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## **CRIMINAL LIABILITY OF MANAGERS IN THE POLISH COMPETITION LAW – DEVELOPMENT AND THE PERSPECTIVE OF PROCEDURAL GUARANTEES**

### **Abstract**

The article discusses the issue of legal liability of managers set out in the Polish competition and consumer protection law, resulting from the Act of 16 February 2007 on competition and consumer protection (Dz. U. (Journal of Laws) of 2021, item 275) (hereinafter: Competition Act). The starting point for my reflections is the provisions of the Competition Act providing for financial liability of persons in managerial positions for infringing prohibitions resulting from competition law (Article 106a of the Competition Act). In Polish law this type of liability is subsidiary to the liability of undertakings. It was also introduced to the Competition Act relatively recently, after the principles of undertakings' liability for infringements of competition law had been formed and developed. My goal is to present the scope of managers' liability and present conclusions resulting from the recent, still rather innumerable, case law of the Polish Competition Authority (President of Office for Competition and Consumer Protection, UOKiK). Due to the quasi-criminal nature of Article 106a, I propose my own reflections on the development of managers' liability considering whether the law and judicial decisions recognize adequate standards of their rights.

## KEYWORDS

competition law, persons holding managerial posts, managers, UOKiK, criminal sanctions, procedural guarantees

## SŁOWA KLUCZOWE

prawo konkurencji, osoby zarządzające, menadżerowie, UOKiK, sankcje karne, gwarancje proceduralne

## 1. INTRODUCTION

The addressees of the provisions of the Polish competition law are primarily legal entities. Prohibition of anti-competitive practices (abuse of a dominant position, anti-competitive agreements), as specified in the Act of 16 February 2007 on competition and consumer protection (hereinafter: Competition Act)<sup>1</sup>, is addressed to undertakings (Article 4 item 1)<sup>2</sup>, and among them – primarily to legal entities (e.g. companies). In reality, competition law rules also apply to individuals. Quite a substantial part of the Polish Competition Authority's<sup>3</sup> judicial decisions relate to micro-enterprises: natural persons conducting business activity individually or in the form of civil law partnerships<sup>4</sup>. In addition, as a result of the 2014<sup>5</sup> amendment to the Competition Act, natural persons may also incur antitrust liability when they have an impact on the undertaking's business decisions as the so-called person holding a managerial post<sup>6</sup> and who, when exercising their responsibilities during the identified infringement, intentionally permitted an undertaking, by acts or omissions, to breach the said prohibitions of certain anti-competitive agreements<sup>7</sup>. As a result of another amendment to the Competition Act<sup>8</sup>, a similar regulation has also been provided for within the

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<sup>1</sup> Dz. U. (Journal of Laws) of 2021, No. 2, item 275. For citations of the provisions of the Competition Act, the translation provided in the Wolters Kluwer LEX data base was used and in certain cases perfected.

<sup>2</sup> More about the concept of undertaking in the Polish competition law, see: G. Materna, *Pojęcie przedsiębiorcy w polskim i europejskim prawie ochrony konkurencji*, Warsaw 2009.

<sup>3</sup> President of Office for Competition and Consumer Protection, hereinafter: UOKiK.

<sup>4</sup> Critically on this topic: P. Semeniuk, "Polskie zmony przetargowe" – krytyka, 'iKAR' 2013, No. 1(2), pp. 53–67.

<sup>5</sup> Act of 10 June 2014 (Dz. U. (Journal of Laws) of 2014, item 945).

<sup>6</sup> Article 4(3a).

<sup>7</sup> Article 6a and 106a.

<sup>8</sup> Act of 9 November 2018 (Dz. U. (Journal of Laws) of 2018, No. 2, item 2243).

field of consumer protection<sup>9</sup>. Under the Competition Act various categories of individuals can also bear financial liability for violations of procedural nature (e.g. individuals authorized by the inspected undertaking to represent them before UOKiK<sup>10</sup>, undertaking's employee when they impede or block UOKiK's inspection<sup>11</sup>, individuals requested for information<sup>12</sup>, witnesses<sup>13</sup> or experts appointed by UOKiK<sup>14</sup>).

The quasi-criminal nature of financial penalties (fines) imposed by competition authorities provokes discussions on the principles of imposing these fines and on the scope of procedural guarantees for their addressees. This topic becomes even more crucial in case of individuals. It is not questioned that fines imposed by competition authorities are of *quasi-criminal* nature<sup>15</sup>, and administrative proceedings in which such penalties are imposed are “not dissimilar to proceedings relating to economic offences”<sup>16</sup>. They have been recognized<sup>17</sup> as criminal proceedings within the meaning of the European Convention for the Protection of Human Rights and Fundamental Freedoms<sup>18</sup>. On this basis, competition authorities are required to apply criminal law standards of protection of fundamental rights, recognizing also in ECHR and the Charter of Fundamental Rights of the European Union<sup>19</sup>. The study of criminal law is also a frequent source of inspiration for the enforcement of competition law<sup>20</sup>.

This article will present the scope of liability of persons holding managerial posts and the recent, still rather modest, body of UOKiK's decisions. This will be a basis for reflections on selected problems identified in relation to procedural guarantees of fundamental rights. Although the Competition Act provides for the liability of managers both in the antitrust and consumer cases, I limit my discussion to competition law. This is justified by particularities that appear in

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<sup>9</sup> Article 23a, 24 and 106b.

<sup>10</sup> Article 108(3)(1).

<sup>11</sup> Article 108(3)(2).

<sup>12</sup> Article 108(3)a.

<sup>13</sup> Article 108(6)(1).

<sup>14</sup> Article 108(6)(2).

<sup>15</sup> B. Namysłowska-Gabrysiak, *Odpowiedzialność karna osób prawnych*, Warsaw 2003, p. 157; M. Bernatt, *Prawo do rzetelnego procesu w sprawach ochrony konkurencji i regulacji rynku (na tle art. 6 EKPC)*, ‘Państwo i Prawo’ 2012, No. 1, pp. 55–58.

<sup>16</sup> A.G. Kokott's opinion of 14 April 2011, C-109/10, *Solvay SA v European Commission*, ECLI:EU:C:2011:256, para. 255.

<sup>17</sup> Judgments of the European Court of Human Rights (ECtHR) of 27 September 2011 (*Menarini Diagnostics S.R.L. v. Italy*, Application no. 43509/08) and of 29 January 2019 (*Orlen Lietuva Ltd. v. Lithuania*, Application no. 45849/13).

<sup>18</sup> 4 November 1950, ETS 5.

<sup>19</sup> OJ C 326, 26.10.2012, pp. 391–407.

<sup>20</sup> G. Materna, *Prawnokarne źródła inspiracji w prawie ochrony konkurencji i konsumentów*, ‘Studia Iuridica’ 2022, No. 93, pp. 189–208.

this area, such as the relationship between competition and criminal law in case of bid rigging<sup>21</sup>.

## 2. THE SCOPE OF ANTITRUST LIABILITY OF PERSONS HOLDING MANAGERIAL POSTS UNDER THE COMPETITION ACT

### 2.1. THE RULES INTRODUCED BY THE AMENDMENT OF 10 JUNE 2014 TO THE COMPETITION ACT

With effect from 18 January 2015, persons holding managerial posts may be subject to personal liability for breaching competition laws when they contribute to the participation of the undertaking in anti-competitive agreements. Under such circumstances not only a purely administrative sanction can be imposed (Article 6a) but also a financial penalty amounting to up to PLN 2 million (Article 106a).

The concept of a person holding a managerial post refers to “any person that is managing an enterprise, and in particular a person in a managerial position or a member of the management body of an undertaking” (Article 4 (3a)). The broad definition may refer to members of managing bodies (management board), persons who hold a managerial function, even when they are not members of the management body (e.g. director of a branch of the undertaking) and persons determining directions of the undertaking’s activities without formally performing managerial functions<sup>22</sup>. Although the intention of the legislator was indisputably to refer the concept of a person holding a managerial post only to individuals<sup>23</sup>, scholars and commentators note that this concept can be applied (even if on rare, specific occasions) also to legal entities<sup>24</sup>.

The manager’s liability is complementary to the undertaking’s liability. When it is found that an undertaking entered into an anti-competitive agreement, UOKiK is empowered to commence single antitrust proceedings intended to determine

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<sup>21</sup> For more, see G. Materna, *Zmowy przetargowe w prawie ochrony konkurencji i prawie karnym*, Warsaw 2016.

<sup>22</sup> G. Materna, A. Zawłocka, *Materiałne i procesowe zmiany w zakresie praktyk ograniczających konkurencję i naruszających zbiorowe interesy konsumentów*, ‘iKAR’ 2015, No. 2(4), pp. 17–19.

<sup>23</sup> Parliamentary paper No. 1703 of 30 August 2013, p. 36; <http://orka.sejm.gov.pl/Druki7ka.nsf/0/9F27C3A04DCCA6E8C1257BE3003730DF/%24File/1703.pdf>, hereinafter: Parliamentary paper.

<sup>24</sup> A. Piszcz, (in:) T. Skoczny (ed.), *Ustawa o ochronie konkurencji i konsumentów. Komentarz*, 2nd edition, Warsaw 2014, p. 115; A. Piszcz, *Sankcje w polskim prawie antymonopolowym*, Białystok 2013, p. 347.

whether: (1) the undertaking violated the prohibition of anti-competitive agreements, and (2) persons holding managerial posts – when exercising tasks during the identified infringement – intentionally permitted the undertaking to infringe Competition Law (Article 88). Should an infringement be found as a result of such proceedings, apart from sanctions imposed on the undertaking, its persons holding managerial posts shall also be subject to liability (Article 6a and 106a). The person holding a managerial post shall not bear antitrust liability when such liability is not borne by the undertaking (Article 12a and 106a (2)).

It is worth noting that the manager's liability does not cover the full spectrum of anti-competitive agreements but only arrangements carrying the characteristics of the conduct as defined in Article 6(1)(1) to Article 6 (1)(6) of the Competition Act or Article 101(1)(a) to Article 101(1)(e) of the TFEU. The legislator left outside the scope of manager's antitrust liability for collusive tendering (Article 6(1)(7) of the Competition Act) and uncategorized anti-competitive agreements. Among other reasons, the aim was to avoid disproportionate (double) liability of managers, under the competition law and pursuant to Article 305 of the Penal Code, which penalizes collusive tendering and other types of obstruction of public tenders. Also the Competition Act safeguards against double fining of the same individual on the basis of competition rules. According to Article 106(3), a financial penalty shall not be imposed on a manager if the same person has already been fined (for the very same infringement) as an undertaking.

The aim of the introduction of managers' liability under the Competition Act was to increase effectiveness of enforcement in the field of cartels and other most anticompetitive conducts. Managers' competition liability has been accompanied with the extension of the leniency program also on them (Article 113h). UOKiK expects that this should result in fewer violations of the provisions of the Competition Act and more effective enforcement<sup>25</sup>.

Competition Act defines factors to be considered while determining the amount of financial penalties (Article 111). They include "in particular" circumstances of the infringement, any previous infringement of the Competition Act (Article 111(1)), as well as the extent of the influence of manager's behavior on the infringement committed by the undertaking, the revenues obtained by the manager from a given undertaking, duration of the infringement and market consequences of the infringement or its consequences for consumers (Article 111(1) (2)). A non-exhaustive list of extenuating circumstances and a closed catalog of aggravating circumstances have also been defined. Extenuating circumstances include: (a) coercion, (b) contributing to voluntary remediation by the undertaking of the consequences of the infringement, (c) contributing to the termination of the questioned conduct by the undertaking, (d) autonomously taken actions in order to cease the infringement or remedy its consequences, (d) cooperation

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<sup>25</sup> Parliamentary paper, pp. 36–37.

with UOKiK during the proceedings (Article 111(3)(3) in conjunction with Article 111(3)(1)(c) and (d)). In contrast, the following circumstances have been legally classified as having an aggravating effect: (a) the role of organizer, initiator or solicitor others to participate in the agreement, (b) obtaining substantial benefits from the infringement, (c) the role of coercer in order to enforce or continue the infringement by other entities (Article 111(4)(3) in conjunction with (4)(1)(b) and (c)).

The statutory rules on fines imposed on managers are supplemented by the official UOKiK guidelines on the method of setting fines imposed on persons holding managerial posts, announced in July 2020<sup>26</sup>. The guidelines specify the phases of calculating fines and the sequence of application of individual criteria and their impact on the actual amount of the fine in a specific case.

## **2.2. THE RULES INTRODUCED BY THE AMENDMENT OF 9 MARCH 2023 TO THE COMPETITION ACT**

The rules on managers' antitrust liability has been adjusted as part of a much bigger set of amendments to the Competition Act aiming at implementing the ECN+ Directive<sup>27</sup>, adopted with the aim to "ensure a truly common competition enforcement area in the Union that provides a more even level playing field for undertakings operating in the internal market" (recital 8, preamble of the ECN+ Directive) through the better and uniform empowerment of National Competition Authorities with tools and guarantees needed to apply Article 101 and 102 TFEU (recital 9, preamble of the ECN+ Directive). The new set of antitrust rules introduced with the Act of 9 March 2023<sup>28</sup> which came into force on 20 May 2023 also includes the extension of the circle of individuals subject to antitrust liability. The Act attributed liability on undertakings that exercise decisive influence over the undertaking directly involved in anti-competitive practice (Article 6b and 9a) and in consequence also on their managers (on the same basis as managers that had been already subject to antitrust regulations before) (Article 6b(4)).

With regard to managers, several significant changes have been introduced regarding both liability for violations of substantive law and procedural rules governing their rights and obligations during the UOKiK's investigation.

A highly anticipated mechanism has been introduced aimed at creating incentives for undertakings to submit leniency applications in bid rigging cases by

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<sup>26</sup> UOKiK, *Zasady karania menedżerów przez Prezesa UOKiK*, press release, 31.07.2020, [https://www.uokik.gov.pl/aktualnosci.php?news\\_id=16645](https://www.uokik.gov.pl/aktualnosci.php?news_id=16645) (accessed 12.12.2023).

<sup>27</sup> Directive (EU) 2019/1 of the European Parliament and of the Council of 11 December 2018 to empower the competition authorities of the Member States to be more effective enforcers and to ensure the proper functioning of the internal market (OJ L 11, 14.1.2019, pp. 3–33).

<sup>28</sup> Act of 9 March 2023 (Dz. U. (Journal of Laws) of 2023, item 852).

excluding criminality under the Penal Code of natural persons who are leniency applicants or who act on behalf of the undertaking who is the leniency applicant<sup>29</sup>. The amendment introduced the new rule to the Penal Code, under which the perpetrator of the offence of collusive tendering (Article 305(1) and (2)) shall not be punished when that person reported the offence committed to the authority appointed to prosecute crimes or to any NCA or to the European Commission. In order for this exemption to be applicable, the notification of the above-mentioned violation shall be submitted and all the relevant circumstances of the offence shall be disclosed before the authority appointed to prosecute crimes (public prosecutor) becomes aware of it (Article 305(6) of the Penal Code). Along with this amendment, also changes to the Competition Act have been introduced in order to provide enough information for the prosecutor to establish the existence of grounds for the perpetrator of bid-rigging not being punished (Article 113l of the Competition Act).

It is worth noting the amendment of the statutory rules on setting fines, that introduced a kind of mechanism safeguarding proportionality of the amount of fines determined under the Competition Act<sup>30</sup>. When determining the amount of the above-mentioned fines (in consumer protection cases), also sanctions imposed for the same infringement in other EU Member States in cross-border cases where information on such sanctions is available under the mechanism established by Regulation 2017/2394 shall be taken into account (Article 111(5)).

As regards changes to procedural rules the amendment extended the range of persons obliged to submit information and documents upon a written request of UOKiK (Article 50(1)). Before the amendment, UOKiK was eligible to address such requests for information solely to undertakings or their associations. Instead, under the current rules any natural or legal person may be requested by UOKiK to provide information and documents within the set period, under the pain of a fine of up to 3% of the person's total annual turnover (Article 108a). Effectively, separate requests can be obtained by the undertaking and his managers, as well as employees or associates (current and former). The described information obligation is subject to certain limitations with the aim to protect the person in question against self-incrimination (for more, see section 4.6 of this article). The same limits are valid when UOKiK exercises its inspection powers, when UOKiK officials request information or explanations from undertaking's representatives (when carrying out inspections and searches) or from the owner of premises or means of transport searched on the basis of Article 91(1) (Article 105d(2) and 3).

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<sup>29</sup> Parliamentary paper, p. 52.

<sup>30</sup> Act of 1 December 2022 (Dz. U. (Journal of Laws) of 2022, No. 2, item 2581).

### 3. PERSONS HOLDING MANAGERIAL POSTS IN UOKiK'S JUDICIAL DECISIONS

#### 3.1. THE DECISIONS SO FAR

The number of cases in which managers were charged under the Competition Act is still modest. Only after about six years from the establishment of the liability of managers the first such decisions were issued (DOK-5/2020<sup>31</sup> and DOK-6/2020<sup>32</sup>). This is quite a moderate number, considering that throughout 2020, UOKiK issued a total of fifteen decisions regarding anti-competitive agreements. Moreover, also in 2021 the total cases were not much different. Managers were charged only in two cases (DOK-4/2021<sup>33</sup> and DOK-8/2021<sup>34</sup>) out of a total of twelve that concerned anti-competitive agreements. According to information published by UOKiK on its website, the same year antitrust proceedings were initiated against the importer of trucks and its official distributors and for long-lasting anti-competition practices, along with eleven managers that could be responsible for collusion<sup>35</sup>. In 2022 UOKiK issued 7 decisions regarding anti-competitive agreements, none of which concerned managers. Nevertheless, antitrust proceedings were initiated in the case of alleged infringement of Article 6 of the Competition Act and Article 101(1) TFEU by six undertakings and their seven managers<sup>36</sup>. At the time of preparation of this article no official information was

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<sup>31</sup> Decision DOK-5/2020 of 3 December 2020 (agreement between companies active on the Warsaw heating market, infringing Article 6(1)(1), (3) and (7) of the Competition Act and Article 101(1)(a) and(c) of the Treaty). See also: UOKiK, *Decision of the President of UOKiK concerning collusion on Warsaw heating market. First penalty for manager*, press release, 07.12.2020, [https://uokik.gov.pl/news.php?news\\_id=17001](https://uokik.gov.pl/news.php?news_id=17001) (accessed 12.12.2023).

<sup>32</sup> Decision DOK-6/2020 of 30 December 2020 (market allocation on the fitness market, infringing Article 6(1)(3) of the Competition Act and Article 101(1)(c) of the Treaty). See also: UOKiK, *Collusion on the fitness market – decision by the President of UOKiK*, press release, 11.01.2021, [https://uokik.gov.pl/news.php?news\\_id=17147](https://uokik.gov.pl/news.php?news_id=17147) (accessed 12.12.2023).

<sup>33</sup> Decision DOK-4/2021 of 27 August 2021 (resale price maintenance agreement on the dietary supplements market, infringing Article 6(1)(1) of the Competition Act and Article 101(1)(a) of the Treaty). See also: UOKiK, *Decision of the President of UOKiK – collusion on the dietary supplements market*, press release, 30.08.2021, [https://uokik.gov.pl/news.php?news\\_id=17768](https://uokik.gov.pl/news.php?news_id=17768) (accessed 12.12.2023).

<sup>34</sup> Decision DOK-8/2021 of 23 December 2021 (truck dealer cartels, infringing Article 6(1)(1), (3) and (7) of the Competition Act and Article 101(1)(a) and(c) of the Treaty). See also: UOKiK, *Truck dealer cartels – two decisions of the UOKiK President*, press release, 11.01.2022, [https://uokik.gov.pl/news.php?news\\_id=18186](https://uokik.gov.pl/news.php?news_id=18186) (accessed 12.12.2023).

<sup>35</sup> See: UOKiK, *Iveco trucks – proceedings of the President of UOKiK*, press release, 31.03.2021, [https://uokik.gov.pl/news.php?news\\_id=17354](https://uokik.gov.pl/news.php?news_id=17354) (accessed 12.12.2023).

<sup>36</sup> UOKiK decision on the initiation of antimonopoly proceedings of 23 November 2022 (DOK-1.410.3.2022.AG.PD). See also: UOKiK, *Dahua Technology Poland – suspicion of collusion*

published by UOKiK regarding any new competition-related charges or decisions against managers in the course of 2023.

It is interesting to note the types of anti-competitive behavior for which charges were addressed against managers. While only one such decision concerned pure vertical price restrictions (DOK-4/2021), all other concerned more complex cases, based on the combination of various activities that could also meet the hypotheses of various practices from the statutory catalogue of anti-competitive practices. Two out of four decisions referred to various restrictions of competition including bid-rigging (Article 6(1)(7) of the Competition Act) (DOK-5/2020 and DOK-8/2021). In these cases, charges against managers did not refer to this provision but were based on the managers' contribution to the undertakings' infringement of the prohibition of price fixing agreements and/or market allocation schemes. All four decisions declared parallel infringement of Polish and EU law (Article 6 of the Competition Act and Article 101(1) of the Treaty).

### 3.2. WHO IS A PERSON HOLDING A MANAGERIAL POST?

According to the four decisions already issued, UOKiK most often made allegations against presidents<sup>37</sup> and members of management boards<sup>38</sup>, which sometimes were also the founders of the managed undertaking<sup>39</sup>. Addresses of UOKiK decisions could also combine function of the presidents of the board of one undertaking with functions in management boards of other undertakings belonging to the same capital group<sup>40</sup>. On a number of occasions a given member of the management board was responsible for the implementation of a specific sales, marketing or pricing policy to which the allegations were related<sup>41</sup>.

UOKiK also held responsible persons who held managerial functions while not being members of the management body: attorney-in-fact<sup>42</sup> and managing director<sup>43</sup> (also when they combined various functions and responsibilities in the same undertaking<sup>44</sup>). When managers were not members of management bodies, UOKiK verified their actual organizational role in the structure of the undertak-

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*with distributors and a fine for hindering the search*, press release, 28.11.2022, [https://uokik.gov.pl/news.php?news\\_id=19082](https://uokik.gov.pl/news.php?news_id=19082) (accessed 12.12.2023).

<sup>37</sup> 10 managers (2 in decision DOK-5/2020; 4 in decision DOK-6/2020; 1 in decision DOK-4/2021; 3 in decision DOK-8/2021).

<sup>38</sup> 6 managers (2 in decision DOK-6/2020; 1 in decision DOK-4/2021; 3 in decision DOK-8/2021, incl. one against whom the proceeding was terminated).

<sup>39</sup> 8 presidents of management boards (4 in decision DOK-6/2020; 4 in decision DOK-8/2021).

<sup>40</sup> 2 managers (1 in decision DOK-5/2020; 1 in decision DOK-8/2021).

<sup>41</sup> 6 managers (2 in decision DOK-4/2021; 4 in decision DOK-8/2021).

<sup>42</sup> 2 in decision DOK-8/2021.

<sup>43</sup> 2 in decision DOK-8/2021.

<sup>44</sup> 1 attorney-in-fact and managing director, 1 attorney-in-fact and director of logistics, 1 managing director empowered to represent the company – all in decision DOK-8/2021.

ing. For example, in one case UOKiK took into account that the attorney-in-fact was also the managing director with a wide range of duties, corresponding in practice to the function of an active member of the management board (in particular the manager in question had a decisive role in shaping the undertaking's sales activities)<sup>45</sup>.

### 3.3. STATUTORY CONDITIONS FOR MANAGER'S LIABILITY

The decisions discussed show the first tendencies in the interpretation of the statutory conditions of the manager's liability and factors determining the amount of financial penalties.

Managers exercising their tasks during the period when the anti-competitive agreement took place can be held responsible for permitting the undertaking to infringe the said prohibitions (Article 6a). Both actions and omissions of the manager are assessed. Effectively, while assessing the above-mentioned condition UOKiK takes into account the position of a given manager in the undertaking's organizational structure as well as the manager's knowledge and role in the infringement. UOKiK emphasized that "the legislator expects UOKiK to thoroughly analyze the actual nature of the behavior of managers in individual cases"<sup>46</sup>. In individual cases UOKiK identified various forms of active actions of managers aimed at applying anti-competitive arrangements: active engagement in coordination of activities between the undertakings<sup>47</sup>, participation in a meeting that led to the extension of the scope of anti-competitive arrangements<sup>48</sup>, negotiating terms of participation of a new participant in the agreement<sup>49</sup>; conducting internal investigations to determine whether employees are complying with anti-competitive arrangements<sup>50</sup>, signing the final version of anti-competitive agreements<sup>51</sup> and sending e-mails to the competitor confirming compliance with collusive arrangements<sup>52</sup>. In one of the cases, UOKiK discontinued proceedings against one member of the management board due to the lack of evidence of her knowledge of the infringement<sup>53</sup>.

Not only active participation in the conclusion of the agreement was considered meaningful. UOKiK also took the manager's lack of reaction to other manager's particular business decisions of a clear anti-competitive character

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<sup>45</sup> Decision DOK-8/2021, (3)65-367.

<sup>46</sup> Decision DOK-8/2021, para. 503.

<sup>47</sup> Decision DOK-5/2020, para. 383.

<sup>48</sup> Decision DOK-8/2021, para. 455.

<sup>49</sup> Decision DOK-6/2020, para. 722.

<sup>50</sup> Decision DOK-8/2021, para. 387.

<sup>51</sup> Decision DOK-5/2020, paras 384–395.

<sup>52</sup> Decision DOK-5/2020, para. 396.

<sup>53</sup> Decision DOK-8/2021, paras 815–819.

accompanied by the manager in question organizational steps ensuring compliance with anti-competitive policy (e.g. signing agreements containing clauses considered anticompetitive) as a proof of this manager's non-compliance with Competition Act<sup>54</sup>. In another case, the manager's antitrust liability was based on the fact of his permission given to subordinates to conduct appropriate discussions with competitors, which was subsequently followed by information that the manager received about such contacts with competitors and of their anti-competitive nature<sup>55</sup>.

Application of the Competition Act to managers requires an analysis of whether the manager acted intentionally. UOKiK treats managers' actions as intentional when they demonstrate awareness of the infringement<sup>56</sup>. Such awareness was derived by UOKiK, for example, from managers' encouragement of the counterpart in another undertaking to communicate directly instead of the written form in order to ensure secrecy of the collusion<sup>57</sup> and initiative taken for the removal of anti-competitive conditions from contracts with other undertakings, while continuing the anti-competitive conduct resulting from these provisions<sup>58</sup>. In another case the manager warned the undertaking's personnel not to talk about market division in communication with the media explicitly "because it is against the rules of competition"<sup>59</sup>. In case of price rigging, the awareness of the infringement was derived from the manager's written declaration that certain contested actions "prevent price competition"<sup>60</sup>.

In case of the manager's omissions, deliberate intent was justified by the manager not taking action to withdraw from the alleged infringement "even though he was aware" that the undertaking participated in the infringement<sup>61</sup>. The intentional nature of the manager's actions was also indicated by the obviously anti-competitive nature of the arrangements<sup>62</sup>, as well as continuation of activities questioned by UOKiK, despite the fact that the representative of the undertaking's supervisory authority drew attention to the possibility of infringement<sup>63</sup>. In the case of the head of marketing it was about the fact that they knew about the undertaking's participation in a market division agreement, adjusting the geographical scope of marketing activities so that they were not carried out in the area assigned to the competitor<sup>64</sup>. In case of a manager of a parent undertaking

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<sup>54</sup> Decision DOK-4/2021, paras 234–238.

<sup>55</sup> Decision DOK-8/2021, paras 419 and 429.

<sup>56</sup> Decision DOK-6/2020, para. 724.

<sup>57</sup> Decision DOK-5/2020, paras 387–388.

<sup>58</sup> Decision DOK-4/2021, para. 242.

<sup>59</sup> Decision DOK-5/2020, para. 399.

<sup>60</sup> Decision DOK-4/2021, para. 241.

<sup>61</sup> Decision DOK-4/2021, paras 234–235.

<sup>62</sup> Decision DOK-5/2020, paras 391 and 403.

<sup>63</sup> Decision DOK-6/2020, paras 766–769.

<sup>64</sup> Decision DOK-8/2021, paras 400–406.

held responsible for the subsidiary, the premise of intentionality was derived from the fact that the manager received “unambiguous and clear” information about the subsidiary’s anti-competitive contacts with competitors which did not result in any action taken to eliminate the infringement, which was understood as a “green light” to further anti-competitive conduct<sup>65</sup>.

According to UOKiK, intentionality of a manager’s anti-competitive conduct cannot be excluded by the fact that the manager is a citizen of another European country, not fluent in Polish, or that he consulted his business activities with professional lawyers, as well as that he acted in trust in the co-participant of the agreement, which was an undertaking controlled by the State Treasury<sup>66</sup>.

It is worth noting that in the case of multi-faceted infringements (e.g., price fixing and division of market), UOKiK determined the intentionality separately in relation to each manifestation of infringement (each of the identified categories of prohibited agreements). As a result, UOKiK could be considered that certain managers acted intentionally in case of one of the alleged categories of agreements, while not in case of the others<sup>67</sup>.

### 3.4. IMPOSING FINES ON PERSONS HOLDING MANAGERIAL POSTS

Observation of the amount of fines shows its slight increase in more recent decisions. Fines imposed in 2020 ranged from PLN 40,800 to PLN 302,000<sup>68</sup>, while in 2021 the fines amounted from PLN 13,125 to PLN 495,000<sup>69</sup>. However, this cannot be considered a regularity or the effect of changes in the UOKiK fining policy. The amount of financial penalties imposed by UOKiK is always the result of many factors. Also the nature of cases and the gravity of anti-competitive practices was not entirely comparable.

The amount of fines was determined based on statutory criteria (Article 111), with reference to the scheme for setting fines disclosed in UOKiK’s official guidelines<sup>70</sup>.

UOKiK assessed the nature of the infringement, which is the starting point for determining the basic (base) amount of the fine. In the analyzed decisions, the nature of the infringement committed by the manager corresponds to the nature of the infringement committed by the undertaking. In that regards the liability of managers strictly depends on the type of violation of the undertakings they man-

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<sup>65</sup> Decision DOK-8/2021, paras 433–434 and 437.

<sup>66</sup> Decision DOK-5/2020, para. 404.

<sup>67</sup> Decision DOK-8/2021, paras 407–408 and 434–435.

<sup>68</sup> Decision DOK-6/2020.

<sup>69</sup> Decision DOK-8/2021.

<sup>70</sup> UOKiK, 2020, *op. cit.*

age<sup>71</sup>. Importantly, if the manager was involved only partially in more complex cartel infringements, e.g. involving price fixing and market sharing, the fine was set at a lower level<sup>72</sup>.

The base amount is modified based on the manager's degree of influence over the infringement (high, moderate or low). UOKiK considered the extent of a manager's influence on the undertaking's infringement as high when such a person was responsible for managing the whole enterprise<sup>73</sup>, especially as the founder of the undertaking or the sole member of its management board<sup>74</sup>, when the manager in question was solely responsible for the undertaking's entering into agreement<sup>75</sup> and for the undertaking's strategy<sup>76</sup>, or when that person made the first (decisive) contact with competitors on behalf of a given undertaking<sup>77</sup>. When several members of the management board had formally equal positions, liability for the infringement was attributed to the person responsible for contacts with co-participants of the agreement<sup>78</sup>. A higher degree of manager's impact on the infringement was found in case of a person responsible for designing the scope of the agreement<sup>79</sup>, while a lower – in case of managers who showed a “reluctant attitude” towards the collusion<sup>80</sup>. Moderate impact of a given manager on the infringement was found evidenced by the fact that the anti-competitive agreement had already been enforced prior to his assignment<sup>81</sup>. Low degree of manager's influence on the infringement occurred when a member of the management board responsible for marketing, who did not make active arrangements with competitors, implemented undertaking's marketing policy in line with the objectives of the collusion<sup>82</sup>.

The amount of financial penalties imposed on managers was also determined by subjective circumstances (mitigating or aggravating). In cases concluded by decisions DOK-5/2020 and DOK-6/2020 no mitigating circumstances were identified, while in subsequent cases UOKiK considered as having mitigating effect e.g. cooperation of the manager in the course of a search that manifested itself in disclosure to UOKiK of certain evidence regarding the undertaking's participation in an infringement<sup>83</sup>. Among aggravating circumstances, UOKiK identi-

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<sup>71</sup> Decision DOK-6/2020, para. 883.

<sup>72</sup> Decision DOK-8/2021, para. 736.

<sup>73</sup> Decision DOK-4/2021, para. 347.

<sup>74</sup> Decision DOK-6/2020, para. 890.

<sup>75</sup> Decision DOK-6/2020, paras 898–899.

<sup>76</sup> Decision DOK-5/2020, para. 569.

<sup>77</sup> Decision DOK-8/2021, para. 741.

<sup>78</sup> Decision DOK-6/2020, para. 891.

<sup>79</sup> Decision DOK-6/2020, para. 896.

<sup>80</sup> Decision DOK-6/2020, para. 900.

<sup>81</sup> Decision DOK-8/2021, para. 743.

<sup>82</sup> Decision DOK-8/2021, paras 744 and 758.

<sup>83</sup> Decision DOK-8/2021, paras 767–769.

fied a person's significant role as an organizer of an infringement (coordinating communication between undertakings)<sup>84</sup>. Also pressure exerted on subordinates "much further than in a typical situation" to ensure that they implement anti-competitive arrangements was considered an aggravating circumstance<sup>85</sup>.

The last stage of setting a fine for a manager was an assessment of the adequacy of the sanction to be imposed. In that regard, UOKiK took into consideration the manager's overall economic situation. In one of the cases analyzed, UOKiK distinguished between "professional managers" and the founders, shareholders or stockholders of the undertaking<sup>86</sup>. UOKiK also compared the amount of manager's income with an average salary in the national economy or the basic emolument of Supreme Court judges<sup>87</sup>. In case of manager's significantly lower earnings, UOKiK found it reasonable to reduce the previously calculated penalties significantly<sup>88</sup>. UOKiK also considered a situation of major disparities between the earnings of individual managers penalized in the same case, reducing the amount of the penalty of the lower remunerated managers, from 30%, 40%<sup>89</sup> up to 50%<sup>90</sup>.

#### **4. SELECTED REFLECTIONS ON PROCEDURAL GUARANTEES FOR PERSONS HOLDING MANAGERIAL POSTS IN UOKiK PROCEEDINGS**

It has not yet been a decade since the introduction in the Polish law of regulations on antitrust liability of managers for allowing undertakings to infringe the prohibition of anti-competitive agreements. The body of judicial decisions in that matter, while still rather modest, gives an idea on how the rules in question are interpreted by UOKiK and to what extent the decision-making practice reflects statements or concerns formulated by legal scholars and commentators. The review of the legal rules and UOKiK past decisions concerning antitrust liability of persons holding managerial posts, as presented in this article, are a good basis to formulate my own reflections on the scope of managers' liability in the context of requirements for standards of procedural guarantees. Below I present the most important, in my opinion, issues in this regard that require changes in the decision-making practice of UOKiK or amendments to the Competition Act.

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<sup>84</sup> Decision DOK-6/2020, para. 905.

<sup>85</sup> Decision DOK-8/2021, para. 765.

<sup>86</sup> Decision DOK-6/2020, para. 914.

<sup>87</sup> Decision DOK-8/2021, para. 791.

<sup>88</sup> Decision DOK-6/2020, paras 922–925.

<sup>89</sup> Decision DOK-8/2021, paras 789–790.

<sup>90</sup> Decision DOK-4/2021, para. 383.

#### 4.1. IMPRECISION OF THE STATUTORY DEFINITION OF “A PERSON HOLDING A MANAGERIAL POST”

The scope of the term “a person holding a managerial post” has raised objections from the very beginning. It was pointed out that as a result of the application of the exemplification in Article 4(3a) of the Competition Act, it is not completely clear which persons other than those listed in the provision<sup>91</sup> can be viewed as “persons holding managerial posts”. In particular it was considered unclear what the status of executive directors, non-executive directors, nominee directors, alternate directors, managing directors, shadow directors and *de facto* directors was<sup>92</sup>. It was proposed that a given manager’s impact on the market behavior of the undertaking be taken into consideration<sup>93</sup>. According to some interpretations, legal entities could be considered “persons holding managerial posts” under certain conditions<sup>94</sup>. On the other hand, a narrow interpretation is recommended, which should exclude, for example, managers or directors of departments from the scope of antitrust liability under the actual definition on the “a person holding a managerial post”<sup>95</sup>.

Imprecise identification of entities subject to legal liability is a serious problem especially as quasi-criminal provisions are concerned. In the given circumstances the conformity of the definition of a person holding a managerial post with the *nullum crimen sine lege certa* principle is doubtful. Despite these objections, UOKiK decision-making policy so far has been relatively cautious, as it has mostly concerned presidents and members of management boards. Nevertheless, in specific situations managers holding other positions were also held responsible under the Competition Act, e.g. attorneys-in-fact, managing director, based on their actual role in the structure of the undertaking (see section 3.2 of this article). Therefore, it will not be an exaggeration to state that the perceived problems may become more visible as UOKiK’s activity develops.

#### 4.2. LIABILITY OF PERSONS WITH A DUAL STATUS OF MANAGER AND UNDERTAKING

An important issue, not addressed properly in the Competition Act, concerns individuals who have dual status of both an undertaking and a person holding

<sup>91</sup> Person in a managerial position and a member of the management body of an undertaking.

<sup>92</sup> M. Król-Bogomilska, *Najnowsze zmiany w zakresie sankcji penalnych w polskim prawie antymonopolowym a prawo unijne – kolejne podobieństwa i różnice*, ‘EPS’ 2015, No. 7, p. 9.

<sup>93</sup> M. Kulesza, *Zakres podmiotowy pojęcia osoby zarządzającej w znowelizowanej ustawie o ochronie konkurencji i konsumentów*, ‘iKAR’ 2015, No. 4(4), p. 109.

<sup>94</sup> A. Piszcz, 2014, *op. cit.*, p. 115, Nb 150.

<sup>95</sup> K. Kohutek, (in:) K. Kohutek, M. Sieradzka, *Ustawa o ochronie konkurencji i konsumentów. Komentarz*, 2nd edition, Warsaw 2014, p. 140.

a managerial post. That would be the case of individuals who run independent businesses (or who conduct business activity as part of a civil law partnership with another natural person), when they also manage the operation of such a business. Such a person is an undertaking in the light of the Competition Act (Article 4(1)) but also may be assumed a person holding a managerial post (Article 4(3a)). In addition, managers who provide management services for their client (certain undertaking) while formally having the status of an undertaking (being self-employed, acting under a managerial contract) may have the dual status of a manager and of an undertaking. Such managers actually act for the benefit of the managed undertaking, implementing the undertaking's business policy. Therefore from the perspective of EU competition law their position might be close to a concept of false self-employed persons<sup>96</sup> or an associated undertakings forming a single economic unit together with the principal undertaking (the undertaking that they are managing)<sup>97</sup>. However, in the light of Polish competition rules, they have the status of formally independent service providers (undertakings). As such, a manager, being a registered business entity, could formally become the addressee of UOKiK's decision as another party to an agreement, an undertaking – a cartel facilitator<sup>98</sup>, next to the undertaking he manages (liability for anti-competitive agreements does not require an undertaking to operate in the market affected by the collusion<sup>99</sup>).

Liability of persons with a dual status of a manager and an undertaking has been only partially addressed in the Competition Act. The Act guarantees that on its basis an individual of a dual nature will not be fined twice (as undertaking and manager) for the very same infringement. Pursuant to Article 106a(3), if such a person has already been fined as an undertaking, the financial penalty provided for managers shall not be imposed. Such a legal solution protects against double liability of individuals with a dual status. Unfortunately, it still leaves UOKiK the choice of whether to sanction such a person as a manager or as an undertaking.

Notwithstanding the gravity of this issue (the choice of basis of liability determines the scope of rights and obligations and the amount of fines), not much has changed in that respect due to the 2023 amendment to the Competition Act. The new Article 4a has been added, which provides that an individual who, as an

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<sup>96</sup> See: Guidelines on the application of Union competition law to collective agreements regarding the working conditions of solo self-employed persons (OJ C 374, 30.9.2022, pp. 2–13).

<sup>97</sup> See: G. Materna, *Zastosowanie zakazu porozumień ograniczających konkurencję do układów zbiorowych pracy*, 'EPS' 2015, No. 4, pp. 24–30.

<sup>98</sup> For more about cartel facilitators see M. Król-Bogomilska, *Zwalczanie karteli w prawie antymonopolowym i karnym*, Warsaw 2013, pp. 468–470; K. Menszig-Wiese, *Pomocnictwo do kartelu: między efektywnością egzekwowania prawa konkurencji a ochroną praw przedsiębiorców – przegląd orzecznictwa*, 'EPS' 2019, No. 10, pp. 40–45; K. Menszig-Wiese, *Odpowiedzialność antymonopolowa pomocnika kartelu w prawie Unii Europejskiej*, Warsaw 2022.

<sup>99</sup> Judgment of the Court of 22 October 2015, C-194/14, *AC-Treuhand AG v European Commission*, ECLI:EU:C:2015:717, para. (3)5.

undertaking, has violated competition law, “is liable for this violation on the terms set out in the Competition Act” and the provisions of that Act apply accordingly, excluding provisions on the liability of managers. This new provision repeats the guarantee for the natural person of dual status of not being fined twice for the very same infringement. Moreover, according to the official justification of this amendment, its purpose disregards the issue of procedural guarantees, focusing on the effectiveness of UOKiK’s intervention (it is supposed to guarantee liability of natural persons who ceased to conduct business activity after having committed infringement<sup>100</sup>).

In my opinion there is a basis for Article 4a of the Competition Act to be interpreted as a guarantee for individuals with a dual status to be held liable for the infringement of competition law as an undertaking, and not as a manager. Unfortunately, UOKiK understands the meaning of this provision in a different way. Therefore, it is not certain whether UOKiK’s practice in the future will be as proposed above. It is thus safe to say that this amendment does not increase legal certainty for individuals whose status under competition law is not uniform.

#### 4.3. DOUBTS ABOUT THE MEANING OF MANAGER’S INTENT

A person holding a managerial post is liable under the Competition Act only for intentional acts or omissions and it is UOKiK’s duty to prove the manager’s reprehensible intention. Negligence or recklessness precludes manager’s antitrust liability. However, although UOKiK imposes financial sanctions of a quasi-criminal nature, the category of intentionality is not precisely defined. For instance, it is not clear whether both of two kinds of intentions recognized under penal law (direct and possible intention) are applicable. Due to the difficulties in defining possible intent in criminal law, it has been postulated not to use the broad concept of intention for the antitrust liability of managers<sup>101</sup>.

The issue discussed here is also related to a much broader concern of the legitimacy of references to penal law when interpreting the Competition Act. Based on the jurisprudence it is not clear to what extent UOKiK may rely on the criminal law principles when interpreting competition law. On one hand the Supreme Court approved references by analogy to concepts taken from the Penal Code in the absence of similar provisions in the Competition Act<sup>102</sup> or when competition law uses concepts taken directly from penal law<sup>103</sup>. As a result, in the field of merger control the Court relied on the criminal law interpretation of intentionality in order to demonstrate the intentionality of actions taken by an undertaking

<sup>100</sup> Parliamentary paper, p. 11.

<sup>101</sup> M. Król-Bogomilska, 2015, *op. cit.*, pp. 9–10.

<sup>102</sup> Judgement of the Supreme Court of 29 July 2020, I NSK 8/19, LEX 3037828.

<sup>103</sup> Judgement of the Supreme Court of 15 October 2019, I NSK 62/18, LEX 2773256.

under the Competition Act<sup>104</sup>. Unfortunately, in other cases the Supreme Court clearly stated<sup>105</sup> that “there are no justified grounds for applying the provisions of the general part of the Penal Code under the regime of administrative liability”<sup>106</sup>.

Greater clarity on this issue would be desirable for the benefit of the level of legal certainty.

#### 4.4. INCOMPLETE PROTECTION AGAINST MANAGER’S MULTIPLE LIABILITY IN CASE OF COMPLEX CARTELS

Under the Competition Act the manager’s liability does not cover collusive tendering (Article 6(1)(7) of the Competition Act) in order to safeguard the same natural person against being fined both under the competition rules and Penal Code (Article 305).

When the provisions on managerial liability came into force, I expressed reservations about the completeness of the statutory protection against managers’ double liability. I drew attention to UOKiK’s discretion as to legal qualification of anti-competitive agreements. Specifically, agreements corresponding to Article 6(1)(7) (bid rigging) may also correspond to other categories of prohibited agreements, e.g. market sharing (Article 6(1)(3)). I postulated that in such cases UOKiK should strictly apply the law, always applying Article 6(1)(7) to undertakings and in effect not applying competition law against managers<sup>107</sup>.

The decision-making practice revealed another problem. Managers may be held liable under the Competition Act for complex collusion including collusive tendering in addition to other anti-competitive infringements. This way, the declared exclusion of antitrust liability of managers for collusive tendering becomes purely formal, and not real. This thesis is well exemplified in UOKiK’s decision DOK-8/2021, which concerned infringement consisting in sharing both “regular” and tender customers, and also price fixing (subsection (1)81). UOKiK recognized the entire arrangement as a “single and continuous infringement” pursued for a common purpose (subsection (2)71). Undertakings were penalized for violating Article 6(1)(1), Article 6(1)(3) and Article 6(1)(7) of the Competition Act, while managers for violation of only Article 6(1)(1) and (3).

This shows that in case of one continuous violation, the activities of the colluding parties regarding tenders and other aspects may overlap and may be difficult to separate. UOKiK then fines managers by simply removing Article 6(1)(7) from the legal basis of the charges. In effect, managers can be held liable by UOKiK when complex cartels are concerned, which include collusions in tenders.

<sup>104</sup> Judgement of the Supreme Court of 21 February 2018, III SK 1/17, LEX 2539157.

<sup>105</sup> Judgement of the Supreme Court of 15 February 2019, I NSK 4/18, LEX 2643239.

<sup>106</sup> For more, see G. Materna, 2022, *op. cit.*, pp. 189–208.

<sup>107</sup> G. Materna, A. Zawłocka, 2015, *op. cit.*, pp. 20.

It means that the risk of manager's double liability (antitrust and penal) has not been eliminated (although this was the legislator's intention) in the case of such multi-faceted collusion.

#### **4.5. INCOMPLETE PROTECTION AGAINST DISPROPORTIONATE PENALTIES IN THE EVENT OF DOUBLE LIABILITY FOR THE SAME INFRINGEMENT**

As shown above, a manager's double liability for bid-rigging (under antitrust and penal law) has not been entirely eliminated. One can get the impression that as regards manager's legal liability, the main goal of the most recent amendments was to take care of the interests of managers of leniency applicants and not others. The amendment of 9 March 2023 of the Competition Act excluded criminality under the Penal Code of natural persons who were leniency applicants or acted on behalf of the undertaking who is the leniency applicant (Article 305(6) of the Penal Code) and introduced rules on the exchange of information between antitrust and penal law institutions in order to provide information for the prosecutor to establish the existence of grounds for the perpetrator of bid-rigging not to be penalized under penal law (Article 113l of the Competition Act).

Unfortunately, no mechanism was introduced to safeguard proportionality of the amount of fines determined under the Competition Act, when the same natural person is subject of antitrust and penal proceeding. It is even less understandable when one takes into account that such mechanisms were introduced in favor of individuals subject to multiple investigations in consumer cases. As described above (section 2.2 of this article), in such cases UOKiK determines the amount of the fine taking into account sanctions imposed for the same infringement by other authorities in other EU Member States (Article 111(5)).

It seems reasonable for a similar mechanism to be set up also in antitrust cases. It should be recommended for such a competition-related mechanism to take into account penalties imposed for the same conduct in other domestic proceedings (e.g. criminal court proceedings concerning bid rigging). In its most recent decisions the Court of Justice stressed the necessity of clear and precise rules and coordination between the authorities executing the law against the same acts or omissions, as well as the confirmation that the overall penalties imposed by the concurrent authorities correspond to the seriousness of the offences committed<sup>108</sup>.

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<sup>108</sup> Judgment of the Court of 22 March 2022, C-117/20, *bpost SA v Autorité belge de la concurrence*, ECLI:EU:C:2022:202.

#### 4.6. BROAD OBLIGATIONS AND LIMITED GUARANTEES

The 2023 amendment to the Competition Act broadened UOKiK's investigatory powers which are not anymore aimed only at undertakings. While legal entities will surely be statistically predominant addressees of UOKiK's searches and requests for information, UOKiK does not need to rely only on them now. The range of addressees of UOKiK's written requests for information and documents encompasses natural or legal persons who are non-undertakings – which may include managers but also regular employees (Article 50(1)). Failure to comply with the request may cost up to 3% of the person's total annual turnover (Article 108a).

Individuals are obliged to respond to UOKiK's requests save for situations when it would result in criminal liability of that person or the person's closest circle<sup>109</sup> (Article 50(4)). The right to avoid self-incrimination is extended only to some extent on strictly antitrust liability. Article 50(5) stipulates that information provided under UOKiK's request by a natural person cannot be used to the detriment of that person or individuals from that person's closest circle when UOKiK is imposing a fine on a manager for contributing to the infringement of Article 6 of the Competition Act or Article 101(1) of the Treaty (Article 106a). Unfortunately, guarantees resulting from this legal solution are definitely incomplete. Firstly, the person in question may not refuse to provide information and UOKiK is not prohibited from making use of this information to impose fines on the undertaking the manager is working for. Secondly, the provision in question only prohibits UOKiK from using information received from an individual with the view to sanctioning that person as a manager (under Article 106a). At the same time, it leaves open the usage of information received from such an individual with the view to sanctioning that person as an undertaking. This translates into potential risks for individuals with dual roles of managers and undertakings.

### 5. CONCLUSION

As discussed in the article, the manager's legal liability under the Competition Act is still a good source of reflections on the completeness of statutory rules in that regard and standards of procedural guarantees. UOKiK's decision-making practice only partially answers the doubts formulated. However, despite the rather symbolic number of antitrust proceedings referring to managers' liability for infringements of competition, the first four decisions, which were discussed

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<sup>109</sup> “Spouses, ascendants, descendants, siblings, and relatives by affinity in the same line or degree, any persons related by way of adoption, guardianship or custody, as well as their partners”.

in this article, give a better idea of the criteria used by UOKiK for assessing who a person holding a managerial post under the Competition Act is and what the conditions of the manager's liability are.

The article presents arguments justifying doubts about the imprecision of the statutory definition of "a person holding a managerial post", as well as other conditions of a manager's liability (the concept of intentional action or omission). I also explained why the position of individuals with a dual status of a manager and an undertaking is insecure, creating additional risks. Unfortunately, the case law draws attention to the incompleteness of protection against managers' multiple liability (based on competition and penal law), when complex cartel cases are concerned. As explained, also mechanisms preventing individuals from incurring multiple liability for the same action are incomplete. The final argument discussed in this article refers to the 2023 amendment to the Competition Act which broadens individuals' obligations with limited guarantees. Each of these issues requires further discussion which should lead to changes in the UOKiK's decision-making practice or amendments to the Competition Act.

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