



CARS Activity Report 2015

1. General information

The Centre for Antitrust and Regulatory Studies (CARS) continued its regular publishing, research and educational activities in the 9th (2015) year of its existence.

The granting of the fourth CARS Award remains among the most noteworthy events of 2015. Unlike in the past however, this year's award was granted in the regulatory, rather than antitrust field. The 2015 CARS Regulatory Award for outstanding academic monographs on legal and economic problems of sector specific regulation honoured Dr. Jan Walulik for his outstanding book entitled *Regulatory reform. The Air Transport Example* (Wyd. EuroPrawo, Warsaw, 2013). The award was once again very generously funded by PKO BP, one of Poland's largest banks.

Professor Tadeusz Skoczny, the founder and Director of CARS, has been selected by the General Assembly of ASCOLA (Academic Society of Competition Law) to become a member of the Board of ASCOLA on 22 May 2015 during the 10th Annual Conference of ASCOLA held in Tokyo, Japan. Professor Skoczny has been tasked to chair the ASCOLA Membership Committee responsible for the expansion of ASCOLA membership primarily in Eastern Europe, Asia and Africa.

CARS continued to engage in advisory activities. In 2015, they mostly took the form of academic expertises commissioned by external partners. In order to ensure the transparency of its activities as well as its continuing scientific independence, the condition for CARS accepting such commissioned work remains the publication of all its research results on the CARS website (www.cars.wz.uw.edu.pl/ekspertyzy). CARS prepared four separate academic expertises in 2015.

In November 2015, CARS signed two agreements with the Polish Competition Authority (UOKiK) concerning the realisation of research projects on the penalisation policy concerning anticompetitive practices and practices infringing collective consumer interests. The above projects are to be completed by June 2016.

The year 2015 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 continued to publish its well established English-language *Yearbook of Antitrust and Regulatory Studies* – two volumes of YARS were released in 2015 (YARS 2015, vol. 8(11) and 8(12)). At the same time, CARS published eight volumes of the Polish-language journal iKAR, *internetowy Kwartalnik Antymonopolowy i Regulacyjny*

(*internet Quarterly on Antitrust and Regulation*). In 2015, both of CARS's journals (YARS and iKAR) went through the ICI Journals Master List 2014 evaluation process receiving their respective ICVs (Index Copernicus Value). The *Yearbook of Antitrust and Regulatory Studies* received an ICV 2014 of 68.41, showing a growing trend since 2013. The *internetowy Kwartalnik Antymonopolowy i Regulacyjny* received an ICV of 48.94, also showing a growing trend since 2013. Both periodicals were also placed on List 'B' of the Polish Ministry of Science and Higher Education. Placing on this list for a number of years already, YARS received 10 points in 2015 (which represents a 100% increase since 2014). At the same time, iKAR received 5 points as a new entry.

In 2015, CARS was involved in the organisation of four conferences – one international and three domestic. Its 'guest lecture' programme has noticeably intensified in 2015 welcoming four outstanding guest lecturers from both Poland and abroad. These exceptional scientific events were complemented by two sessions of the CARS Open PhD Seminar.

CARS signed also in 2015 a cooperation agreement with the National Radio and Television Council.

2. Advisory activities (academic expertises)

2.1. Duty to supply medicine to wholesalers in the light of the provisions of competition law and sector-specific regulation

The expertise was prepared by Professor Tadeusz Skoczny (Department of European Economic Law, Faculty of Management, University of Warsaw) and Mr Marcin Kolasiński (PhD candidate, Department of European Economic Law, Faculty of Management, University of Warsaw). The work was commissioned by INFARMA, the Employers' Association of Innovative Pharmaceutical Companies. The project related to the, at that time, ongoing legislative works on amendments to Poland's Pharmaceutical Law. Since the CARS expertise was published on its website, a condition of accepting the commission in the first place, its results were available also outside the legislative process. The main aim of the expertise was to verify whether it is necessary to guarantee supplies to wholesalers of refunded medicine in order to ensure that patients' every day needs are fulfilled.

2.2. Notion of 'subsidiaries' and 'capital groups' in the light of the Competition and Consumers Protection Act, also taking into account Article 99(3) of Pharmaceutical Law of 6 September 2001

The expertise was prepared by Professor Tadeusz Skoczny (Department of European Economic Law, Faculty of Management, University of Warsaw). It was commissioned by the Regional Apothecary Council in Warsaw. The purpose of this project was to clarify – on the basis of the Competition and Consumer Protection

Act – the term ‘subsidiaries’ and ‘capital group’ as defined in Article 99(2) and (3) of Pharmaceutical Law. The latter are the basis for the issue of a permit to run a pharmacy issued by regional pharmaceutical inspectors.

2.3. The possibility and manner of eliminating from the legal order of contractual clauses deemed abusive by the Court of Competition and Consumer Protection

The expertise was prepared by Assistant Professor Monika Namysłowska (Institute of European Economic Law, Faculty of Law, University of Łódź) with the cooperation of Professor Tadeusz Skoczny (Department of European Economic Law, Faculty of Management, University of Warsaw). It was commissioned by the Association of Polish Banks. The purpose of the expertise was to specify the possibility, and potential manner, of eliminating from the legal order of contractual clauses that have been deemed abusive by the Court of Competition and Consumer Protection

2.4. The analysis of examples of anticompetitive concentrations of undertakings on two-sided markets

The expertise was prepared by a team including: Professor Tadeusz Skoczny (Department of European Economic Law, Faculty of Management, University of Warsaw), Dr. Jakub Górka (Chair of Financial Systems of Economy, Department of Banking and Money Markets, Faculty of Management, University of Warsaw) and Dariusz Aziewicz (PhD candidate, Department of European Economic Law, Faculty of Management, University of Warsaw). It was commissioned by the law firm Sołtysiński Kawęcki & Szlęzak in Warsaw. The purpose of this expertise was to analyse six analytical problems relating to pre-emptive control exercised by competition authorities over concentrations between undertakings acting on two-sided markets understood in the economic sense of the term.

3. Publications

3.1. Konrad Stolarski, *Abuse of dominant position on telecommunications markets in the law of the European Union, Textbooks and Monographs* (16), University of Warsaw Faculty of Management Press, Warsaw, 2015

The subject matter of this book concerns the functioning of the prohibition of the abuse of dominance on telecommunications markets in the law of the European Union. It presents an in-depth, comprehensive analysis of this institution meant to explain the problems that may be experienced during its functioning in practice. In principle, the law of the European Union serves as the reference point for this analysis. However, for comparative purposes, the author also considers how similar provisions function in the legal regimes of Poland and selected EU Member States. The main purpose

of this book is to analyze how the specific nature of the strictly regulated telecoms market affects the application of competition law institutions, primarily Article 102 TFEU. In this respect, the author studies issues such as the boundaries between regulatory and antitrust intervention, and the relations between Directives which are the basis for the activities of national and EU regulatory and antitrust authorities. The book also thoroughly analyses several notions particularly important from the antitrust perspective such as market definition, dominance, collective dominance and objective justification of abusive practices. It also presents an analysis of the most characteristic meeting point of regulatory and antitrust law, that is, the ‘regulated conduct’ defence in antitrust cases.

3.2. Rajmund Molski, *Legal and economic aspects of national champion policy*, Textbooks and Monographs (17), University of Warsaw Faculty of Management Press, Warsaw 2015

A State’s policy of promoting national champions has sparked controversy, which has in turn provoked a lively debate on its rightfulness. By now, more questions have been asked than answers given in this debate. The key problem here comes down to the fact whether national champions should form spontaneously or rather, whether an active role in their formation and growth should be taken by the State and if so, what form should the public support take in such cases. Another issue which needs to be addressed here is the real dimension of the policy of promoting national champions pursued in practice by various States, as well as the question of its compliance with competition law and policy understood in a broad sense of the word. As much as these matters have gained particular importance during the time of intensified public intervention in the market economy following the economic crisis, their topicality cannot be reduced merely to this specific period of time. The objective of this monograph is to attempt to respond, at least in part, to these fundamental questions.

3.3. Marta Michalek, *Right to Defence in EU Competition Law; The Case of Inspections*, Textbooks and Monographs (18), University of Warsaw Faculty of Management Press, Warsaw 2015

This book constitutes a doctoral dissertation defended by the author at the University of Fribourg (Switzerland) in 2015. The book examines the question of the protection of undertakings’ right to defence in the context of inspections carried out by the European Commission. The assessment of the level of protection granted to undertakings is based on the comparison of: (i) the current EU legal order and the approach adopted by the Court of Justice of the European Union with; (ii) the protection enshrined by the European Convention on Human Rights and the standards set out by the European Court of Human Rights in this matter. The analysis covers the following issues: characteristics of the right to defence; the most relevant international (in particular European) systems or legal acts providing for the

protection of the right to defence; the powers of inspection of the Commission; power to impose fines and periodic penalty payments and some related problems (fishing expeditions, subsequent electronic searches); as well as the most relevant rights and principles (being components of the right to defence) that constitute limitations of the Commission's powers of inspection that is: the principle of proportionality, legal professional privilege, privilege against self-incrimination, principle of effective judicial protection as well as right to privacy.

3.4. Piotr Semeniuk, *Concept of single economic unit in competition law*, Textbooks and Monographs (19), University of Warsaw Faculty of Management Press, Warsaw 2015

The book discusses the conditions of the application of the single economic unit doctrine in competition law. Polish and EU competition law constitute the main legal regimes subject to the analysis in this thesis. Since they both refer to the single economic unit doctrine in a very general manner only, the author also discusses additional legal regimes, mainly US law. Various justifications for the existence of the single economic unit doctrine in competition law are examined in the book. The doctrine is also confronted with the input from the economic sciences (in particular with the "theory of the firm") and the views expressed towards this doctrine by scholars, courts and competition law enforcers.

The main objective of the thesis, apart from systematizing existing views of the judiciary and literature, is to prove that the single economic unit doctrine can take on different meanings and should be subject to a non-homogeneous analysis depending on the legal norms for the application of which it is used. The above should be the case even if the single economic unit doctrine is based on a homogenous ontological phenomenon (the phenomenon of a "firm" described by economic sciences). Each legal norm of the antitrust system is motivated by different aims and functions. Depending on those functions and aims, the single economic unit doctrine should be applied in a different manner. Referring to one, objectively understood, doctrine of a single economic unit can thus be a substantial simplification.

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

The first regular volume of YARS published in 2015 (2015, vol. 8(11)) contained academic papers from authors from Albania, Georgia, Kosovo, Lithuania and Poland.

The second volume of YARS published in 2015 (YARS 2015, vol. 8(12)) contained conference papers presented during the international conference entitled *Harmonisation of Private Antitrust Enforcement: A Central and Eastern European Perspective*. The Conference was organized jointly by CARS and the Faculty of Law of the University of Białystok, which took place in Supraśl on 2-4 July 2015. The authors of the papers contained in this volume derive from a wide range of countries including: Croatia, Georgia, Lithuania, Poland, Portugal, Serbia, Slovenia, Ukraine and Hungary.

3.6. internetowy Kwartalnik Antymonopolowy i Regulacyjny (www.ikar.wz.uw.edu.pl)

The year 2015 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 2(4), 4(4), 5(4), 8(4)). The remaining four volumes were dedicated to specific regulated sectors: rail transport (No. 1(4)), energy (No. 3(4)), audiovisual media (No. 7(4)) and telecommunications (No. 8(4)).

4. Conferences

4.1. International Conference on Harmonization of Private Antitrust Enforcement: a Central and Eastern European Perspective

The Centre for Antitrust and Regulatory Studies (CARS, University of Warsaw) and the Faculty of Law of the University of Białystok (Department of Public Commercial Law) organised an international Conference entitled ‘Harmonisation of Private Antitrust Enforcement: A Central and Eastern European Perspective’ which was held in Supraśl (Poland) on the 2-4 July 2015. The Conference’s main focus was on the implementation of the Damages Directive (Directive 2014/104/EU). The Conference gathered over 40 competition law researchers primarily from countries of the Central and Eastern European region, just over half of the participants came from Poland. The conference papers were subsequently published in the *Yearbook of Antitrust and Regulatory Studies* 2015, vol. 8(12).

4.2. Amended Act of the Competition and Consumers Protection Act – main changes and directions of further modernisations

This Conference took place on 19 January 2015 in Warsaw. Its purpose was to provide a critical summary of the key changes introduced into Poland’s Competition and Consumer Protection Act of 2007 by way of the Amendment Act of 10 June 2014 and to discuss the general expectations related to its forthcoming entry into force. The Conference was also meant to provide a platform for initial reflections on future directions and proposals of further modernisations of the Competition and Consumer Protection Act. These would include issues intended to improve the effectiveness of competition protection in Poland, increase the level of its procedural fairness as well as its compatibility with EU and world standards.

4.3. The First Polish Congress on Competition Law

The First Polish Congress on Competition Law – **1. PKPK** – was without a doubt the main event of 2015 as far as competition law field in Poland is concerned. It

was initiated and organized by CARS – Tauron Sprzedaż acted as its official Patron.

The Congress was organized in the context of the 25th anniversary of Poland's transformation – which included the creation of the normative basis of its competition and consumer protection laws and the fight against unfair competition in a free market economy. The Congress was meant to summarise past achievements as well as to identify current and likely future challenges facing academics and practicing lawyers in the field of competition law and unfair competition law.

The Congress took place on 13-15 April 2015 in the Conference Centre of the Polish Competition Authority (UOKiK) in Warsaw. Immediately before the opening of the Congress, an official session took place commemorating the 25th anniversary of the introduction of competition law in Poland hosted by the UOKiK President Mr Adam Jasser.

The materials from the Congress were published in the volume: Competition law 25 years. First Polish Congress on Competition Law, Edited by T Skoczny, Wolters Kluwer, Warsaw, 2016, see also the dedicated Congress website <http://www.1pkpk.wz.uw.edu.pl/>

4.4. Economics of Competition Protection

A Conference took place on 13-14 October 2015 on the Economics of Competition Protection. It was organized by the Polish Competition Authority (UOKiK) and CARS; it was held in the Conference Centre of the Polish Competition Authority (UOKiK) in Warsaw.

An international seminar on vertical restraints was held during the first day of the Conference. The seminar was attended by the representatives of the European Commission, several national competition authorities of EU Member States, as well as numerous academics and practitioners. The relevant presentations are available on the UOKiK website.

Four panels were held during the second day of the Conference. They were devoted to: the use of economics in competition protection, the use of economic analyses and the conditions of using qualitative methods in the application of competition law as well as the economics of competition protection and regulation towards anti-competitive practices.

5. Guest lectures

5.1. Barry Sullivan, 'Use of Economic Analysis in US Administrative Law'

On 26 October 2015, Professor Barrym Sullivanem (Loyola University, Chicago) delivered a guest lecture entitled 'The Use of Economic Analysis in US Administrative Law'. The lecture was organized by the Centre for American Law Studies, Faculty of Law, University of Warsaw with the cooperation of CARS.

5.2. Rajmund Molski, 'Policy Dilemmas in Promoting National Champions'

On 13 November 2015, Professor Rajmund Molski gave a guest lecture entitled 'Policy Dilemmas in Promoting National Champions'. Professor Molski tackled, among others, some of the most controversial questions of current industrial policy namely: should companies with the status of a national champion come into existence on their own, or should an active role in their creation be played by States and if the latter was true, what sort of State help should they receive? What are the practical experiences with the policy of promoting national champions by different countries? Can such policy be in agreement with competition law?

5.3. Marek Martyniszyn, 'How high (and far) can you go? On fine-setting in cartel cases involving vertically-integrated undertakings and foreign sales'

On 30 November 2015, Dr. Marek Martyniszyn (Lecturer at Queen's University Belfast School of Law) gave a guest lecture entitled 'How high (and far) can you go? On fine-setting in cartel cases involving vertically-integrated undertakings and foreign sales'.

5.4. Paul Nihoul, 'Fairness, efficiency, choice. What standard for competition policy worldwide?'

On 17 December 2015, Professor Paul Nihoul (Catholic University Louvain, ASCOLA Chair) gave a guest lecture entitled 'Fairness, efficiency, choice. What standard for competition policy worldwide?' The lecture was organized by CARS with the support of the Polish Competition Authority (UOKiK) and the Competition Law Association and held the Conference Centre of the Polish Competition Authority (UOKiK) in Warsaw. In his speech, Professor Nihoul noted that a growing number of academics look towards maximising consumer choice as a competition law standard, as opposed to the more typical consumer welfare or total welfare standard. According to the speaker, strong support for such an approach can be found in cases such as *Microsoft*, *Intel* or *France Telecom*. At the same time, he noted that standard economic criteria do not always give correct answers and thus it is necessary to look more closely at consumer preferences measured, for instance, by way of questionnaires.

6. Open PhD Seminar

6.1. Piotr Semeniuk, 'Responsibility of mother companies in Polish competition law and the concept of guilt of collective entities'

A meeting of the Open PhD Seminar took place on 24 March 2015. The presentation given by Piotr Semeniuk was commented by Associate Professor Agata Jurkowska-Gomułka and Associate Professor Anna Piszcz.

The subject matter of Mr Semeniuk's presentation (PhD candidate Faculty of Law Jagiellonian University) was that of administrative responsibility of collective bodies in competition law as well as within those bodies. The speaker aimed to answer whether the President of UOKiK can impose fines on mother companies for the behaviours of daughter companies. The speaker also tried to clarify responsibility issues within collective bodies, that is, such legal bodies where a hierarchical decisional structure exists. He mentioned doubts surrounding the amendments of the Polish Competition and Consumer Protection Act concerning the introduction of administrative responsibility of 'managers'.

6.2. Jan Markiewicz, 'Slotting fees' – taking fees other than trade margin in order to have a product placed in the store as an unfair competition practice in the light of Article 15(1)(4) of the Act on Combating Unfair Competition. A traditional interpretation in the light of new jurisprudence'

A meeting of the Open PhD Seminar took place on 11 October 2015. Barrister Jan Markiewicz (Law Firm Wardyński & Wspólnicy, PhD candidate supervised by Professor Ewa Nowińska of the Faculty of Law Jagiellonian University) made a presentation on the interpretation of Article 15(1)(4) of the Act on Combating Unfair Competition. According to the current interpretation, the charging of any fees other than a trade margin (that is, the charging of 'slotting-fees'), would be an act of unfair competition as it hinders market access. Since the entry into force of that provision, suppliers have been regularly using it in order to demand the return of what they generally call 'slotting-fees'. Such demands cover mainly payments made for services rendered (e.g. advertising or logistic) and amounts by which prices were cut. The speaker made also a critical analysis of cases where suppliers might have been using this provision unjustifiably and noted that while it cannot be said that the current judicial line has yet changed, he was of the opinion that the judiciary seems to have nevertheless become somewhat more critical towards the suppliers' aforementioned practices. Covered in the presentation was also the transferral of the disputes from judicial to arbitration venues.

7. Agreements: CARS – National Radio and Television Council (KRRiT)

Continuing the tradition of cooperation with public administration bodies responsible for competition protection and sector specific regulation, CARS has signed on 5 May 2015 a cooperation agreements with the National Radio and Television Council (www.cars.wz.uw.edu.pl/). The agreement envisages widespread cooperation between CARS and Polish bodies responsible for the regulation of the radio and television sector in the field of scientific research, publications, conferences and other events.

Ewelina D. Sage

CARS International Co-operator