooperation ...), broad comparative research on the legal grounds and practices in this field, in particular in countries of Central and Eastern Europe, will be conducted in 2018.

3. Academic (experts) opinions

3.1. Assessment of public financing, including EU resources, of an investment into railway station buildings in the context of the notion of state aid in the meaning of Article 107(1) TFEU – actualization

The original expert opinion on public financing, including EU resources, of investments into train station buildings, in the context of the notion of state aid within the meaning of Article 107(1), commissioned by PKP S.A. (Polish State Railways), was prepared in 2016 by Dr Stefan Jarecki from the CARS Rail and Public Transport Laboratory (see www.cars.wz.uw.edu.pl/consulting ...). In 2017, this expertise was updated in the framework of the CARS Rail and Public Transport Laboratory due to changes in Polish law and the issuance by the European Commission of new guidance on the application of state aid rules to

public financing of infrastructure projects. These changes do not alter the final conclusions of the opinion prepared in 2016.

3.2. The analysis of demand-side substitution between digital terrestrial TV and satellite TV in the end-users market

The expertise was commissioned by Emitel Sp. z o.o. The aim of the opinion was to investigate demand-side substitution between two television platforms – digital terrestrial TV and satellite TV – in the end-users market. The analysis was conducted in accordance to the documents and practices of the Polish competition authority (Office of Competition and Consumer Protection – UOKiK) that specify the method of defining relevant markets. Account was also taken of applicable European Commission recommendations, international benchmarks and publicly available data such as commercial offers of the two platforms. The functional analysis of the two most equivalent services (DTT and basic offers of satellite TV operators) lead to the conclusion that there is asymmetric substitution in the investigated market.

The expertise was prepared by Dr Andrzej Nałęcz and Dr Magdalena Olender-Skorek from the CARS Electronic Communications Laboratory.

4. Publications

4.1. *Implementation of the EU Damages Directive in Central and Eastern European Countries*

The 1st publication of 2017, the 24th in general, in the CARS ‘Textbooks and Monographs’ series entitled ‘*Implementation of the EU Damages Directive in Central and Eastern European Countries*’, edited by Anna Piszcz, Warsaw 2017, University of Warsaw, Faculty of Management Press, was printed in the form of a book (it is not going to be published in the digital format). The book contains national reports written in the framework of the comparative research project ‘*Harmonisation of Private Antitrust Enforcement: A Central and Eastern European Perspective*’ implemented in the framework of CRANE (Competition and Regulation. Academic Network. Europe (see www.cars.wz.uw.edu.pl/cooperation ...)) (see above). The book presents and analyses the implementation of the so-called Damages Directive and covers all eleven EU Member States from Central and Eastern Europe (Bulgaria, Croatia, Czech Republic, Estonia, Latvia, Lithuania, Poland, Romania, Slovakia, Slovenia).

4.2. *Group litigation as an instrument of competition law enforcement – analysis based on European, French and Polish experiences*

The book undertakes a detailed analysis of the European system of competition law enforcement, and aims to create a theoretical basis required to answer the following questions: (i) how to establish a more effective system of antitrust enforcement in Europe; (ii) how to mitigate the problems of injured individuals claiming compensation; and (iii) how to ensure an equilibrium between the public and private methods of competition law enforcement.

In order to address the above issues, the book focuses on the mechanism of group litigation, which is, in the author's opinion, the missing piece to the puzzle within the European system of antitrust enforcement. It is also a key factor required for the establishment of a modern and effective approach to the execution of competition law provisions. Through a comparison of the various approaches to group litigation (European and American), as well as through reference to the national experiences in this area of legal practice (French and Polish), the book aims to formulate a model solution for antitrust enforcement by means of collective redress.

The main objective of the book is to encourage the national and EU legislator to undertake more decisive steps in the area of competition law enforcement, and to introduce solutions which are able to mitigate the problems of individuals injured by antitrust infringements. By formulating *de lege ferenda* proposals, the author tries to construct a coherent, uniform, and effective approach to collective redress, which could possibly be implemented at the European and national level.

4.3. *Yearbook of Antitrust and Regulatory Studies* (YARS[®]) (www.yars.wz.uw.edu.pl)

Professor Anna Piszcz edited the 1st of the two numbers of YARS[®] of 2017 (vol. 10(15)); it contains papers presented during the international scientific conference Supraśl 2, summarizing the results of the comparative research project '*Harmonisation of Private Antitrust Enforcement: A Central and Eastern European Perspective*' (see above). The 2nd number of YARS[®] issued in 2017 (vol. 10(16)) – the so-called 'regular number' – contains different articles written by academics from Bulgaria, Lithuania, Poland, Portugal and Serbia.

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

The year 2017 was a further successful step in the development of the *internet Quarterly on Antitrust and Regulation*. Eight separate volumes of iKAR were published that year. Four of them had a general nature and contained varied contributions on competition and consumer

protection matters (volumes 1(6), 3(6), 5(6), 8(6)). The remaining four volumes were dedicated to regulation in air transport (volume 2(6)), railways transport (volume 4(6)), energy (volume 6(6)) and electronic communications (volume 7(6)).

4.5. New publishing series ‘CARS Working Papers’

Two original Working Papers were published in 2017 in the new series of the CARS Publishing Programme entitled ‘CARS Working Papers’:

- WP 1) Marcin Kolasieński ‘*Do “unilateral agreements” restrict competition?*’ [in Polish: *Czy “porozumienia jednostronne” ograniczają konkurencję?*];
- WP 2) Dr Antoni Bolecki, ‘*Unilateral change of terms and conditions used with consumers as potential infringement of collective consumer rights*’ [in Polish: *Modyfikacja klauzul abuzywnych w trybie tzw. jednostronnej zmiany umowy a naruszenie zbiorowych interesów konsumentów*].

5. Conferences

5.1. International Seminar: ‘Reform of Regulation 1/2003 – Effectiveness of the NCAs and Beyond – Competition Law Scholars Forum’

The goal of this international workshop was to discuss, in the light of the European Commission’s suggested amendments of Regulation 1/2003, the legal and institutional challenges faced by national competition authorities. The workshop was co-organised by CARS and the British scientific society Competition Law Scholars Forum (CLaSF) with the support of the Polish law firm Wierciński Kwieciński Baehr (WKB).

5.2. International Conference: ‘Harmonisation of Private Antitrust Enforcement: A Central and European Perspective’

On 29-30 June 2017, the 2nd International Conference on the ‘*Harmonisation of Private Antitrust Enforcement: A Central and Eastern European Perspective*’ took place in Supraśl. It was organized jointly by the Law Faculty of the University of Białystok and CARS and devoted to the effects of the implementation of the so-called Damages Directive (2014/104/EU) in Central and Eastern European countries. The preliminary plan of the organisers is that a 3rd conference in this series shall take place in 2019 or 2020.

35 participants took part in this year’s conference, including 11 foreign guests (representing the Czech Republic, Estonia, Hungary, Lithuania, Latvia, Slovakia, Slovenia and Poland). During the conference, its participants received a book published by CARS entitled *Implementation of the EU Damages Directive in Central and Eastern European Countries*,

edited by Anna Piszcz, Warsaw 2017, University of Warsaw Faculty of Management Press. The book contains individual national reports which describe and analyse the implementation of the so-called Damages Directive in their respective countries; all of the eleven EU Member States from Central and Eastern Europe are covered (see above).

5.3. International ‘Airline Regulatory and Antitrust Conference’

The international ‘Airline Regulatory and Antitrust Conference’, organized by CARS in October 2017, was without a doubt the event of the year for the Centre. The aim of the conference was to discuss current problems and legal trends related to economic regulation and antitrust policy in international air transport. The debate was meant to reveal and reconcile distinct perspectives on this matter characteristic for different regions of the world. For this purpose, CARS invited renowned academic experts from most key aviation markets. The Conference had about 40 participants – managers, consultants, legal advisers and attorneys-in-law, academics, PhD students and other persons interested in international air transport from Poland and abroad (see www.arac2017.wz.uw.edu.pl).

Distinguished foreign professors participated in the panel discussions – Dr Shadi A. Alshdaifat (University of Sharjah), Dr Elena Carpanelli (Center for Studies in European and International Affairs, University of Parma), Prof Paul S. Dempsey (McGill University), Prof Elmar M. Giemulla (Berlin Institute of Technology), Prof P.P. Haanappel (McGill University & Leiden University), Prof Frans G. von der Dunk Harvey and Susan Perlman (University of Nebraska-Lincoln) and Prof Pablo Mendes de Leon (Professor of Air and Space Law, International Institute of Air and Space Law, Leiden University) – as well as a number of Polish specialists – Dr Filip Czernicki (CARS Civil Aviation Laboratory and Strategy and Ownership Supervision Unit, Polish Airports State Enterprise), Piotr P. Dziubak (CARS Civil Aviation Laboratory and Ministry of Development), Dr Agnieszka Kunert-Diallo (CARS Civil Aviation Laboratory and Legal advisor to LOT Polish Airlines), Dr Jan Walulik (Head of the CARS Civil Aviation Laboratory, Attorney at Law, Warsaw), Prof Małgorzata Polkowska (National Security Department, War Studies University, Warsaw), Dr Pawel Zagrajek (Civil CARS Aviation Laboratory and Welcome Airport Services Ltd, Warsaw), Prof Marek Żylicz (University of Warsaw).

5.4. Do ‘unilateral agreements’ restrict competition?

A presentation by Marcin Kolasiński entitled ‘Do “unilateral agreements” restrict competition?’ was the basis of a seminar organized by CARS in June 2017. The speaker presented therein the thesis of his Working Paper (same titled, Working Paper (No 1))

published by CARS a few months earlier. In the WP 1, Marcin Kolasinski argues that the enforcement practice of the President of the Office of Competition and Consumer Protection (UOKiK), which is based on an affirmative answer to the above question, constitutes – in the opinion of the author – an infringement of the Competition and Consumer Protection Act as well as of the Administrative Proceedings Code. The 1st co-speaker, Professor Agata Jurkowska-Gomułka, shared the opinion presented by Marcin Kolasinski. An opposing view was however taken by the 2nd co-speaker, Professor Grzegorz Materna. In the lively discussion that followed, the seminar participants stressed the need to reconcile two values – the right of the UOKiK President to conduct efficient proceedings, and the necessity to comply with the rules of the Competition and Consumer Protection Act and the Administrative Proceedings Code. Assessed in this context was the concept of the so-called selective application of competition law by the UOKiK President. Contrasting views emerged about whether such selection may mean a right to institute and conduct proceedings only in cases of certain important agreements, and whether the UOKiK President may choose to try to prove an illegal action by only one party of an agreement.

5.5. *'The First National Postal Conference'*

The '*First National Postal Conference*', organized in 2017 by CARS with the co-operation of 'Poczta Polska S.A.' (Polish Post), consisted of three discussion panels. The first panel gathered a high ranking representative of the postal regulator (Deputy President of Electronic Communication Office), a member of the Board of the Polish Post, the President of the Express Carriers Forum and the CARS deputy director. The first panel dealt with problems of competition on postal markets from the perspectives of the operators and the regulator. During the remaining two panels answers to the following questions were searched for: '*What kind of postal market? Between regulation and competition*' and '*Universal service as a (non)redundant element of the postal market*'.

Conferences papers will be published in the *internet Quarterly on Antitrust and Regulation* in volume 1/2018.

5.6. Seminar *State Aids and Tax rulings: An assessment of the Commission's recent decisional practice*

Following the newest developments in Brussels the Centre for Antitrust and Regulatory Studies (CARS) organised on 9 October a seminar on "State Aids and Tax rulings: An assessment of the Commission's recent decisional practice" with Professor Amedeo Arena (University of Naples Federico II) and Dr Łukasz Grzejdzia (University of Łódź) as speakers

and many academics and practitioners as participants. The seminar coincided with the Amazon Decision of the European Commission.

5.7. ‘*Competition protection in times of challenges*’ – 70th Birthday Celebration of Professor Tadeusz Skoczny

The conference ‘*Competition protection in times of challenges*’ – 70th Birthday Celebration of Professor Tadeusz Skoczny’ was held at the Faculty of Management, University of Warsaw on 27 October 2017. It was organised in order to celebrate the 70th birthday of Professor Skoczny. During the ceremony, a number of personalities, such as Prof Alojzy Nowak (Dean of the Faculty of Management, University of Warsaw), Prof Anna Fornalczyk (the President of the Antimonopoly Office 1990-1995), Prof Stanisław Piątek (CARS Deputy Director), Dr Maciej Bernatt (CARS Scientific Secretary), Prof Agata Jurkowska-Gomułka and others had the pleasure to present the work and achievements of Professor Skoczny.

Gratitude letters to Prof Skoczny were read during the ceremony from Prof Hanna Gronkiewicz-Waltz (President of Warsaw), Prof Maciej Szpunar (EU Advocate General) and the directors of the Railway Institute – Dr Andrzej Żurkowski, Dr Andrzej Massel and Dr Marek Pawlik. The event was attended by many judges, representatives of regulatory bodies, law firms and enterprises, including Judge Prof Małgorzata Gersdorf (President of the Supreme Court), Judge Teresa Fleming-Kulesza (President of the Chamber in Supreme Court), Retired Judge of the Supreme Administrative Court Dr Stanisław Gronowski, Judge Andrzej Turlinowski (President of the Court of Competition and Consumer Protection), Dorota Karczewska (UOKiK Vice-President), Michał Holeksa (UOKiK Vice-President), Radosław Pacewicz (Vice-President of the Office of Rail Transportation), Krzysztof Dyl (Vice-President of the Office of Electronic Communications), Prof Stanisław Sołtysiński (partner at the Law Firm Sołtysiński Kawęcki Szlęzak & Partner), Dr Mirosław Antonowicz (Member of the Board PKP [Polish Railways]) and many other colleagues of Professor Skoczny from the Faculty of Management as well as other faculties.

Professor Skoczny was given a commemorative book edited by Dr Maciej Bernatt, Prof Agata Jurkowska-Gomułka, Prof Monika Namysłowska and Prof Anna Piszcz. The event concluded with a stimulating panel discussion on ‘*Competition protection in times of challenges*’, moderated by Prof Stanisław Piątek. The following panellists took part in the discussion: Prof Sławomir Dudzik (Jagiellonian University), Prof Dawid Miąsik (Judge of the Supreme Court), Małgorzata Modzelewska-de Raad (Attorney and Partner at the Law Firm Modzelewska & Paśnik) and Prof Monika Namysłowska (Łódź University).

6. Guest lectures

6.1. Professor Kathryn McMahon, *Reflections on the role of economics in the interpretation of EU competition law*

The CARS Guest Lecture Series is devoted to key problems of competition protection and regulation. On 3 March 2017, Dr **Kathryn McMahon**, Associate Professor at the School of Law, University of Warwick, delivered a lecture presenting her reflections on the role of economics in interpreting and applying competition law.

6.2. Dr Peter Whelan, *'Competition law and criminal justice'*

As part of the CARS Guest Lecture Series, Dr Peter Whelan from the University of Leeds delivered a lecture on relations between competition law and criminal justice. This event took place on 24 March 2017 at the Faculty of Management.

7. Sectorial Laboratories

1. Throughout 2017, the three CARS Sectorial Laboratories, established in 2016, continued to pursue their research, publication and conference activities.
2. 'CARS Civil Aviation Laboratory', which already has five members, organised its first international event – the '*Airline Regulatory and Antitrust Conference*', which is held in high esteem both in Poland and abroad. The Head of this Laboratory, Dr Jan Walulik, has also edited a special number of the '*internet Antitrust and Regulation Studies*' (iKAR 2017, vol. 2(6)). Thanks to the efforts of this Laboratory, an '*Agreement on the Co-operation between CARS and the Polish Air Navigation Services Agency*' was signed in 2017 (see [www.cars.wz.uw.edu.pl/cooperation ...](http://www.cars.wz.uw.edu.pl/cooperation...)).
3. A major event was also prepared and organised in 2017 by the 'CARS Postal Market Laboratory' – the '*First National Postal Conference*' (see above). Starting in the summer of 2017, works are also underway on the first domestic commentary on Polish 'Postal Law', which will be edited by members of this Laboratory – Dr Mateusz Chołodecki (Head of the Laboratory) and Prof Anna Piszcz as well as Prof Tadeusz Skoczny (Cars Director).
4. The 'CARS Electronic Communications Laboratory' joined in 2017 the three already functioning laboratories – together, they are a special form of fulfilling CARS's statutory objectives in regulated sectors. The newest laboratory was designed so as to extend CARS's activities in fields of telecommunications and audio-visual services. The Laboratory started its activities on 21 April 2017, focusing first on collecting members and on the preparation of its

action plan for 2017-2020. Dr Magdalena Olender-Skorek – Associate Professor in the Market Economy Unit of the Department of National Economy at the University of Warsaw Faculty of Management – became the Head of this Laboratory.

8. National Co-operation

9.1. Co-operation between CARS and sectorial regulators

The co-operation agreements between CARS and sectorial regulators continue to function. In 2017, the co-operation was most intensive with the Office of Railway Transport as well as with the Office of Electronic Communications. The co-operation Agreement between CARS and the Office of Civil Aviation was discontinued on request of the regulator.

9.2. Cooperation agreements with academic institutions

1. CARS's co-operation agreements with academic institutions continue also with respect to the Railways Institute and the Communications Institute. In particular, with respect to the latter, multiple projects (expertises, seminars etc), to be realized in 2018, were agreed upon in 2017.

2. The 'Cooperation Agreement between Warsaw University Faculty of Management and Białystok University Faculty of Law' was signed on 30 June 2017. Most of the tasks resulting from this agreement on the side of the Faculty of Management of the University of Warsaw will be fulfilled by CARS; most tasks resulting from this agreement on the side of the Faculty of Law of the University of Białystok will be undertaken by its Department of Public Economic Law.

9.3. Co-operation with firms

1. Certain practical results were achieved in 2017 in the framework of the co-operation agreements between CARS and the State Enterprise 'Polish Airports' and CARS and the Company 'Polish Post'; both firms supported conferences organized by CARS – the international '*Airline Regulatory and Antitrust Conference*' and the '*First National Postal Conference*'.

Actions were also taken to strengthen the co-operation in the future.

2. An '*Agreement on the Co-operation between CARS and the Polish Air Navigation Services Agency*' was signed on 19 April 2017. Most of the tasks resulting from this agreement on the side of the Warsaw University Faculty of Management will be undertaken by the 'CARS Civil Aviation Laboratory'.

Warsaw, 31 January 2018