86/6/A/2009

JUDGMENT
of 23 June 2009
Ref.No. K 54/07*

In the Name of the Republic of Poland

The Constitutional Tribunal, in a bench composed of:

Janusz Niemcewicz – Presiding Judge
Zbigniew Cieślak
Marian Grzybowski – Judge Rapporteur
Wojciech Hermeliński
Ewa Łętowska,

Krzysztof Zalecki – Recording Clerk,

having considered, at the hearing on 22 June 2009, in the presence of the applicants, the Sejm, the Prime Minister and the Public Prosecutor-General, the applications submitted by two groups of the Sejm Deputies to determine the conformity of:

1) the Central Anti-Corruption Bureau Act of 9 June 2006 (Journal of Laws - Dz. U. No. 104, item 708) to Article 2, Article 7, Article 10, Article 20, Article 22, Article 30, Article 31(3), Article 42(1), Article 47, Article 50, Article 51 and Article 202(1) of the Constitution, to Article 7(1), Article 8 and Article 18 of the Convention for the Protection of Human Rights and Fundamental Freedoms, done at Rome on 4 November 1950 (Journal of Laws - Dz. U. of 1993 No. 61, item 284), to Article 20 of the Criminal Law Convention on Corruption, done at Strasbourg on 27 January 1999 (Journal of Laws - Dz. U. of 2005 No. 29, item 249), as well as to the Preamble, Article 5, Article 6 and Article 7 of the Council of Europe Convention No. 108 for the Protection of Individuals with regard to the Automatic Processing of Personal Data, done at Strasbourg on 28 January 1981 (Journal of Laws - Dz. U. of 2003 No. 3, item 25);
2) Article 1(3) and Article 2(1)(1)(b), (c) and (d) of the Act mentioned in point 1 above to Article 2, Article 20, Article 22, Article 31(3) and Article 42(1) of the Constitution, and to Article 7(1) of the Convention for the Protection of Human Rights and Fundamental Freedoms;
3) Article 2(1)(2)-(5) of the Act mentioned in point 1 to Article 2, Article 10 and Article 202(1) of the Constitution;
4) Article 5(2) and (3), Article 6(1) and Article 12(1) of the Act mentioned in point 1 to Article 2 and Article 10 of the Constitution as well as to Article 20 of the Criminal Law Convention on Corruption;
5) Article 22 of the Act mentioned in point 1 to Article 47, Article 51 in conjunction with Article 31(3) and Article 30 of the Constitution, to Article 8 and Article 18 of the Convention for the Protection of Human Rights and Fundamental Freedoms as well as to the Preamble, Article 5, Article 6 and

* The operative part of the judgment was published on 2 July 2009 in the Journal of Laws - Dz. U. No. 105, item 880.

Article 7 of the Council of Europe Convention No. 108 for the Protection of Individuals with regard to the Automatic Processing of Personal Data;

6) Article 31(3) of the Act mentioned in point 1 to Article 2 and Article 32(1) of the Constitution;

7) Article 31(3) in conjunction with Article 32 and Article 33 of the Act mentioned in point 1 to Article 20 and Article 22 in conjunction with Article 31(3) of the Constitution;

8) Article 40 of the Act mentioned in point 1 to Article 2, Article 47 and Article 50 of the Constitution as well as to Article 8 of the Convention for the Protection of Human Rights and Fundamental Freedoms;

9) Article 43(2) of the Act of 29 August 1997 on the Protection of Personal Data (Journal of Laws - Dz. U. of 2002 No. 101, item 926, as amended), with amendments introduced by Article 178 of the Act mentioned in point 1, to Article 2, Article 47 and Article 51 in conjunction with Article 31(3) of the Constitution as well as to the Preamble and Article 6 of the Council of Europe Convention No. 108 for the Protection of Individuals with regard to the Automatic Processing of Personal Data;

10) § 3 and § 6(1) of the Regulation of the Prime Minister of 27 September 2006 on the scope, terms and procedure regarding the transfer of information to the Central Anti-Corruption Bureau by the organs, services and institutions of the state (Journal of Laws - Dz. U. No. 177, item 1310)

to Article 22(9) in conjunction with Article 22(2) of the Act mentioned in point 1, and thus to Article 92(1) and Article 47 and Article 51(2) in conjunction with Article 31(3) and Article 51(5) of the Constitution, to Article 8 in conjunction with Article 18 of the Convention for the Protection of Human Rights and Fundamental Freedoms as well as to the Preamble, Article 5(b) and (c), Article 6 and Article 7 of the Council of Europe Convention No. 108 for the Protection of Individuals with regard to the Automatic Processing of Personal Data,

adjudicates as follows:

I

1. Article 1(3) of the Central Anti-Corruption Bureau Act of 9 June 2006 (Journal of Laws - Dz. U. No. 104, item 708, No. 158, item 1122 and No. 218, item 1592, of 2008 No. 171, item 1056 as well as of 2009 r. No. 18, item 97) **insofar as it defines corruption in the private sector as the conduct of any person not performing a public function, without narrowing down the definition with the premisses of socially detrimental reciprocity:**

a) is inconsistent with Article 2, Article 22 and Article 31(3) of the Constitution of the Republic of Poland,

b) is inconsistent with Article 7(1) of the Convention for the Protection of Human Rights and Fundamental Freedoms, done at Rome on 4 November 1950, subsequently amended by Protocols No. 3, 5 and 8 as well as supplemented with Protocol No. 2 (Journal of Laws - Dz. U. of 1993 No. 61, item 284, of 1995 No. 36, items 175, 176 and 177, of 1998 No. 147, item 962 as well as of 2003 No. 42, item 364),

c) is not inconsistent with Article 20 and Article 42(1) of the Constitution.

2. Article 1(3) of the Act mentioned in point 1 – due to the facts that it contains expressions which are semantically unclear and its wording does not meet the requirements of formal logic – is inconsistent with the principle of appropriate legislation, as expressed in Article 2 of the Constitution.

3. Article 2(1)(1)(b), (c) and (d) as well as Article 2(3) of the Act mentioned in point 1:

a) is consistent with Article 2, Article 31(3) and Article 42(1) of the Constitution,

b) is consistent with Article 7(1) of the Convention mentioned in point 1,

c) is not inconsistent with Article 20 and Article 22 of the Constitution.

4. Article 2(1)(2)-(5) of the Act mentioned in point 1:

a) is consistent with Article 2 of the Constitution,

b) is not inconsistent with Article 10 and Article 202(1) of the Constitution.

5. Article 5(2) and (3), Article 6(1) and Article 12(1) of the Act mentioned in point 1:

a) are consistent with Article 2 of the Constitution as well as with Article 20 of the Criminal Law Convention on Corruption, done at Strasbourg on 27 January 1999 (Journal of Laws - Dz. U. of 2005 No. 29, item 249)**,**

b) are not inconsistent with Article 10 of the Constitution.

6. Article 22(1)-(3) of the Act mentioned in point 1, insofar as it permits obtaining (also – confidentially), collecting, verifying and processing information which is necessary to combat offences in the realm falling within the statutory scope of tasks of the Central Anti-Corruption Bureau:

a) is consistent with Article 47 in conjunction with Article 31(3), Article 51 in conjunction with Article 31(3) and Article 30 of the Constitution,

b) is consistent with Article 8 and Article 18 of the Convention mentioned in point 1, as well as with the Preamble, Article 5, Article 6 and Article 7 of the Council of Europe Convention No. 108 for the Protection of Individuals with regard to the Automatic Processing of Personal Data, done at Strasbourg on 28 January 1981 (Journal of Laws - Dz. U. of 2003 No. 3, item 25 and of 2006 No. 3, item 15)**.**

7. Article 22(4)-(7) of the Act mentioned in point 1, insofar as it permits the Central Anti-Corruption Bureau to obtain data specified in Article 27(1) of Act of 29 August 1997 on the Protection of Personal Data (Journal of Laws - Dz. U. of 2002 No. 101, item 926, and No. 153, item 1271, of 2004 No. 25, item 219 and No. 33, item 285, of 2006 No. 104, items 708 and 711, as well as of 2007 No. 165, item 1170 and No. 176, item 1238) **as well as making use of the data of that type and the information obtained in the course of operational activities, without the knowledge and consent of the person whom they concern – without guaranteeing the instruments of control over the manner of storing and verifying data and the way of eliminating data which are redundant for carrying out the statutory tasks of the Central Anti-Corruption Bureau – is inconsistent with Article 47 and Article 51 in conjunction with Article 31(3) and Article 30 of the Constitution, with Article 8 and Article 18 of the Convention mentioned in point 1, as well as with the Preamble, Article 5, Article 6 and Article 7 of the Council of Europe Convention 108, as mentioned in point 6 .**

8. Article 22(8)-(10) of the Act mentioned in point 1 is inconsistent with Article 51(5) of the Constitution.

9. Article 31(3) of the Act mentioned in point 1 is consistent with Article 2 and Article 32(1) of the Constitution.

10. Article 31(3) in conjunction with Article 32 and Article 33 of the Act mentioned in point 1, insofar as it permits surveillance activities necessary for the protection of state security, public order or an important public interest:

a) is consistent with Article 22 in conjunction with Article 31(3) of the Constitution,

b) is not inconsistent with Article 20 of the Constitution.

11. Article 40 of the Act mentioned in point 1, insofar as it permits an inspection of immovable property or other assets, without revealing the manner of use and storage of the data obtained this way, in particular the data regarding third parties who are not obliged to submit asset declarations:

a) is inconsistent with Article 47 and Article 50 with Article 31(3) of the Constitution,

b) is inconsistent with Article 8 of the Convention mentioned in point 1,

c) is not inconsistent with Article 2 of the Constitution.

12. Article 43(2) of the Personal Data Protection Act mentioned in point 7, as amended by Article 178 of the Act mentioned in point 1, is consistent with Article 2, Article 47 and Article 51 in conjunction with Article 31(3) of the Constitution as well as with the Preamble and Article 6 of the Council of Europe Convention 108 mentioned in point 6.

13. § 3 and § 6(1) of the Regulation of the Prime Minister of 27 September 2006 on the scope, terms and procedure regarding the transfer of information to the Central Anti-Corruption Bureau by the organs, services and institutions of the state (Journal of Laws - Dz. U. No. 177, item 1310) **is inconsistent with Article 51(5) of the Constitution and, moreover, with Article 22(9) in conjunction with Article 22(2) of the Act mentioned in point 1, with Article 8 in conjunction with Article 18 of the Convention mentioned in point 1 as well as with the Preamble, Articles 5-7 of the Council of Europe Convention 108 mentioned in point 6.**

II

The provisions set forth in Part I points 1, 2, 7, 8, 11 and 13 shall become null and void after the elapse of 12 (twelve) months from the date of the publication of this judgment in the Journal of Laws of the Republic of Poland (Pol. *Dziennik Ustaw Rzeczypospolitej Polskiej*).

Moreover, the Tribunal decides:

pursuant to Article 39(1)(1) of the Constitutional Tribunal Act of 1 August 1997 (Journal of Laws - Dz. U. No. 102, item 643, of 2000 No. 48, item 552 and No. 53, item 638, of 2001 No. 98, item 1070 as well as of 2005 No. 169, item 1417), **to discontinue the proceedings as to the remainder.**

STATEMENT OF REASONS

I

1. On 9 November 2007, a group of Deputies from the Sejm of the Republic of Poland referred an application to the Tribunal for it to determine the non-conformity of the provisions of the Central Anti-Corruption Bureau Act of 9 June 2006 (Journal of Laws - Dz. U. No. 104, item 708; hereinafter: the Central Anti-Corruption Bureau Act), indicated in the application, to the Constitution of the Republic of Poland and the Convention for the Protection of Human Rights and Fundamental Freedoms, done at Rome on 4 November 1950 (Journal of Laws - Dz. U. of 1993 No. 61, item 284, as amended; hereinafter: the Convention for the Protection of Human Rights).

1.1. The applicant alleged that Article 1(3) and Article 2(1)(b), (c) and (d) of the Central Anti-Corruption Bureau Act was inconsistent with Article 2, Article 31(3) and Article 42(1) of the Constitution, and with Article 7(1) of the Convention for the Protection of Human Rights, as well as with Article 20 and Article 22 of the Constitution. In the applicant's opinion, the statutory definition of corruption, as expressed in Article 1(3) of the Central Anti-Corruption Bureau Act, due to not narrowing down the definition of corruption in the private sector by specifying that corruption involves socially detrimental reciprocity, infringes on Article 2 and Article 31(3) of the Constitution, clashing with the principle of a state ruled by law (Article 2) and the principle of proportionality (Article 31(3) of the Constitution). In the applicant's view, unlike in state and local self-government institutions which base their decision-making process solely on the binding law (Article 7 of the Constitution), private law entities do not have to have only legal motives, provided they do not breach legal restrictions and imperatives. According to the applicant, different scope of the object of protection against corruption in the private and public sectors should determine the different scope of the object of the two types of corruption.

The challenged provision infringes on the principle of appropriate legislation, derived from Article 2 of the Constitution, by the use of vague and ambiguous terms. As a result of such wording of Article 1(3) of the Central Anti-Corruption Bureau Act, there may be practical difficulties in distinguishing socially detrimental corruption from ordinary contractual provisions, formulated on the basis of the civil-law freedom to contract.

In the applicant's view, such a broad legal definition of corruption clashes with the freedom of economic activity enshrined in Article 20 of the Constitution. In the part regarding corruption in the private sector, it restrains the economic freedom in such a way that the statutory restriction goes beyond the protection of any reasonable interest, and hence is – in the applicant's opinion – inconsistent with Article 22 of the Constitution. Moreover, according to the applicant, the non-conformity of the same degree to the Constitution is also the case with Article 2(1)(1)(b), (c) and (d) of the Central Anti-Corruption Bureau Act.

The Central Anti-Corruption Bureau (the CBA) has been called into existence for the purpose of investigating, detecting and preventing offences (Article 2(1) of the Central Anti-Corruption Bureau Act) as well as in order to conduct other related activity (paragraphs 2-4). For that reason, in the applicant's opinion, the definition of corruption should meet the statutory requirement of specificity of prohibited acts (and their categories) which are to be investigated by the CBA. This requirement primarily arises from Article 42 of the Constitution. The substantive elements of an act recognised as criminal should be defined in a statute (pursuant to the constitutional principle that the individual's freedoms are regulated

exclusively by statute, which is binding in this regard) in a complete, precise and unambiguous way. The legislator may not require the citizen to be aware of a legal prohibition if he himself is not capable of precisely specifying its limits. This would be contrary to the statutory requirement of specificity of a prohibited act (Article 42(1), first sentence, of the Constitution), but also to the principle that the individual's freedoms are regulated exclusively by statute, which is broadly conceived in constitutional jurisprudence and which arises from Article 31(3) of the Constitution. The equivalent of Article 42(1) of the Constitution is Article 7(1) of the Convention for the Protection of Human Rights, which contains the entirety of a criminal law's response to a offence. The statutory definition of corruption – in the applicant's view – does not fulfil the requirements of the Convention.

1.2. By contrast, as regards the provisions of Article 22 of the Central Anti-Corruption Bureau Act, the applicant argued, , that they did not contain a restriction that the CBA obtained personal data provided that they are indispensible for carrying out specific proceedings effectively, although such a requirement ensues *expressis verbis* from Article 51(2) of the Constitution. Article 22 of the challenged Act merely provides for the CBA to be able to store any personal data, as long as this falls within the scope of its competence and is "justified by the character of its activities". In the applicant's opinion, such wording is too general and as such excessively interferes with the area of privacy (Article 47 of the Constitution) and with the information autonomy of the individual (Article 51 of the Constitution). Moreover, such rendering does not abide by the principle of proportionality (Article 31(3) of the Constitution).

In the applicant's view, Article 22 of the Central Anti-Corruption Bureau Act constitutes a legal basis for devising a database of a general character, which may encompass not only information pertaining to the specific case handled by the CBA, but also information "which is needed only potentially (hypothetically in the view of the CBA itself)", which could be used in the future in unspecified circumstances. The restriction on the right to private life, without specifying the purposes of that restriction which arises – in the applicant's opinion – from Article 22 of the Central Anti-Corruption Bureau Act, not only goes beyond the framework of the requirements of statutory specificity for the interference of public authorities and the necessity for it in a democratic society (Article 8(2) of the Convention for the Protection of Human Rights), but also disregards the requirement that the restriction on the right to private life shall be applied only for purposes for which it has been prescribed (Article 18 of Convention for the Protection of Human Rights).

Moreover, the challenged Act does not provide for judicial review of legality of the CBA's activity, with regard to collecting and processing personal data pursuant to Article 22 of the said Act. The person concerned may not exercise, in particular, the right which is guaranteed to him/her in Article 51(4) of the Constitution (by demanding the correction or deletion of untrue or incomplete information, or information obtained in a way which is inconsistent with the Act). Consequently, in the applicant's opinion, objective verification of the relevant CBA's actions is not possible.

Article 22(7) of the Central Anti-Corruption Bureau Act mentions the so-called sensitive data (including: the data concerning sexual life) as those that may also be available to the CBA. In the applicant's view, such a solution should be regarded as inconsistent with the constitutional protection of privacy, which finds its basis in Article 31(3), second sentence, and in Article 30 of the Constitution (inalienable dignity of the person). Additionally, Article 22 of the Central Anti-Corruption Bureau Act does not provide for the possibility of making the obtained data available to the persons whom they concern. This gives rise to concern from the point of view of the standard ensuing from Article 8 of the Convention for the Protection of Human Rights.

1.3. The applicant argued that the provisions of Article 31(3) of the Central Anti-Corruption Bureau Act were inconsistent with Article 2 and Article 32(1) of the Constitution. Furthermore, the regulation arising from Article 31(3) in conjunction with Article 32 and Article 33 of the Central Anti-Corruption Bureau Act is – in his view – inconsistent with Article 20 and Article 22 of the Constitution. The said provisions concern the CBA's surveillance activities (Article 32 and Article 33), also with regard to entrepreneurs (Article 31(3) *in fine*). Entrepreneurs are subject to surveillance activities as part of surveillance of persons performing public functions (Article 31(3)), even if they do not receive public funds. However, in the case of "individuals not included in the public finance sector", only the individuals that receive public funds are subject to surveillance. Such a proviso has not been applied to entrepreneurs. In the applicant's view, the lack of the proviso that the entrepreneurs subject to surveillance are only those that receive public funds, at the same time with the proviso with regard to the individuals not included in the public finance. As a result, Article 31(3) of the Central Anti-Corruption Bureau Act – in the applicant's opinion – is inconsistent with Article 2 and Article 32(1), first sentence, of the Constitution.

The circumstance that the ad hoc surveillance of entrepreneurs takes 3 or 6 months, at the same time without the proviso that they are carried out where other measures turned out to be ineffective or where there is significant likelihood that they will be ineffective, implies - in the applicant's view - an infringement on the provisions of Articles 20 and 22 of the Constitution by Article 31(3) in conjunction with Articles 32 and 33 of the Central Anti-Corruption Bureau Act.

1.4. The last provision that has been challenged by the applicant is Article 40 of the Central Anti-Corruption Bureau Act, concerning persons performing public functions. That provision constitutes a legal basis for conducting an "inspection" when determining the financial situation - and thus intrusion on privacy, without indicating the requirement of necessity. As a result, persons performing public functions are, as a rule, treated as suspects, which is contrary to the principle of a democratic state ruled by law (i.e. to Article 2 of the Constitution).

The applicant asserted that Article 40 of the Central Anti-Corruption Bureau Act also infringes on the requirements of the Convention, which do not exclude state functionaries from the scope of legal protection. "In accordance with Strasbourg jurisprudence, »the status of a state functionary does not deprive of protection arising from Article 8 of the Convention – the decision of 4 March 1988 by the Commission, in the case A.O. v. the Netherlands«" (p. 16 of the application). In addition, Article 40 of the Central Anti-Corruption Bureau Act provides for inspection to be carried out by a given functionary, after filing an asset declaration by a person performing a public function. Therefore, it allows for interference the individual's rights without the control of the court. Finally, Article 40(2) of the said Act, which concerns an inspection of immovable property, breaches the inviolability of the home, i.e. the value protected by Article 5 of the Constitution and Article 8 of the Convention for the Protection of Human Rights. In the applicant's view, Article 40 of the said Act, authorising the CBA to interfere with the constitutional rights and freedoms, does not contain a positive premiss of necessity (indispensability) of such interference.

2. In a letter of 30 January 2008, the applicant presented a supplement to the application of 9 November 2007, referring to the Tribunal for it to determine the non-conformity of the entirety of the provisions of the Central Anti-Corruption Bureau Act to Article 2, Article 7, Article 10, Article 20, Article 22, Article 30, Article 31(3), Article 42(1), Article 47, Article 50, Article 51 and Article 202(1) of the Constitution, to Article 7(1),

Article 8 and Article 18 of the Convention for the Protection of Human Rights; Article 20 of the Criminal Law Convention on Corruption (Journal of Laws - Dz. U. of 2005 No. 29, item 249; hereinafter: the Criminal Law Convention), to the Preamble, Article 5, Article 6 and Article 7 of the Council of Europe Convention No. 108 for the Protection of Individuals with regard to the Automatic Processing of Personal Data (Journal of Laws - Dz. U. of 2003 No. 3, item 25; hereinafter: the Council of Europe Convention 108)

At the same time, allowing for partial adjudication of unconstitutionality, the applicant requested the Tribunal to determine the non-conformity to the Constitution and the Conventions of the following provisions:

1) Article 1(3) and Article 2(1)(1)(b), (c) and (d) of the Central Anti-Corruption Bureau Act – to Article 2, Article 20, Article 22, Article 31(3), Article 42(1) of the Constitution as well as to Article 7(1) of the Convention for the Protection of Human Rights;

2) Article 2(1)(2)-(5) of the Central Anti-Corruption Bureau Act – to Article 2, Article 10 and Article 202(1) of the Constitution;

3) Article 5(2) and (3), Article 6(1), and Article 12(1) of the said Act – to Article 2 and Article 10 of the Constitution as well as to Article 20 of the Criminal Law Convention;

4) Article 22 of the said Act – to Article 47, Article 51 in conjunction with Article 31(3) and Article 30 of the Constitution as well as Article 8 and Article 18 of the Convention for the Protection of Human Rights, as well as to the Preamble, Article 5, Article 6 and Article 7 of the Council of Europe Convention 108;

5) Article 31(3) of the said Act – to Article 2 and Article 32(1) of the Constitution, Article 31(3) in conjunction with Article 32 and Article 33 of the said Act – Article 20 and Article 22 in conjunction with Article 31(3) of the Constitution;

6) Article 40 of the said Act – to Article 2, Article 47 and Article 50 of the Constitution as well as to Article 8 of the Convention for the Protection of Human Rights;

7) Article 43(2) of the Act of 29 August 1997 on the Protection of Personal Data (Journal of Laws - Dz. U. of 2002 No. 101, item 926, as amended; hereinafter: the Personal Data Protection Act) as amended by Article 178 of the Central Anti-Corruption Bureau Act – to Article 2 and Article 47 and Article 51 in conjunction with Article 31(3) of the Constitution as well as to the Preamble and Article 6 of the Council of Europe Convention 108.

This way, the applicant extended the scope of the application by adding new allegations and supplemented the argumentation regarding the allegations raised earlier.

2.1. The applicant stated that the non-conformity of the definition of corruption set out in Article 1(3) of the Central Anti-Corruption Bureau Act to Article 2 of the Constitution ensues, in particular, from the assumption that corruption may concern “any person”, including a person who does not perform a public function and does not use “public funds”. According to the applicant, this also leads to an infringement on the constitutional guarantees of freedom of economic activity that is enjoyed by entrepreneurs who, in the light of the defective definition of corruption, “become potentially corrupt persons, even if they act within their own circle, without involving any public officials”. What also results in the breach of the principle of a democratic state ruled by law is the assumption that the object of corruption is “any undue advantage”. In the applicant’s opinion, such wording is definitely too broad and does not facilitate the distinction between corrupt activities and other cases of accepting “undue advantages” which are not related to the public function performed by a given person, or the performance of his/her official duties.

The applicant underlined that the definition of corruption plays a fundamental role in determining the scope of competence of the CBA, which is crucial as regards the scope of interference with the rights and freedoms of the individual. Indeed, the applicant indicated that obtaining, collecting and processing data by the CBA as well as the scope of operational

activities and surveillance activities, and also all the other powers of the CBA functionaries, including the power to apply direct coercive measures, are limited by the scope of the CBA's competence.

In the applicant's view, the definition of corruption set out in the Central Anti-Corruption Bureau Act breaches the principles of appropriate legislation arising from Article 2 of the Constitution, and also gives rise to excessive interference with the rights and freedoms of individuals, as a result of the CBA's activities which are based on that definition. In addition, it leads to the infringement of the formal requirement that limitation upon the exercise of constitutional rights and freedoms may be imposed only by statute (Article 31(3) of the Constitution).

2.2. The provisions contained in Article 2(1)(2)-(5) of the Central Anti-Corruption Bureau Act grant powers falling within the scope of state audit to the CBA, which – in the applicant's view – undermines the constitutionally established position of the Supreme Chamber of Control (hereinafter: the NIK) as "the chief organ of state audit" (Article 202(1) of the Constitution). Hence, a "supra-constitutional »chief organ of state audit«, being competitive to the NIK, is being established (...), which is placed in the state structure as an element of government administration, deprived of the guarantee of independence as in the case of the NIK, and subordinate to the Prime Minister".

In the applicant's opinion, concerns may be raised by the facts that the CBA is authorised to disclose and counteract the incidents of breaching the provisions of the Act on the restrictions on conducting economic activity by persons performing public functions as well as is authorised to verify the correctness and truthfulness of asset declarations or declarations about conducting economic activity by persons performing public functions. The far-reaching surveillance powers of the CBA functionaries, who are subordinate solely to the Prime Minister, do not guarantee legal protection to persons performing public functions as regards arbitrary interference with the right to private life.

In the applicant's view, "in a democratic state ruled by law, and based on the principle of separation of powers, organs of the state that are solely subordinate to the executive branch should not be granted such broad and uncontrolled capability to affect the realm of rights enjoyed by the representatives of the legislative and judicial branches of government".

For these reasons, granting the CBA the status of a surveillance authority with similar, and partly overlapping, powers to the powers of the NIK, the applicant regarded as inconsistent with Article 2, Article 10 and Article 202(1) of the Constitution. He also stated that the NIK, as the "constitutional chief organ of state audit", enjoying considerable independence, should take over the surveillance activities referred to in Article 2(1)(2)-(5) of the Central Anti-Corruption Bureau Act, and at least participate in the carrying out of these activities.

2.3. As regards the allegations of non-conformity of Article 5(2) and (3), Article 6(1), as well as Article 12(1) of the Central Anti-Corruption Bureau Act to Articles 2 and 10 of the Constitution and to Article 20 of the Criminal Law Convention, the applicant stated that "in a democratic state ruled by law, an institution entrusted with such a wide scope of powers, and having such great capabilities to interfere with the freedoms and rights of the individual, should be subject to supervision and control mechanisms, other than those applied within the framework of government administration".

According to the applicant, the lack of mechanisms for actual control over the CBA's activities by authorities which are not subordinate to the executive branch, gives rise to concern that the CBA may become an instrument of political campaign against the representatives of the legislative and judicial branches. Moreover, the way of structuring the

supervision and control over the CBA, the manner of giving instructions to the Head of the CBA, as well as the procedures for appointing and dismissing the Head of the CBA also infringe on Article 20 of the Criminal Law Convention. In the applicant's view, the possibilities of influencing the CBA's activities by the Prime Minister (providing guidelines, coordinating and supervising the CBA's activities, as well as appointing and dismissing the Head of the CBA) and the lack of actual control over the CBA's activities on the part of the organs of public authority which are not subordinate to the executive branch – create space for exerting "undue pressure", as referred to in Article 20 of the Criminal Law Convention.

2.4. In the context of non-conformity of Article 22 of the Central Anti-Corruption Bureau Act to the indicated higher-level norms for review, the applicant maintained his allegations as regards excessive interference with the realm of privacy and the information autonomy of the individual, as well as the non-fulfilment of requirements of the indispensability and proportionality of restrictions, which are introduced by this regulation. To substantiate these allegations, the applicant recalled the theses from the jurisprudence of the Constitutional Tribunal which indicated the special character of the right to private life in the system of constitutional rights and freedoms, and which concerned the conditions for permitting restrictions on that right (the judgment of the Constitutional Tribunal of 20 November 2002, Ref. No. K 41/02, in which the Tribunal stated that even the imposition of martial law and a state of emergency did not allow the legislator to be more lenient as regards the admissible premisses of interference in the realm of private life; the judgments of the Constitutional Tribunal of: 26 April 1995 Ref. No. K. 11/94 and 3 October 2000 Ref. No. K. 33/99, the judgment 12 December 2005, Ref. No. K 32/04, concerning the conditions for permitting restrictions on the rights and freedoms of the individual).

The applicant also recalled the jurisprudence of the European Court of Human Rights (hereinafter: the ECHR) regarding the premisses of interference with the right to private life. The ECHR has established, *inter alia*, that collecting and providing information which concerns private life is subject to assessment from the point of Article 8 of the Convention for the Protection of Human Rights (the judgment of the ECHR of 26 March 1987, the case of Leander v. Sweden, Application No. 9248/81, the judgment of the ECHR of 4 May 2000, the case of Rotaru v. Romania, Application No. 28341/95). The ECHR has recognised that the scope of interference of secret service, operating in a democratic state, with the right to private life granted to citizens must be strictly limited to ensure state security (the judgment of the ECHR of 6 September 1978, the case of Klass and others v. Germany, Application No. 5029/71). What is more, there must be a measure of legal protection in domestic law against arbitrary interferences by public authorities (see: Rotaru v. Romania).

The applicant emphasised that in the judgment in the case Amann v. Switzerland, the ECHR stated that the content of Article 8 of the Convention for the Protection of Human Rights corresponded to the guarantees arising from the Council of Europe Convention 108 (the judgment of the ECHR of 16 February 2000, in the case of Amann v. Switzerland, Application no. 27798/95).

The applicant repeated the allegation that there was no point in collecting the so-called sensitive data by the CBA, which are referred to in Article 22(7) of the Central Anti-Corruption Bureau Act. Moreover, he stated that if it had been at all possible to prove a connection between combating corruption and the necessity to obtain sensitive data for that purpose – which was, in his opinion highly improbable – then the said connection would have been so loose that there would have been no justification for sacrificing a strictly protected good such as sensitive data. He also underlined that Article 22(7) of the Central Anti-Corruption Bureau Act did not contain any guarantees making it impossible to obtain those data for other than statutory purposes.

In the applicant's view, the above arguments confirm that Article 22 of the Central Anti-Corruption Bureau Act extends the range of data that may be obtained and processed by the CBA, with regard to the actual aim of prosecuting corruption. This follows from a defective definition of corruption which excessively extends the scope of competence of the CBA (including the scope of activities which involve collecting and processing personal data). The regulation allows the CBA to collect and process sensitive data, which is not indispensible for the purposes of prosecuting corruption, does not justify departure from the general prohibition on automatic processing of sensitive data, and creates a justified risk that those strictly protected data will be used for other than statutory purposes. Moreover, the applicant pointed out that the adopted time limit for the obligatory verification of the data that had been collected in the CBA data files (no less frequently than every 10 years) is not adequate to the need for protection of the data against unauthorised access and an unlawful use.

2.5. As regards the non-conformity of Article 31(3) of the Central Anti-Corruption Bureau Act to Article 2 and Article 32(1) of the Constitution, the applicants maintained all their statements and allegations presented in the application.

The applicant based the allegation of non-conformity of Article 31(3) in conjunction with Articles 32 and 33 of the Central Anti-Corruption Bureau Act to Articles 20 and 22 in conjunction with Article 31(3) of the Constitution on the fact that the said provisions, interfering with the entrepreneurs' freedom of economic activity, did not fulfil the requirement of proportionality and indispensability. In the applicant's opinion, the CBA's surveillance powers with regard to entrepreneurs, which arise from Article 31(3) in conjunction with Articles 32 and 33 of the Central Anti-Corruption Bureau Act, constitute – due to their scope ratione personae and ratione materiae – unjustified interference with the freedom of economic activity, as they overlap with the powers of the NIK. The applicant also underlined that the powers of the NIK were exercised only with regard to entrepreneurs who made use of state property or funds and met their liabilities towards the state; whereas the CBA's surveillance powers were not limited by a similar restriction, and thus had a wider scope. Such a regulation goes beyond the scope of admissible interference with the freedom of economic activity, "for it does not limit the activity of the CBA to the examination of instances of irregularities in entrepreneurs' activities which are against the financial interests of the state or which are related to corrupt activities". In the applicant's opinion, the rules for the CBA's surveillance of entrepreneurs (Articles 32 and 33 of the Central Anti-Corruption Bureau Act) lead to the imposition of excessive burdens on entrepreneurs, which are inadmissible in the light of the principle of proportionality.

2.6. As regards the non-conformity of Article 40 of the Central Anti-Corruption Bureau Act to Articles 2, 47 and 50 of the Constitution as well as to Article 8 of the Convention for the Protection of Human Rights, the applicants maintained all their statements and allegations presented in the application.

2.7. The applicant also challenged the conformity of Article 43(2) of the Personal Data Protection Act to Articles 2, 47 and 51 in conjunction with Article 31(3) of the Constitution as well as to the Preamble and Article 6 of the Council of Europe Convention 108. In accordance with that regulation, as regards the data files maintained by the CBA, *inter alia*, the following shall be excluded: the power of the Inspector General for the Protection of Personal Data (GIODO) to issue administrative decisions and examine complaints concerning the execution of provisions on personal data protection; the right of entrance, for the inspectors of the GIODIO upon presentation of authorisations in their names

and service ID cards, to the room where a given data file is stored and to the room where data are processed outside the data file, as well as the right to carry out necessary examination or other supervision activities in order to assess the conformity of the processing of data to the Act; the right of access to any documents and data which are directly related to the object of supervision and the right to make copies thereof; the right to inspect devices, carriers and computer systems used for processing data; also, the right to commission the preparation of expert opinions and other evaluations. Moreover, in the case of any breach of the provisions on personal data protection, the Inspector General may not, by means of an administrative decision, order the CBA to restore the proper state of affairs which would be consistent with the law (Article 18 of the Personal Data Protection Act).

In the applicant's view, the above state of affairs infringes on the guarantees of the right to private life, enshrined in Article 47 and 51 in conjunction with Article 31(3) of the Constitution. Furthermore, the following norms of the Council of Europe Convention 108 have also been breached: Article 6 – as the above state of affairs does not ensure appropriate protection as regards the procedure for processing data which reveal racial origin, political opinions, or religious or other beliefs, as well as personal data concerning health or sexual life; and also the Preamble to the Convention No. 108 – "insofar as it does not lead to extending »the safeguards for everyone's rights and fundamental freedoms, and in particular the right to the respect for privacy«, and results in (...) exclusion of actual control over collecting and processing of personal data by the CBA".

3. On 27 February 2008, the Constitutional Tribunal received an application by the second group of Deputies from the Sejm of the Republic of Poland, in which they requested the Tribunal to determine the non-conformity of § 3 and § 6(1) of the Regulation of the Prime Minister of 27 September 2006 on the scope, terms and procedure regarding the transfer of information to the Central Anti-Corruption Bureau by the organs, services and institutions of the state (Journal of Laws - Dz. U. No. 177, item 1310; hereinafter: the Regulation of 27 September 2006) to Article 22(9) in conjunction with Article 22(2) of the Central Anti-Corruption Bureau Act, and thus to Article 92(1) as well as Article 47 and Article 51(2) in conjunction with Article 31(3) and Article 51(5) of the Constitution, to Article 8 in conjunction with Article 18 of the Convention for the Protection of Human Rights, as well as to the Preamble, Article 5(b) and (c), Article 6 and Article 7 of the Council of Europe Convention 108.

By the disposition of the President of the Constitutional Tribunal dated 4 March 2008, the application of 27 February 2008 by the group of Deputies, due to having the same scope ratione materiae, has been referred for joint examination, together with the application of 9 November 2007 by the group of Deputies, under the common reference number K 54/07.

The applicant alleged that the challenged provisions of the Regulation, in a diversified way, shaped the procedure for the transfer of data to the CBA by the entities enumerated in Article 22(2) of the Central Anti-Corruption Bureau Act as well as by the entities referred to in Article 22(4) of the said Act. In the applicant's view, the procedure for the transfer of data to the CBA by the entities specified in Article 22(2) of the said Act is limited by considerably less restrictive requirements than in the case of the entities indicated in Article 22(4) of the said Act. The way of using the data collected by the entities specified in Article 22(2) of the said Act has been left subject to internal agreements between the CBA and those entities. Moreover, the Regulation provides for a possibility of departing from the obligation to apply for access in writing whenever such access is needed, and does not require the identification of persons transferring the relevant data to the CBA, as well as the identification of those receiving them.

In the applicant's view, Article 22(9) of the Central Anti-Corruption Bureau Act

(constituting statutory authorisation for issuing the challenged Regulation) does not constitute the grounds for diversifying the way of transferring data to the CBA which have been collected by the entities specified in Article 22(2) and (4) of the said Act. In particular, it does not constitute the grounds for departing, by virtue of agreements between the CBA and the entities specified in Article 22(2) of the said Act, from the data transfer procedure solely on the basis of an application. In the opinion of the applicants, an application procedure for data access constitutes a fundamental guarantee of ensuring the protection of the right to private life and the right to personal data protection during the data transfer process. It guarantees the individualisation of the data transfer process, as it allows for the possibility of identifying the person applying for access to data and for registering (marking) the data transfer in order to, for instance, verify whether it is justified to apply for access to given data. At the same time, the application procedure makes it impossible to provide data on a mass scale and in an uncontrolled way, contributing to the implementation of the rule that the transfer of personal data may only be carried out within strictly specified and indispensable limits, and not in a free and random way.

In the applicant's view, the purpose of the Regulation – which is determined in the content of the authorisation specified in Article 22(9) of the Central Anti-Corruption Bureau Act – is to ensure that personal data will be transferred to the CBA solely insofar as this is necessary for carrying out the tasks of the Bureau. Whereas § 3 and § 6 of the Regulation - by making reference to internal agreements between the CBA and the entities indicated in Article 22(2) of the Central Anti-Corruption Bureau Act as well as by allowing for departure from the application procedure - infringe on the rule that the CBA obtains personal data only in order to prevent and detect offences falling within the scope of its competence. According to the applicants, in this context, what should be particularly negatively assessed is the fact that the data referred to in Article 22(2) of the Central Anti-Corruption Bureau Act also include the so-called sensitive data, which are under special protection against unauthorised access.

The applicant also stated that Article 22(2) of the said Act shaped an open-ended catalogue of entities that were obliged to make their data available. Therefore, the scope of the CBA's interference with the right to private life and the right to personal data protection still remained insufficiently specified, which might give rise to concern from the point of view of the standards of a democratic state ruled by law.

What was assessed especially negatively by the applicant was the fact that the possibility of specifying the rules for transferring personal data to the CBA was left at the discretion of the CBA itself and the entities indicated in Article 22(2) of the said Act, which was assumed *expressis verbis* in § 3 of the Regulation. Thus, in the applicant's view, what was shifted to the area of internal administration was the burden of regulating the scope and manner of interference in the realm of the right to private life and the right to personal data protection (including the so-called sensitive data).

4. In a letter of 25 March 2009, the Public Prosecutor-General presented his position on the case. Before carrying out a substantive evaluation of the allegations put forward by the applicant, he pointed out that in a democratic state ruled by law, whose system of government is based on the separation of powers, the law is established by the legislative branch. The legislative branch enjoys considerable freedom with regard to determining the content of the law, and the restrictions on this freedom are determined by constitutional norms.

Making reference to the jurisprudence of the Constitutional Tribunal, the Public Prosecutor-General drew attention to the fact that the legislator – within the scope of its unrestrained (political) discretion – had the autonomy to establish law which would correspond to the political and economic assumptions, and thus to adopt solutions that would

best serve the attainment of the set goals (see the judgments of the Constitutional Tribunal in the cases: Ref. No. P 9/01, Ref. No. K. 19/96, Ref. No. K. 8/95, and Ref. No. K. 12/94). The Public Prosecutor-General emphasised that what was subject to assessment by the Constitutional Tribunal was the multi-faceted legality of a normative act, but the Tribunal was not competent to review the activities of the legislator, as regards their usefulness, rationality and substantive aptness, including, *inter alia*, the assessment of solutions adopted by the legislator which constituted measures of criminal policy. In the Prosecutor's view, the legislator's freedom in this regard may not be challenged, provided it falls within the scope of constitutional guarantees.

In his stance, the Prosecutor recalled the legal opinions concerning the threats to the institutional order of the state and the degradation of public and economic life in Poland, stemming from the phenomenon of corruption. He also indicated the objectives underlying the introduction of institutional solutions, contained in the Central Anti-Corruption Bureau Act, into the Polish legal system (strengthening the role of the institution of the state with regard to combating corruption; fighting the abuse of power and the arrogance thereof, fighting the abuse of privileged positions to derive personal and property advantages, disclosing irregularities in the functioning of the entities which dispose of public funds and make use of the financial support of the state).

4.1. As regards the assessment of the provisions of Article 2(1)(1)(b), (c) and (d) of the said Act, which were challenged by the applicant in the context of the higher-level norms contained in Article 42(1), Article 31(3) and Article 2 of the Constitution as well as Article 7(1) of the Convention for the Protection of Human Rights, the Public Prosecutor-General stated that, while determining the scope of a new secret service, the legislator had to consider the fact that combating crime is one of the fundamental obligations of the state, especially when this crime poses a particularly serious threat to the state security and public order, as referred to in Article 31(3) of the Constitution. However, in his opinion, the scope of competence of the CBA should also be perceived in the context of specific criminal policy of the state.

When enacting the challenged provisions of Article 2(1)(1)(b), (c) and (d) of the Central Anti-Corruption Bureau Act, the legislator assumed that the tasks of the secret service in the making were to include, *inter alia*: surveillance, prevention and detection of certain offences. According to the Prosecutor, it should be stressed that the said Act does not specify the characteristics of the aforementioned offences, and merely refers to other statutes where the characteristics have been set out. However, the Prosecutor indicated that such a legislative technique was often encountered in the context of the binding Polish law, and although at times it raised some interpretative doubts in the course of the application of the law, it had not been challenged in the light of the higher-level norm contained in Article 2 of the Constitution, as being inconsistent with the principles of appropriate legislation.

In the view of the Prosecutor, an analysis of the challenged provisions leads to the conclusion that the object of the CBA's activity, in the light of these provisions, may only be events regulated earlier (i.e. prior to the entry into force of the Central Anti-Corruption Bureau Act) in legal acts equivalent to statutes. Therefore, if a given event does not have the characteristics of an offence (Article 2(1)(1)) or of another pathological event (cf. Article 2(1)(2)-(5)), then – according to the Prosecutor – it should not at all be the object of assessment, and thus the object of further activities of the CBA.

The Public Prosecutor-General pointed out that the provisions of Article 2(1)(1)(b), (c) and (d) contained additional premisses restricting the scope of the CBA's activity in the form of a condition that surveillance, prevention and detection should concern only those offences which bore relation to corruption (as defined in Article 1(3) of the said Act) or to any

activity which was against the economic interests of the state (the activity defined in Article 1(4) of the said Act). Although the applicant raised allegations also against the legal definition of corruption, yet regardless of that, according to the Prosecutor, none of the premisses extended the catalogue of offences set out in the challenged provisions of the said Act. In the Prosecutor's view, one also may not assume that the definition of corruption or the definition of activity against the economic interests of the state may create a new category of events (in comparison with the ones already specified in the light of legislation), which would constitute a separate object of the CBA's activity.

The Public Prosecutor-General emphasised that the acts specified in Article 2(1)(1)(b), (c) and (d) of the said Act – penalised as offences in legal acts equivalent to statutes – had not raised the applicant's reservations of a constitutional character in respect of the conformity of their description to the principles of appropriate legislation or the requirement of adequate specificity of an act prohibited under penalty. In the opinion of the Prosecutor, the connection between the indicated offences and corruption or the activity against the economic interests of the state may only be regarded as a premiss which sufficiently specifies the characteristics of the objects of those offences, and which narrows down the range of acts which may be the objects of the CBA's activities.

In the view of the Public Prosecutor-General, assuming a different interpretation of Article 2(1)(1)(b), (c) and (d), from the one presented above, might lead to the reservations of a constitutional character. However, the Prosecutor underlined that, in the light of the doctrine and the jurisprudence of the Constitutional Tribunal, it did not seem that such a solution was admissible. He indicated that in the situation where a common court, adjudicating in a given case, would raise doubts as to the constitutionality of a provision which was to be the premiss of the adjudication, in the first place: the court should aim for eliminating the doubts in the light of the interpretation which was consistent with the Constitution (the decision of the Constitutional Tribunal of 15 May 2007, Ref. No. P 13/06, OTK ZU No. 6/A/2007, item 57). In the opinion of the Prosecutor, when assuming a proper interpretation of the challenged provisions of Article 2(1)(1)(b), (c) and (d), it does not seem possible to presume that the definition of corruption (Article 1(3) of the said Act) could have an impact on the extension of the CBA's competence.

Therefore, the Prosecutor concluded that the provisions of Article 2(1)(1)(b), (c) and (d) of the said Act did not clash with the principle of appropriate legislation, the principle of proportionality or the requirement of sufficient specificity of a prohibited act, which is prosecuted in criminal proceedings, and thus were consistent with Article 2, Article 31(3) and Article 42(1) of the Constitution as well as with Article 7 of the Convention for the Protection of Human Rights.

4.2. Moving on to the assessment of the allegation of non-conformity of Article 2(1)(1)(b), (c) and (d) of the said Act to the regulations of Articles 20 and 22 of the Constitution, the Public Prosecutor-General stated that the principle of economic freedom did not have an absolute character. He recalled the jurisprudence of the Constitutional Tribunal, in accordance with which that freedom might be subject to various restraints to a larger extent than the rights and freedoms of a personal or political character. In the Prosecutor's opinion, the pathology in the form of a spreading phenomenon of corruption in Poland not only may not remain a domain to which the state is indifferent, but also it requires the state's decisive counteraction, also by means of the legislator equipping competent services with adequate tools enabling them to fight corruption. In his view, the arguments for the introduction of the analysed solutions into the Polish legal system, which would allow for the interference with the freedom of economic activity, are important public reasons within the meaning of Article 22 of the Constitution.

Taking the above into consideration, the Public Prosecutor-General stated that the provisions of Article 2(1)(1)(b), (c) and (d) of the said Act did not clash with the principle of freedom of economic activity and remained consistent with Articles 20 and 22 of the Constitution.

4.3. The Public Prosecutor-General indicated that another provision that had been challenged in the application, i.e. Article 1(3) of the said Act, contained a legal definition of corruption which determined the normative meaning of that term that applied to the whole regulation and was of utmost significance for the entire legal system. The Prosecutor stressed that what was important for the wording of the definition of corruption was the fact that corruption constituted the criterion for undertaking action by the CBA functionaries, who *ex officio* were to combat instances of corruption in social life.

The Prosecutor admitted that the broad powers granted to the CBA functionaries must have caused frequent interference with citizens' rights and freedoms which were protected by the Constitution. In his opinion, in that context the issue of protection of the rights and freedoms is becoming increasingly important, and in particular the constitutional requirement that the issues of considerable significance for the exercise of those rights and freedoms were regulated in a complete and exhaustive way in a legal act equivalent to a statute.

Making reference to the principle that the individual's freedoms are regulated exclusively by statute, contained in the jurisprudence of the Constitutional Tribunal, the Public Prosecutor-General stated that the requirement for the restrictions on constitutional rights and freedoms to be specified in a statute, including the freedom of economic activity, implied an imperative for an appropriate quality of statutory regulation which should be understood as an imperative for completeness of statutory regulation which needed to independently specify all basic elements of a restriction on a given right and freedom, so that solely on the basis of reading the provisions of a statute it would be possible to precisely determine the scope of that restriction (see the following judgments of the Constitutional Tribunal: Ref. No. P. 11/98, Ref. No. P 10/02, Ref. No. SK 22/02, Ref. No. U. 6/92, and Ref. No. U. 7/93).

In the Prosecutor's opinion, when determining admissible restrictions on the rights and freedoms protected by the Constitution, the principle that the individual's freedoms are regulated exclusively by statute is of special significance in the field of repressive law, and in particular criminal law *sensu stricto*. This provision and the other fundamental principles of criminal law serve to guarantee legal protection to individuals against arbitrary actions of public authorities.

The Prosecutor indicated that it followed from the jurisprudence of the Constitutional Tribunal that the function of criminal law in a democratic state ruled by law was not merely the protection of the state, its institutions, society and particular individuals against offences, but also, "not to a lesser extent, the protection of the individual against the lawlessness of the state". Criminal law creates a boundary for authorities in a democratic state ruled by law, outside of which the citizen should feel secure, in the sense that, unless s/he crosses the forbidden line under penalty, s/he may not be held criminally liable. The provisions of criminal law are to delineate clear boundaries between what is permissible and what is prohibited. The Prosecutor pointed out that, in that context, the provisions of criminal law might not become a tool for achieving political goals, as in their character they constituted a restriction on the individual's right.

Therefore, in a democratic state ruled by law, criminal law must be based on at least two fundamental principles: adequate specificity of acts prohibited under penalty (*nullum crimen, nulla poena sine lege*) and the prohibition of retroactivity of a statute which introduces or increases criminal liability (*lex severior retro non agit*). Expressed in the Polish

Penal Code, these principles also jointly constitute the principle of a democratic state ruled by law, which is expressed in the Constitution (see Ref. No. S. 6/91, Ref. No. S. 1/94, Ref. No. P. 2/00, Ref. No. P 2/03). The Prosecutor emphasised that also any restrictions on the freedom of economic activity might be imposed solely by statute.

The Prosecutor argued that, in the light of the principle of a democratic state ruled by law (and the principle of appropriate legislation arising therefrom) as well as in the light of Article 31(3), it was inadmissible to enact provisions which lacked an adequate degree of precision, as that had an impact on the interpretation of the law. He stressed that since the restrictions on the freedom of economic activity constituted an exception to the general principle of that freedom, then, when there was no clearly specified restriction, a presumption should be made in favour of the freedom of economic activity (see L. Garlicki, theses to Article 22, [in:] *Konstytucja Rzeczypospolitej Polskiej. Komentarz*, Vol. 4, L. Garlicki (ed.), Warszawa 2005, p. 14).

In the context of the above-mentioned principles, the Public Prosecutor-General stated that the legal definition of corruption which had been adopted by the legislator had a substantially broad scope ratione personae and ratione materiae, and comprised various facts. He also indicated that, in the course of legislative work, the wording of the definition of corruption raised serious doubts among experts. According to the Prosecutor, corruption - within the meaning of Article 1 – may concern "any person", including a person who does not perform a public function and who does not make any use of "public funds". Thus, as regards private law entities, there may be practical difficulties with distinguishing corruption (within the meaning of the challenged provision) from, for instance, ordinary contractual provisions, accepted by both contracting parties, or from a common fraud. The Prosecutor stated that, in this context, particular attention should be paid to the fact that the CBA undertook activities *ex officio* and it was the CBA that independently assessed whether an actual situation bore the statutory characteristics of corruption, i.e. the characteristics of an act subject to prosecution.

In the view of the Prosecutor, the definition of corruption contained in the Central Anti-Corruption Bureau Act criminalises any independent advantage promised, suggested, handed, demanded or accepted by anyone "in the course of economic activity". In his opinion, maintaining such a definition would be against the freedom of economic activity, which is guaranteed in Article 20 of the Constitution.

According to the Prosecutor, an analysis of the challenged provision leads to the conclusion that the definition of corruption in the public sector includes a specific proviso that an undue advantage is to be given or promised in exchange for taking action or refraining from action in the performance of public functions, whereas, with regard to the private sector, not only does it not contain such restrictions (or specific provisos), but it actually comprises all aspects of economic activity. Consequently, in the Prosecutor's opinion, "indispensable minimum" could be the narrowing down of the definition of corruption in the private sector by means of the premisses of socially detrimental reciprocity (cf. e.g. Article 296[a] or Article 296 of the Penal Code).

The Public Prosecutor-General stated that a private law entity did not have to have solely legal motives, as long as it did not breach legal prohibitions and orders. The objects of protection in the case of the offence of corruption in the private (economic) sector are proper business transactions. By contrast, the provisions penalising corruption in the public sector protect citizens' trust in public authorities, and in particular citizens' trust that, when making decisions, state and local self-government institutions act within the binding law, and do not have any non-legal motives. According to the Public Prosecutor-General, the varied scope ratione materiae of protection, as regards the offence of corruption in the public sector and the said offence in the private sector, should determine the varied scope ratione materiae of the definitions of these two types of corruption. In this context, in the opinion of the Prosecutor,

serious doubts arise as to whether the definition of corruption meets the requirement of sufficient specificity and whether such a broad scope of interference with the freedom of economic activity can be justified by the public interest.

Therefore, in the light of the above considerations, the Public Prosecutor-General held the view that Article 1(3) of the said Act – insofar as it defines corruption in the private sector as the conduct of any person, without narrowing down the definition with the premisses of socially detrimental reciprocity – was inconsistent with Article 2, Article 20, Article 22, Article 31(3) and Article 42(1) of the Constitution as well as with Article 7(1) of the Convention for the Protection of Human Rights.

4.4. The Public Prosecutor-General stated that the provisions of Article 2(1)(2)-(5) of the Central Anti-Corruption Bureau Act, challenged by the applicant, were consistent with Article 2 and Article 10(1) and (2) of the Constitution. According to the Prosecutor, the principle of separation (tri-division) of powers, arising from Article 10, might not take the form of "isolation of powers". This principle does not have an absolute character and does not necessarily mean that each of the three functions is delegated entirely to merely one group of organs of the state, or that a given group of state organs has been established to fulfil only one function. The Prosecutor, making reference to the doctrine, stated that, as regards both those aspects, there might be certain exceptions (cf. P. Sarnecki, theses to Article 10, [in:] *Konstytucja Rzeczypospolitej Polskiej. Komentarz*, Vol. 5, L. Garlicki (ed.), Warszawa 2007, p. 12). He also added that the scope of the CBA's powers had been determined by the scope of the CBA's tasks, and not by its formal inclusion in a given group of state organs.

The Public Prosecutor-General stated that in a democratic state ruled by law, whose system of government was based on the separation of powers, the enactment of laws fell within the realm of the legislative branch, which had been granted considerable freedom in that regard, and the boundaries of that freedom were primarily set by constitutional norms. In his opinion, the Constitutional Tribunal is not competent - within that scope - to review the legislator's activities, as regards their usefulness, rationality and substantive aptness, and may only examine broadly construed legality of a normative act.

In view of the Prosecutor, the provisions of Article 2(1)(2)-(5) of the Central Anti-Corruption Bureau Act clash neither with the principle of a democratic state ruled by law, nor with the said principle of tri-division of powers, and are consistent with Article 2 and Article 10 of the Constitution. By contrast, the Prosecutor assessed the higher-level norm for review contained in Article 202(1) of the Constitution as inadequate in relation to these provisions, consequently stating that the provisions of Article 2(1)(2)-(5) of the said Act were not inconsistent with Article 202(1) of the Constitution.

4.5. Referring to the allegation of non-conformity of Article 5(2) and (3), Article 6(1) and Article 12(1) of the Central Anti-Corruption Bureau Act (specifying the mutual relations between the Council of Ministers and the CBA) to Article 20 of the Criminal Law Convention, as well as to Articles 2 and 10 of the Constitution, the Public Prosecutor-General indicated that, pursuant to Article 146(4)(7) of the Constitution, within the scope and according to the rules set out in the Constitution and statutes, the Council of Ministers ensured the internal security of the state and public order. Therefore, it is due to the will of the constitution-maker that primarily the Council of Ministers is burdened with carrying out the duties of the state in the aforementioned regard.

The Public Prosecutor General recalled the assumptions of the doctrine which indicated what activities were related to the constitutional duty of the Council of Ministers to ensure the internal security of the state and public order. He pointed out that, in a broader sense, that duty included maintaining the so-called "constitutional order", i.e. the proper

functioning of all public authorities (as provided in the Constitution). He also recalled the experts' opinions that had been voiced in the course of legislative work, which had referred to placing the CBA within the structure of organs of the state and the issue of appointing and discharging the management of the CBA, its organisational and official subordination, as well as the authorities competent to supervise its activities.

The Prosecutor pointed out that, in accordance with Article 146(3) of the Constitution, the Council of Ministers managed the government administration. The fulfilment of the obligation to manage the government administration, in the context of ensuring the internal security of the state and public order, requires equipping the Council of Ministers – and as a consequence, the Prime Minister, who manages the work of the Council of Ministers (Article 148(2) of the Constitution) – with appropriate legal tools which would enable them to carry out the said management. When creating the CBA, the legislator referred to regulations which were well-known in the Polish legal system and which concerned other secret services.

In the view of the Public Prosecutor-General, the analysis of the status of the CBA allows to draw a conclusion that it is close to the status of such services as the Internal Security Agency (ABW) or the Foreign Intelligence Agency (AW). The heads of those services are direct subordinates of the Prime Minister, are appointed and dismissed by him, belong to the central organs of government administration and act adequately with the assistance of the ABW and the AW, which are offices of government administration.

In the opinion of the Public Prosecutor-General, there seems to be no barriers of a constitutional character or barriers arising from conventions which would make it impossible to place the Head of the CBA under the supervision of the Prime Minister, according to the rules set out in the Central Anti-Corruption Bureau Act. However, depriving the Prime Minister of the analysed powers could have an impact on the limitation of his abilities to duly fulfil his obligations imposed on him by the Constitution. In the Prosecutor's opinion, placing the CBA and the Head of the CBA within the structure of state organs guarantees sufficient independence, which allows for the effective carrying out of tasks within the scope of combating corruption, within the meaning of the Criminal Law Convention.

According to the Prosecutor, the provisions of Article 5(2) and (3), Article 6(1) and Article 12(1) of the Central Anti-Corruption Bureau Act do not clash with the principle of a democratic state ruled by law and the principle of tri-division of powers, and thus are consistent with Articles 2 and 10 of the Constitution as well as with Article 20 of the Criminal Law Convention.

4.6. As regards the allegation of unconstitutionality of Article 22 of the Central Anti-Corruption Bureau Act and the non-conformity to the convention regulations indicated by the applicant, the Public Prosecutor-General pointed out that, both in the doctrine as well as in the jurisprudence, it had been assumed that the right to private life did not have an absolute character and might be subject to limitation, as prescribed in Article 31(3) of the Constitution. He recalled the rulings in which the Constitutional Tribunal stated that, although the realm of intimate life (in a broader sense than its colloquial meaning) was under full legal protection, the protection of the realm of private life was subject to certain restrictions, substantiated by "justified interest" (cf. the judgment of the Constitutional Tribunal of 21 October 1998, Ref. No. K. 24/98, OTK ZU No. 6/1998, item 97, p. 519). The restriction may be imposed on a right or freedom only when this is provided for by another constitutional norm, principle or value, and the degree of that restriction must remain adequately proportionate to the significance of the interest the said restriction is to serve (cf. the judgment of the Constitutional Tribunal of 20 April 2004, Ref. No. K 45/02, OTK ZU No. 4/A/2004, item 30, p. 402 as well as the decision of the Constitutional Tribunal of 24 June 1997, Ref. No. K. 21/96, OTK ZU No. 2/1997, item 23, p. 225). The legislator is thus competent to limit the

scope of exercise of constitutional rights and freedoms, such as the right to private life and the right to information autonomy, but it has to take into consideration the premisses of such restrictions, set out in the Constitution (Article 31(3) of the Constitution).

Evaluating Article 22 of the Central Anti-Corruption Bureau Act in the light of the values such as security, public order or the protection of rights and freedoms of other persons, the Public Prosecutor-General stated that the obligations of the state within the scope of exercise of such values forced the legislative branch to adopt legal solutions constituting measures which made combating crime possible. Among those measures, a significant one consists in granting the relevant services the power to carry out activities aimed at confidential obtaining, collecting, verifying and processing of a certain type of information. Carrying out such activities is bound to interfere with the privacy and information autonomy of the individual. The Public Prosecutor-General drew attention to the fact that admissibility of such activities, in the context of constitutional provisions, had already been the subject of the Constitutional Tribunal's deliberations, as part of analysis of police operational activities (cf. the judgment of the Constitutional Tribunal of 12 December 2005, Ref. No. K 32/04, OTK ZU No. 11/A/2005, item 132, pp. 1493-1494).

The Public Prosecutor-General emphasised that combating corruption is the state's obligation, and therefore it should be regarded as necessary in a democratic state ruled by law, within the meaning of Article 31(3) of the Constitution and Article 8 of the Convention for the Protection of Human Rights. Obtaining information by the CBA, also confidentially, within the scope of its competence, and collecting, verifying and processing it, seem to remain a justified restriction on the rights and freedoms of the individual, within the meaning of the indicated provisions of the Constitution and the Convention. According to the Public Prosecutor-General, a similar conclusion may be drawn with regard to processing personal data by the CBA when the data have been obtained from authorities, institutions and services, specified in Article 22(2) and (4) of the Central Anti-Corruption Bureau Act.

The Public Prosecutor-General stressed that obtaining information, also confidentially, as well as collecting, verifying and processing it may be carried out – pursuant to Article 22(1) of the Act – only within the scope of competence of the CBA. The legislator has set out the scope of competence of the said secret service in Article 2 of the Central Anti-Corruption Bureau Act, by specifying its tasks. In the opinion of the Public Prosecutor-General, the powers that have been granted to the CBA by the legislator in Article 22 of the challenged Act "constitutes an indispensable set of tools for carrying out the tasks reserved for the secret service under review".

In the opinion of the Public Prosecutor-General, Article 22(7) of the said Act does not contain regulations which authorise the functionaries of this secret service to undertake actions aimed at obtaining sensitive data. In his opinion, the provision concerns the situation where sensitive data are disclosed as part of statutory activities of the CBA. In the event of disclosure of such information, the legislator has provided for a procedure to destroy the information, which is to be carried out by a committee and is to be recorded in relevant minutes, with the proviso that the information concerns persons who have not been convicted of an offence. The Prosecutor added that the said solution was known in the system of Polish criminal law and was among the regulations governing the operational activities of other services, the example of which might be found in Article 20(18) of the Act of 6 April 1990 on the Police (Journal of Laws - Dz. U. of 2002 No. 7, item 58, as amended). In this context, the Prosecutor also indicated the regulation of Article 13(4) of the Central Anti-Corruption Bureau Act which entailed that the CBA functionaries, while carrying out relevant activities, are obliged to respect human dignity as well as respect and protect human rights, regardless of nationality, racial origin, social status, political convictions, religious beliefs or worldviews.

According to the Public Prosecutor-General, challenged Article 22 of the Central Anti-Corruption Bureau Act does not seem to clash with the right to private life and the right to information autonomy, and thus, in this regard, it does not violate human dignity. He concluded that the said Article was consistent with Article 30, Article 31(3), Article 47 and Article 51(1) and (2) of the Constitution as well as with Articles 8 and 18 of the Convention for the Protection of Human Rights.

4.7. As part of the assessment of challenged Article 22 of the said Act, in the context of the right of access to official documents and the right to demand the correction of information, the Public Prosecutor-General stated that, as regards those rights, the premiss of admissibility of the restriction on the rights is the state's obligation to combat corruption. It is this obligation which determines that operational activities carried out by the CBA (and other secret services) are categorised as confidential.

Not only does the CBA undertake operational activities or surveillance activities, but it also carries out preliminary proceedings (Article 2(3) of the Central Anti-Corruption Bureau Act) and carries out certain activities as requested by a court or a prosecutor (Article 13(2) of the said Act). If, in the course of operational activities, evidence is gathered which allows for instigating criminal proceedings or which is significant for the pending criminal proceedings, the Head of the CBA transfers the gathered materials to the Public Prosecutor-General (Article 17(15) of the said Act). The Head of the CBA has a similar obligation in the case where the information about an offence specified in Article 2(1) of the Central Anti-Corruption Bureau Act (Article 19(5) of the said Act) has been confirmed. The above-mentioned preliminary proceedings are carried out in accordance with the regulations contained in the Code of Criminal Procedure. Thus, the person concerned, after gaining the status of the suspect, is entitled to examine the materials gathered in the course of the proceedings before the closure thereof (Article 321(1) of the Code of Criminal Procedure).

In the opinion of the Public Prosecutor-General, restricting access to personal data and other information, as referred to in Article 22 of the Central Anti-Corruption Bureau Act, with regard to persons who – as a result of activities carried out by the CBA functionaries, gain the status of suspects, has merely a temporal character and ensues from the limitations provided for in the criminal procedure with regard to preliminary proceedings. Due to that temporal character of the restriction, in the Prosecutor's view, the said restriction does not seem to undermine the essence of the restricted right.

The Public Prosecutor-General assessed the limitation of the right to correct information in a similar way. He stated that, although as a result of temporary lack of access to documents regarding a particular person, in the case of the person concerned, the possible exercise of the right to correct information by the person is deferred in time, thus it does not seem that one can speak of an infringement of that right to an extent that would justify deeming the provision unconstitutional. The Public Prosecutor-General therefore took the stance that Article 22 of the Central Anti-Corruption Bureau Act was consistent with Article 51(3) and (4) of the Constitution.

4.8. The applicant's allegation that there was no judicial review of legality of obtaining and processing personal data on the basis of Article 22 of the Central Anti-Corruption Bureau Act, in the Prosecutor's opinion, has not been confirmed by indicating an adequate higher-level norm for constitutional review, which would be Article 45(1) of the Constitution. However, in the view of the Prosecutor, even then the said allegation could not be the object of deliberation in the proceedings before the Constitutional Tribunal, as it focuses on indicating that the said provision does not contain regulations which, in the applicant's opinion, should have been included there. In the opinion of the Public Prosecutor-General, any statute could be challenged based on that kind of negative premiss. The

examination of such allegations does not fall within the scope of competence of the Constitutional Tribunal, as this would bring it closer to the role of a quasi-legislator, and it would then cease to be "a court of law".

4.9. Assessing Article 22 of the Central Anti-Corruption Bureau Act, in the context of higher-level norms for review contained in the Council of Europe Convention 108, the Prosecutor stated that the interpretation concerning the provisions of the normative part of the Convention should be carried out in accordance with the intentions expressed in its Preamble. In a similar way, one should interpret the rights and freedoms protected by the Council of Europe Convention 108, in the context of the premisses of admissibility of restrictions on those rights and freedoms in the light of the Constitution. In the opinion of the Prosecutor, the argumentation presented earlier on in his letter, with regard to the admissibility of those premisses, remained relevant within that scope. Therefore, the Prosecutor concluded that Article 22 of the said Act was consistent with the Preamble and Articles 5, 6 and 7 of the Council of Europe Convention 108.

4.10. Moving on to the applicant's allegation that Article 31 of the Central Anti-Corruption Bureau Act infringed on the principle of equality (Article 32(1) of the Constitution), and thus infringed on Article 2 of the Constitution, the Public Prosecutor-General stated that, while granting surveillance powers over various persons and entities to the CBA, the legislator actually differentiated the scope of such surveillance, depending on which person or entity was subject thereto. According to the Public Prosecutor-General, the extent to which particular persons and entities may be subject to surveillance, carried out by a secret service, is determined by objectives and, to some extent, also by the criminal policy of the state.

In the view of the Prosecutor, on no account may a thesis be formulated that the mere fact of being subject to such surveillance is a relevant characteristic which entitles all persons and entities in question to demand that the scope of surveillance should always be identical. In his opinion, what may be regarded as a relevant characteristic is when particular persons or entities belong to the following categories: persons who perform public functions, entities of the public finance sector within the meaning of the Act on Public Finances, entities which are not included in the public finance sector as well as entrepreneurs. Within the scope of each of these categories, the principle of equality should be applied.

The applicant's proposal that the persons belonging to the category of entrepreneurs should be divided into those who receive public funds and those who do not receive such funds (i.e. in a similar way as differentiation concerning the entities which are not included in the public finance sector), may be regarded merely as a proposal to supplement the provision in accordance with the applicant's expectations. In the opinion of the Prosecutor, the proposal does not authorise the applicant to challenge a provision which is binding in the light of the constitutional principle of equality.

Therefore, the Prosecutor-General concluded that Article 31(3) of the Central Anti-Corruption Bureau Act was consistent with Article 2 and Article 32(1) of the Constitution.

4.11. Moving on to the assessment of Article 31(3), challenged by the applicant in conjunction with Article 32 and 33 of the Central Anti-Corruption Bureau Act, in the context of the higher-level norms for review contained in Article 20 and Article 22 in conjunction with Article 31(3) of the Constitution, the Public Prosecutor underlined that freeing economic activity completely from any restrictions, by depriving the state of any control measures, might endanger the state's security, public order or the constitutionally protected public interest. There is a legitimate state interest in creating such a legal framework for economic

activity which will allow for minimising the negative effects of free-market mechanisms, if these effects show in the realm which may not be indifferent to the state, due to the protection of commonly cherished values.

In the opinion of the Public Prosecutor-General, "the spread of corruption in Poland, which is an extremely dangerous pathology, for obvious reasons, may not remain an indifferent realm to the state, but, in fact, it requires the state's decisive counter-measures". The counter-measures should, *inter alia*, encompass relevant legislative measures aimed at equipping competent services with appropriate instruments which would allow for combating corruption. In the view of the Prosecutor, such instruments are the surveillance powers of the CBA, and what weighs in favour of introducing them into the legal system is an important public interest, within the meaning of Article 22, as well as Article 31(3) of the Constitution, despite the fact that the instruments allow for interference with the freedom of economic activity.

Therefore, the Public Prosecutor-General concluded that Article 31(3) in conjunction with Articles 32 and 33 of the Central Anti-Corruption Bureau Act was consistent with Article 20 and Article 22 in conjunction with Article 31(3) of the Constitution.

4.12. Making reference to the allegation that Article 40 of the Central Anti-Corruption Bureau Act was inconsistent with Article 2, Article 47 and Article 50 in conjunction with Article 31(3) of the Constitution, as well as with Article 8 of the Convention for the Protection of Human Rights, the Prosecutor stressed that "the inviolability of the home", specified as undisturbed use of one's home, was a typical example of the individual's freedom which is personal in character. This freedom primarily serves the mental integrity of the individual, and is clearly linked to his/her dignity, as well as to his/her right to private life. Citing the doctrine, the Public Prosecutor-General indicated that "the inviolability of the home" might not be merely understood as prohibition against any "search" (without sufficient grounds), but also as prohibition against any unauthorised entry and stay. Not only may "search" happen "solely in the cases specified by statute and in the manner specified therein", but this is also required in the case of any other instances of entry to someone else's home, in particular by public functionaries or the employees of public services (P. Sarnecki, comments to Article 50 [in:] *Konstytucja Rzeczypospolitej Polskiej. Komentarz*, Vol. III, L. Garlicki (ed.), Warszawa 2003, p. 1).

The Public Prosecutor-General noted that, in the context of the Convention law, the dominant view stated that there might be interference with privacy in the course of criminal proceedings, due to the applied coercive measures and due to certain evidence gathering activities. The application of such measures which constitute interference with privacy is inadmissible, in the light of Article 8 of the Convention of for the Protection of Human Rights. At the same time, the Convention does not explicitly specify the premisses of admissibility of the interference. The fact of a potential breach of privacy must be then examined by taking into account the circumstances of a particular case. It may only be indicated what criteria are taken into consideration for such examination. In the first place, there is the statutory basis of interference which should be precisely set out in the national law. Also, the admissible interference must be "necessary in a democratic society", which, *inter alia*, implies a requirement that the interference be minimised with the application of the principle of proportionality.

On the basis of Article 40 of the Central Anti-Corruption Bureau Act, the CBA functionaries have been authorised to conduct inspections of immovable property or other assets so that they can assess the condition of the property or other assets indicated in asset declarations. By introducing the norm under analysis, the legislator applied terminology which was appropriate for criminal proceedings.

As the Prosecutor-General stressed, it was assumed in the literature on criminal law that inspection is a trial measure aimed at providing evidence, which consisted in revealing and retaining the characteristics, state and location of various objects for the purpose of explaining the circumstances which were significant in a given case. Conducting an inspection is aimed at examining the state of affairs as it was found in the place where an offence was committed and searching for traces of the committed offence – including the objects, with the use of which the offence was committed.

In the view of the Prosecutor, inspection within the meaning of the Central Anti-Corruption Bureau Act does not imply the necessity to gain evidence in the course of proceedings concerning a particular offence. It is not clear if, at the moment of commencing an inspection, the CBA must possess data which make it sufficiently probably that there may be at least other pathologies which the CBA has been established to combat.

The Prosecutor emphasised that the legislator had used the term "inspection of immovable property" in the provision under analysis, and not the term used in Article 50 of the Constitution: "search". In colloquial language it is sometimes assumed that the inconvenience of the owner or resident of the property, ensuing from an inspection carried out by a functionary, is not as far-reaching as the inconvenience resulting from a search. However, in the doctrine of criminal law, it is commonly accepted that, despite the lack of reference to the provisions concerning search, carrying out an inspection is subject to the same restrictions as a search of property (Articles 219 to 224 of the Code of Criminal Procedure). Both these activities - *ex ante* – infringe on the inviolability of the home and the right to private life in an identical way; also, in both cases, there is a similar risk of losing evidence. If severe restrictions are introduced on the inviolability of premises which are not generally accessible, despite such important aims of a search, then the restrictions should also be adhered to in the case of an inspection of premises (cf. J. Grajewski, L. Paprzycki, M. Płachta, *Kodeks postępowania karnego. Komentarz*, Vol. 1, Kraków 2003, pp. 541-542; S. Waltoś, *Proces karny. Zarys systemu*, Warszawa 2002, p. 383; R. Stefański, Z. Gostyński, *Kodeks postępowania karnego. Komentarz*, Vol. 1, Warszawa 2003, p. 953 as well as P. Hofmański, E. Sadzik, K. Zgryzek, *Kodeks postępowania karnego. Komentarz*, Vol. 1, Warszawa 2004, p. 888).

In the opinion of the Public Prosecutor-General, since the legislator used the terminology from criminal proceedings, then the restrictions concerning the admissibility of the institution of search, regulated in that procedure, should be respectively applied to the institution of inspection of immovable property, which has been specified in the Central Anti-Corruption Bureau Act.

The Prosecutor stated that the detailed wording of the provisions containing the guarantees for proportional limitation on the constitutional rights and freedoms and the preservation of their essence (the inviolability of the home and, as a consequence, the right to private life) remains within the scope of competence of the legislator. However, in the view of the Prosecutor, it is the legislator's obligation to include appropriate guarantee regulations in a normative act, in particular taking into account the requirement arising from Article 31(3) of the Constitution that limitation upon the exercise of constitutional rights and freedoms may be imposed only by statute, and only when necessary in a democratic state for the protection of the values enumerated in the Constitution. Also, Article 8(2) of the Convention for the Protection of Human Rights stipulates that there shall be no interference by a public authority with the exercise of the right to respect for the individual's private and family life, as well as his/her home and correspondence, except where this is necessary in a democratic society for the protection of values indicated in the Convention.

In the opinion of the Public Prosecutor-General, one should agree with the applicant's view that challenged Article 40 of the Central Anti-Corruption Bureau Act, enabling the CBA

functionaries to interfere with the constitutional rights and freedoms (the inviolability of the home, the right to private life) does not contain a regulation concerning the positive premiss of necessity to undertake such action and it overlooks the issue whether such interference is indispensable for achievement of the statutory aims. The Prosecutor concluded that the provision under analysis, insofar as it allowed for carrying out an inspection of immovable property in a situation where it was not necessary for the achievement of goals specified by statute, which was inconsistent with Article 2, Article 47 and Article 50 in conjunction with Article 31(3) of the Constitution as well as with Article 8 of the Convention for the Protection for Human Rights.

4.13. As regards the allegation of non-conformity of Article 43(2) of the Personal Data Protection Act – as amended by Article 178 of the Central Anti-Corruption Bureau Act – to Article 2, Article 47 and Article 51 in conjunction with Article 31(3) of the Constitution, to the Preamble and Article 6 of the Council of Europe Convention 108, the Prosecutor stated that the legislator had limited the powers of the Inspector General for the Protection of Personal Data (GIODO), with reference to a number of personal data files. The said limitation consisted in expanding the list of secret services - whose personal data files were not subject to supervision by the Inspector General for the Protection of Personal Data, as set out in Article 43(2) of the Personal Data Protection Act - by adding the CBA.

According to the Public Prosecutor-General, the applicant rendered his allegation as a proposal for preserving broader powers of the Inspector General for the Protection of Personal Data, in order to ensure independent external supervision over the CBA's activities which were related to the processing of personal data. In the opinion of the Prosecutor, the Constitutional Tribunal is not competent to examine such proposals, as this would mean that the Tribunal would assume the role of a quasi-legislator. In the view of the Public Prosecutor-General, the allegation that Article 43(2) of the Personal Data Protection Act, as amended by Article 178 of the Central Anti-Corruption Bureau Act, clashes with the indicated higher-level norms for review has not been proven.

4.14. With reference to the allegation of non-conformity of the Central Anti-Corruption Bureau Act as a whole to the indicated higher-level norms from the Constitution and Conventions, the Prosecutor stated that it followed from the substantiation of the application of 9 November 2007 and the substantiation of the pleading of 30 January 2008 that the applicant derived the non-conformity of the said Act as a whole to the Constitution and the indicated acts of international law primarily from the non-conformity of the provisions he challenged to the proposed higher-level norms for review, with the assumption that those provisions were inextricably linked with the said Act as a whole. In the opinion of the Public Prosecutor-General, the said Act, except for its Article 1(3) and Article 40, is consistent with Article 2, Article 7, Article 10, Article 20, Article 22, Article 30, Article 31(3), Article 42(1), Article 50, Article 51 and Article 202(1) of the Constitution, with Article 7(1), Article 8 and Article 18 of the Convention for the Protection of Human Rights, with Article 20 of the Criminal Law Convention on Corruption, as well as with the Preamble, Article 5, Article 6 and Article 7 of the Council of Europe Convention 108. In the opinion of the Prosecutor, potential declaration of non-conformity of the aforementioned provisions of the said Act to the Constitution or the Conventions by the Constitutional Tribunal does not determine the unconstitutionality of the said Act as a whole.

4.15. The Public Prosecutor-General shared the applicant's view on the non-conformity of the challenged provisions of § 3 and § 6(1) of the Regulation of 27 September 2006 to the Constitution.

The statutory authorisation contained in Article 22(9) of the Central Anti-Corruption Bureau Act authorises the Prime Minister to determine, by way of a regulation, the scope, terms and procedure regarding the transfer of information to the Central Anti-Corruption Bureau by the organs, services and institutions of the state. Obtaining such information (including also personal data), collecting, verifying and processing it per se must interfere with the rights and freedoms protected by the Constitution, such as the right to legal protection of one's private and family life, of one's honour and good reputation, and the right to information autonomy. Thus, all the restrictions on these freedoms and rights may be imposed solely by statute, and a normative act equivalent to a regulation may not repeat, reformulate, modify or synthesise the content included in a statute.

The challenged § 3 of the Regulation of 27 September 2006 leaves the regulation of the way of transferring data files, data or information to the CBA organisational units by the entities specified in Article 22(2) of the Central Anti-Corruption Bureau Act to the agreements made between those entities and the CBA. Likewise, § 6(1) of the Regulation of 27 September 2006 allows those entities to express their consent – by way of a decision or pursuant to separate agreements – to make the collected data files, data or information available to the organisational units of the CBA by means of computer hardware and systems, without the necessity to apply for access in writing whenever such access is needed. As a result, it is not the Act, but the agreement between the CBA and a given entity - which has the data files, data or information (including personal data) in its possession – that determines the way of transferring those data and information, or even possible resignation from restrictions (application procedure) meant to ensure proper transfer of that information. According to the Public Prosecutor-General, the procedure for making data available, specified in such a way, shifts the burden of regulating the manner of interference with the realm of the right to private life and the right to personal data protection into the scope of internal powers of government administration (for example, in the form of agreements of particular secret services).

The Prosecutor agreed with the applicant that the challenged provisions of the Regulation of 27 September 2006 did not facilitate proper protection of personal data stored in automated data files against accidental damage, unauthorised damage or accidental loss as well as against unauthorised access to data, and making changes to them or disseminating them, since the realm regulated by internal agreements of public administration (including secret services) is in practice subject to relatively illusory external control.

Therefore, the Public Prosecutor-General concluded that the provisions of § 3 and § 6(1) of the Regulation of 27 September 2006 go beyond the statutory authorisation contained in Article 22(9) of the Central Anti-Corruption Bureau Act, clashing with the constitutional premisses of legality of an executive act, the right to private life and the right to protection of information autonomy, as well as with the right to protection of personal data stored in automated data files. Thus, they are inconsistent with Article 22(9) in conjunction with Article 22(2) of the said Act, Article 92(1), Article 47, Article 51(2) in conjunction with Article 31(3) and Article 51(5) of the Constitution, with Article 8 in conjunction with Article 18 of the Convention for the Protection of Human Rights as well as with the Preamble, Article 5(b) and (c), Article 6 and Article 7 of the Council of Europe Convention 108.

5. In a letter of 30 April 2008, the Prime Minister presented his views with regard to the non-conformity of the provisions of the Regulation of 27 September 2006, challenged in the application, to the Constitution, the Convention for the Protection of Human Rights and the Council of Europe Convention 108.

First of all, the Prime Minister pointed out that the Regulation of 27 September 2006 had been issued on the basis of the authorisation contained in Article 22(9) of the Central

Anti-Corruption Bureau Act, which authorised the Prime Minister to determine, by way of a regulation, the scope, terms and procedure regarding the transfer of information to the CBA by the organs, services and institutions of the state indicated in Article 22(2) and (4) of the said Act, taking into account the way of documenting that information and the entities which were authorised to transfer data.

The Prime Minister stated that it followed from the content of Article 22(2) and (4) of the said Act that the very Act itself distinguished between two categories of information which were collected and were subject to transfer to the CBA. The subject matter of the information collected in the data files referred to in Article 22(2) is each time specified in universally binding law, which provides for such data files. Moreover, the provisions specify the entities authorised to obtain information about persons whose personal data are held in a register. This also includes the CBA. The subject matter of information referred to in Article 22(4) has not been specified.

What is more, the Prime Minister indicated that the said Act also drew a distinction between the terms for imparting data. Pursuant to Article 22(3) of the said Act, the data from the data files, as referred to in paragraph 2, are transferred via an optical or magnetic carrier or by means of teletransmission. By contrast, for the purpose of transferring the data referred to in Article 22(4), the procedure set out in Article 22(5) of the said Act is applied. The Prime Minister stressed that the statutory differentiation of categories of data and the terms of their processing was included in the content of the Regulation.

The Regulation of 27 September 2006, in its § 6, grants authorisation to reach appropriate agreements, allowing the CBA to use the data files, referred to in Article 22(2) of the Central Anti-Corruption Bureau Act, by means of computer hardware and systems, without the necessity to apply for access in writing whenever such access is needed. The Prime Minister stated that: "the interpretation of the Act and the Regulation may however lead to the conclusion that a given agreement is aimed at regulating, in detail, merely the issues which are technical and organisational in character, and the said Regulation is to fit in the technical conditions and capabilities of the networks and systems where the data are stored, which are changing due to progress". He also indicated that § 6(3) of the Regulation imposed an obligation on the CBA and an entity disclosing the information to observe the provisions on the protection of confidential information and the provisions on the protection of personal data.

To conclude his observations, the Prime Minister stated that "the authority issuing the Regulation was bound by the scope of statutory authorisation to issue such a regulation".

In addition, the Prime Minister remarked that due to the doubts raised before the Constitutional Tribunal, a draft amendment to the Regulation had been prepared, which should eliminate possible interpretative discrepancies which were the object of the application of the group of Deputies. He stressed that the draft amendment to the Regulation contained, *inter alia*, a provision in accordance with which the transfer of data referred to in both Article 22(2) and Article 22(4) of the Central Anti-Corruption Bureau Act, had to be preceded by an application in writing submitted by the CBA. Also, it has been clearly indicated in the draft amendment that "a separate agreement concluded between the CBA and the entities referred to in Article 22(2) sets out only organisational and technical solutions as regards transferring information by means of teletransmission".

6. In a letter of 4 March 2009, the Marshal of the Sejm requested the Tribunal to determine that:

1) the Central Anti-Corruption Bureau Act as a whole was consistent with Article 2, Article 7, Article 10, Article 20, Article 22, Article 30, Article 31(3), Article 42(1), Article 47, Article 50, Article 51 and with Article 202(1) of the Constitution, with

Article 7(1), Article 8 and Article 18 of the Convention for the Protection of Human Rights, with Article 20 of the Criminal Law Convention, with the Preamble and Articles 5-7 of the Council of Europe Convention 108,

2) Article 1(3) of the said Act was consistent with Article 2 as well as it was not inconsistent with Article 20, Article 22, Article 31(3) and Article 42(1) of the Constitution and with Article 7(1) of the Convention for the Protection of Human Rights,

3) Article 2(1)(1)(b), (c) and (d) of the said Act was consistent with Article 2 as well as was not inconsistent with Article 20, Article 22, Article 31(3), Article 42(1) of the Constitution and with Article 7(1) of the Convention for the Protection of Human Rights,

4) Article 2(1)(2)-(5) of the said Act was consistent with Article 2, Article 10 and Article 202(1) of the Constitution,

5) Article 5(2) and (3), Article 6(1) and Article 12(1) of the said Act was consistent with Article 2 and Article 10 of the Constitution, as well as with Article 20 of the Criminal Law Convention,

6) Article 22 of the said Act was consistent with Article 47, Article 51 in conjunction with Article 31(3) and Article 30 of the Constitution as well as with Article 8 and Article 18 of the Convention for the Protection of Human Rights as well as with the Preamble and Articles 5-7 of the Council of Europe Convention 108,

7) Article 31(3) of the said Act was consistent with Article 2 and Article 32(1) of the Constitution,

8) Article 31(3) of the said Act in conjunction with Article 32 and Article 33 of the said Act was consistent with Article 20 and Article 22 of the Constitution in conjunction with Article 31(3) of the Constitution,

9) Article 40 of the said Act was consistent with Article 2, Article 47 and Article 50 of the Constitution and Article 8 of the Convention for the Protection of Human Rights,

10) Article 43(2) of the Personal Data Protection Act, as amended by Article 178 of the Central Anti-Corruption Bureau Act, was consistent with Article 2 as well as Article 47 and Article 51 in conjunction with Article 31(3) of the Constitution as well as with the Preamble and Article 6 of the Council of Europe Convention 108.

6.1. The Marshal of the Sejm stated that the legislator, when introducing a legal definition of corruption into the Central Anti-Corruption Bureau Act, achieved two goals in the context of the Act: "firstly, what has been avoided is an infringement on the principle of appropriate legislation, arising from Article 2 of the Constitution; this infringement could have occurred by using a term which lacked sufficient specificity or was ambiguous". The Marshal of the Sejm emphasised, in that context, that the term of corruption had not been previously defined in a statutory provision. The existing definitions of that term formulated in international agreements or by non-governmental organisations, as well as its colloquial meaning, indicated that – to avoid ambiguity and imprecision – it was necessary to formulate a legal definition of the term of corruption. The Marshal stated that the term of corruption was of key importance to the whole Act, and in particular as regards determining the scope of competence of the CBA. For that reason, as the Marshal underlined, adhering to the regulation contained in § 146(1) of the rules on legal drafting (which prescribed that a definition of a given term should be formulated where the term was ambiguous or imprecise), a definition of the term "corruption" had been included in the general provisions of the Central Anti-Corruption Bureau Act.

Secondly, the introduction of the term corruption into the Act and its definition allowed – according to the Marshal – to outline, as precisely as possible, the limits of competence ratione materiae of the CBA. That competence is specified, *inter alia*, by Article 2(1) of the said Act in conjunction with Article 1(1) of the Act. The Marshal indicated

that: “the CBA is competent in the cases regarding offences set out in Article 2(1)(b)-(d) of the Act only when those offences bear relation to corruption (or, in the case of the offences specified in points b and d, activity against the economic interests of the state). Determining if a given case falls within the scope of competence of the CBA requires answering the question whether, in a given actual state of affairs, an offence specified in Article 2(1)(1)(b)-(d) of the said Act has been committed, and also whether it bears any relation to corruption”. In the view of the Marshal of the Sejm, Article 1(3) of the Act narrows down the scope of competence of the CBA solely to those offences (out of those enumerated in Article 2(1)(1)(b)-(d) of the said Act) which bear relation to corruption.

Taking into consideration the fact that the content of Article 1(3) and Article 2(1)(1)(b)-(d) of the said Act requires the fulfilment of two premisses together: occurrence of a certain offence and a relation between the offence and corruption; in the Marshal’s opinion, in the light of the challenged provisions, it is not possible for the CBA to prosecute the perpetrators of acts which are irrelevant in the context of criminal law. In the Marshal’s view, it is therefore unjustified to allege that the scope ratione materiae of the CBA’s activity goes beyond the statutory specificity of acts prohibited under penalty, as expressed in criminal law, which would result in the infringement of Article 2 and Article 31(3) of the Constitution.

The Marshal of the Sejm stressed that, with regard to Article 2(1)(1)(b)-(d) of the Central Anti-Corruption Bureau Act, the technique of making reference to other provisions which contain relevant criminal law regulations was applied which specify in a precise way the acts subject to penalty, their characteristics and the object of protection. For that reason, the Marshal stated that it was unjustified to allege that “the object of protection contained in Article 1(3) of the Act, as regards corruption in the private sector, goes beyond a reasonable legal value”. Indeed, he pointed out that, in that case, one could speak of the object of protection with regard to criminal law provisions contained in statutes referred to in Article 2 of the said Act. However, it was improper to use that term in relation to a defining provision. Therefore, according to the Marshal, one cannot agree with the allegations of non-conformity of the challenged provisions to Article 31(3) of the Constitution.

Making reference to the allegations of non-conformity of Article 1(3) and Article 2(1)(1)(b)-(d) of the Central Anti-Corruption Bureau Act to Article 20 and Article 22 of the Constitution, the Marshal of the Sejm indicated that challenged Article 1(3) was a defining provision. Consequently, that provision may not be used for deriving a legal norm which would impose a restriction on the freedom of economic activity. In the Marshal’s opinion, presented in the application by the group of Deputies, the argumentation for the allegation was based on incorrect understanding of the provision and incorrect interpretation of its significance in the context of the entire text of the Central Anti-Corruption Bureau Act. The Marshal held the view that what was of fundamental significance for the assessment of conformity of the challenged provisions to Article 20 and Article 22, as well as to Article 42(1) of the Constitution – was the answer to the question whether those provisions introduced prohibitions with regard to carrying out economic activity and whether those provisions and other provisions of the said Act might be used for deriving a legal norm which would sanction the infringement of Article 1(3) and Article 2(1)(1)(b)-(d) of the said Act. In the event of a negative determination of that issue, it would be groundless to make allegations of non-conformity to Article 20, Article 22 and Article 42(1) of the Constitution. In that context, the Marshal indicated that indispensable elements of a criminal law provision are: specifying the characteristics of a prohibited act (apart from the exceptions indicated in § 75(2) and (3) of the rules on legal drafting) and specifying the sanctions imposed for the commission thereof. In the opinion of the Marshal of the Sejm, an analysis of the content of Article 1(3) of the Central Anti-Corruption Bureau Act leads to an observation that the above-

mentioned provision is not criminal in character, as it does not create a new type of a prohibited act, and there is no sanction for the commission thereof. Also, the provisions of Article 2(1)(1)(b)-(d) of the said Act are meant to indicate the scope of the CBA's activity, and may not constitute a basis for criminal repression. For that reason, the arguments - contained in the application by the group of Deputies - which concerned the statutory specificity of acts prohibited in the light of Article 42(2) of the Constitution, although they were substantively justified, they might not refer to the challenged provisions, and even more so they might not substantiate their non-conformity to Article 42(2) of the Constitution. For the same reasons, according to the Marshal of the Sejm, it should be considered unjustified to allege that the provisions of Article 1(3) and Article 2(1)(1)(b)-(d) of the said Act are inconsistent with Article 7 of the Convention for the Protection of Human Rights.

The Marshal of the Sejm also assessed the allegations and deliberations concerning Article 20 and Article 22 of the Constitution as irrelevant in respect of the content of the challenged provisions. He stressed that, just as the introduction of a legal definition of corruption did not create a new type of a prohibited act, likewise the introduction of that definition was irrelevant for the freedom of economic activity.

The scope of the definition of corruption is significant as regards determining the scope of the CBA's competence in the context of offences indicated in Article 2(1)(1)(b)-(d) of the said Act. The mere fact that a given act bears relation to corruption does not deem it to fall within the scope of the CBA's activity, for it is also necessary for the act to be an offence indicated in Article 2(1)(1)(b)-(d). For that reason, the Marshal concluded that the applicants' allegations - indicating that the scope of the definition of corruption might cause the CBA's interference (even one of criminal law character) in the relations of civil-law character which were irrelevant from the point of view of criminal law - had no factual grounds and were based on incorrect premisses.

6.2. The Marshal emphasised that detecting the acts indicated in Article 2 of the Central Anti-Corruption Bureau Act and combating them fall within the remit of the executive power (Article 10 of the Constitution), and in particular the remit of the organs of government administration (Article 146 of the Constitution). In this context, assigning such tasks to a special unit, being part of the structure of government administration (a central organ of government administration), may not give rise to reservations pertaining to the system of government. Moreover, Article 146(4)(7) of the Constitution obliges the Council of Ministers, and the organs subordinate thereto, to "ensure the internal security of the State and public order". In the view of the Marshal of the Sejm, the assessment of the merits of establishing a new service in the place of the authorities that have fulfilled the functions of "anti-corruption services", does not fall merely within the limits of purely legal argumentation, but it constitutes an element of the policy of law and of a chosen approach to carrying out public tasks by the legislator.

According to the Marshal, it cannot be concluded that granting the status of a surveillance authority whose powers resemble the powers of the NIK staff to the CBA results in an infringement of Article 2, Article 10 and Article 202(1) of the Constitution. Combating crime, including offences of corruption and other offences committed in relation to performing a public function or making use of public funds, ought to be qualified as a constitutional task of the Council of Ministers and the administrative structure subordinate thereto. In this context, Article 2(1)(2)-(5) of the said Act is consistent with Article 2, Article 202(1) and Article 146 of the Constitution.

6.3. The Marshal did not share the applicant's allegations either as regards Article 5(2) and (3), Article 6(1) and Article 12(1) of the Central Anti-Corruption Bureau Act.

Making reference to the regulations of Article 146(1) of the Constitution, the Marshal of the Sejm stated that the legal sense of "implementation of state policy" corresponded to the principle of separation of powers (Article 10 of the Constitution) and the term "executive power" used therein. In the opinion of the Marshal of the Sejm, it is the Council of Ministers that, pursuant to Article 146(7), ensures "the internal security of the State and public order" and should combat offences involving corruption. Therefore, undoubtedly, the Council of Ministers may fulfil its constitutional obligations solely via its subordinate government administration organs, including the CBA.

In the view of the Marshal of the Sejm, the Council of Ministers as an organ of government administration which is superior to other organisational units, together constituting that administration, should manage the activity of the units which are subordinate to the Council. Drawing parallels to other organs of the state which have the status of secret services, the Marshal of the Sejm observed that they were directly subordinate to the Prime Minister, whereas the Head of Military Counter-Intelligence Service and the Head of Military Intelligence Service were subordinate to the Minister of National Defence, with the proviso that the powers of the Prime Minister or the Minister Coordinator of Secret Services in that regard were specified by statute. Moreover, he pointed out that the activity of the heads of particular secret services was subject to supervision by the Sejm. In the view of the Marshal of the Sejm, it follows from the above comparison that there is no homogeneous model for placing secret services in the current legal system; however, the dominant position in this regard is definitely held by the Prime Minister. Therefore, it should not be surprising, in the opinion of the Marshal of the Sejm, that there is a similar situation with the Head of the CBA, who is appointed and dismissed and – which is also significant – supervised by the Prime Minister. According to the Marshal of the Sejm, such a systemic position of the CBA corresponds to Article 146(3) of the Constitution and leads to the coherence of the legal system.

As regards the allegation of infringement on Article 20 of the Criminal Law Convention, the Marshal of the Sejm stated that a possibility of exerting "improper political pressure" which consisted in aiming the CBA's activities at particular persons or groups - constituted an argument which was political in character, rather than legal. He admitted that, pursuant to binding legal provisions, such an allegation could be made against the Prime Minister with relation to supervision over all secret services. At the same time, the Marshal of the Sejm indicated that the Prime Minister exercised supervision over the activity of the Head of the CBA, and it was within the Prime Minister's powers to outline the directions of the CBA's activities by way of guidelines (Article 12(1) of the Central Anti-Corruption Bureau Act). Such a construction is appropriate for centralised structures based on hierarchy, within which there is a possibility of giving orders to the state organs of lower rank by the organs of the state that are higher in the hierarchy. Such a situation is also relevant for the relations between the Prime Minister and the Head of the CBA. Summing up that part of his deliberations, the Marshal of the Sejm stated that Article 5(2) and (3), Article 6(1) as well as Article 12(1) of the said Act did not infringe on Articles 2 and 10 of the Constitution and Article 20 of the Criminal Law Convention.

6.4. With regard to the allegations of unconstitutionality of Article 22 of the Central Anti-Corruption Bureau Act, the Marshal of the Sejm, after presenting the genesis of the regulations contained in the challenged provision, stated that the regulations on the collecting and processing of personal data are not exclusive regulations, drafted solely to meet the needs of the CBA's activities. In the opinion of the Marshal of the Sejm, they constitute the entirety of legislation that the legislator drew on while preparing Article 22 of the said Act. Moreover, the Marshal of the Sejm noted that some regulations on the collecting and processing of

personal data had already been the object of assessment by the Constitutional Tribunal and had stood the test of practice in the field of the activities of relevant secret services. In the opinion of the Marshal of the Sejm, the efficiency and effectiveness of carrying out statutory tasks by services whose character is similar to that of police forces depends, *inter alia*, on: the possibility of collecting and processing personal data. The Marshal of the Sejm also admitted that those powers raised certain doubts in the course of legislative work, as well as after the entry into force of the Act. These doubts concerned the mutual relations between the scope of powers granted to the secret services and citizens' right to private life. However, according to the Marshal of the Sejm, the right to private life does not have an absolute character and may be subject to restrictions, provided that these restrictions are formulated in conformity to constitutional requirements. The Marshal of the Sejm pointed out that a restriction might be imposed on the right to private life only when it was provided for by another constitutional norm, principle or value, and the degree of that restriction had to remain adequately proportionate to the significance of the interest which the said restriction was to serve. In that situation, the Marshal of the Sejm concluded that the regulations of Article 22 of the said Act were consistent with the provisions of the Constitution and the Convention. Indeed, the terms of collecting and processing of personal data were specified in the provisions of statutory rank, and the tasks which are to be carried out by the CBA serve the fulfilment of constitutional obligations of the state as regards ensuring the security and freedom of economic activity.

6.5. As far as the allegations of unconstitutionality of Article 31(3) of the Central Anti-Corruption Bureau Act are concerned, the Marshal of the Sejm emphasised that the surveillance conducted by the CBA primarily involved examining and overseeing procedures, specified by legal provisions, for taking and implementing decisions with regard to: carrying out privatisation and commercialisation, providing financial support, awarding public procurement contracts, disposing of state or council property, granting concessions, permits, and exemptions within the scope ratione personae and ratione materiae, as well as granting discounts, preferences, quotas, tariff ceilings, loan sureties and guarantees. Pursuant to Article 31(3) of the said Act, persons who are subject to surveillance are persons who perform public functions, entities of the public finance sector within the meaning of the Act of 30 June 2005 on Public Finances, entities which are not included in the public finance sector but which receive public funds as well as entrepreneurs.

In the view of the Marshal of the Sejm, the allegations concerning the diversification of the legal situation of subjects of rights and obligations belonging to the same category, which would clash with Article 2 and Article 32(1) of the Constitution, should be deemed unjustified. The Marshal of the Sejm stated that entrepreneurs belonged to the category of business operators involved in legal transactions with regard to whom public functionaries may be most likely to infringe legal provisions. Among the operators not included in the public finance sector, entrepreneurs may, to the largest extent, in a way different than by receiving public funds, enter into mercenary relations with public bodies. According to the Marshal of the Sejm, it is entrepreneurs - and not other operators among the entities not included in the public finance sector (e.g. foundations or associations) - that may gain concessions and permits for conducting a given economic activity; also, it is entrepreneurs who are the subjects of procedures for commercialisation or privatisation. The Marshal of the Sejm also indicated that entrepreneurs were most frequently parties to proceedings concerning public procurement. Therefore, narrowing down the scope of surveillance conducted by the CBA only to those entrepreneurs who receive public funds (within the meaning of the Act of 30 June 2005 on Public Finances) would make it difficult and, at times actually impossible, to examine many cases of corruption involving public functionaries. Consequently, the Marshal

of the Sejm stated that the challenged provision introduced a diversification criterion that was objective in character and which was related to the object of regulation, and as such was consistent with Article 2 and Article 32(1) of the Constitution.

The Marshal of the Sejm did not agree with the allegations that the challenged provision infringed on Articles 20 and 22 of the Constitution, by the fact that the provision concerning surveillance conducted by the CBA with regard to entrepreneurs lacked the requirement of "indispensability" of such surveillance. In the opinion of the Marshal of the Sejm, the mere introduction of surveillance procedures aimed at combating corrupt practices with regard to entrepreneurs was consistent with the Constitution. None of the provisions of the Central Anti-Corruption Bureau Act gives the CBA any grounds for using surveillance instruments for other purposes than anti-corruption activities. Therefore, the surveillance of entrepreneurs may only have such a goal. Since the CBA's activities are also aimed at preventing and counteracting corruption, and thus these activities precede events, and not only deal with consequences – then, in the opinion of the Marshal of the Sejm, during the surveillance of persons performing public functions (and, by the same token, also during the surveillance of entrepreneurs linked with those persons), the principles applied may be other than the principle of necessity or indispensability of surveillance. In this situation, the lack of connection between the undertaken surveillance and particular allegations made against a given public figure, in the view of the Marshal of the Sejm, is not an unconstitutional solution.

6.6. As regards the allegations of unconstitutionality of Article 40 of the Central Anti-Corruption Bureau Act, the Marshal of the Sejm stated that they were unjustified. Following the analysis of the doctrine in respect of the term "inspection", the Marshal of the Sejm deemed it improper to claim that a person whose property was inspected, by the mere fact of such inspection being carried out was considered to be guilty. According to the Marshal of the Sejm, the fact of granting measures such as inspection to the CBA functionaries who carry out surveillance should be considered in the light of a goal which is to be achieved after carrying out the said inspection. As the Marshal of the Sejm stressed, that goal is not to gather evidence of guilt, but to verify asset declarations submitted pursuant to separate provisions by persons performing public functions. The institution of inspection is therefore, in the view of the Marshal of the Sejm, an instrument aimed at ensuring the effectiveness of verification of asset declarations, and may not be regarded as a sign of suspicion towards a person whose assets are being inspected, but merely as an activity aimed at verifying the data submitted in a given asset declaration.

In the context of allegations that the principle of protection of private life and the principle of inviolability of the home had been infringed, the Marshal of the Sejm pointed out that a person who decided to accept a position by which s/he became a person performing a public function, at the same time consented to those inconveniences which were related to performing the said public functions. One of such inconveniences is the legal institution of asset declarations and its derivative, i.e. inspection of assets of a person performing a public function.

Making reference to selected theses of the jurisprudence of the Constitutional Tribunal as regards protecting the private lives of persons performing public functions, the Marshal of the Sejm stated that the public good, such as a state free from corrupt practices, justifies the adoption of such a form of inspection in legal solutions concerning anti-corruption activities. In the view of the Marshal of the Sejm, corruption poses a threat to the foundations of a democratic state. In this context, the restriction on the right to private life of persons performing public functions is justified in respect of the common good as well as public security and order. In the view of the Marshal of the Sejm, such a solution is thus

consistent with the constitutional principle of proportionality, as expressed in Article 31(3) of the Constitution.

6.7. As regards the allegations pertaining to the amended provisions of the Personal Data Protection Act, the Marshal of the Sejm repeated the argumentation put forward in the context of challenged Article 22 of the Central Anti-Corruption Bureau Act. He admitted that, while amending the selected provisions of other statutes, the legislator did not propose any new solutions concerning solely the powers of the CBA. The amendment entailed that the newly-established CBA was to be included in the list of entities in relation to which the powers of the Inspector General for the Protection of Personal Data were limited. The solution stemmed from the fact that the CBA's activities with regard to the state security were recognised as significant and sensitive as well as from the necessity to limit the access of external entities to the materials in the CBA's possession. The safety of the persons carrying out the activities within the CBA's structures and for the CBA constitutes a value which justifies, in the opinion of the Marshal of the Sejm, the solutions restricting the powers of the Inspector General for the Protection of Personal Data with regard to the CBA.

The Marshal stated that, although the introduced solution was far-reaching, the principle of proportionality was observed in its case. The solution is adequate to the purpose of combating corruption. In his view, the regulation is indispensable from the point of view of the public interest. The principle of personal data protection does not have an absolute character, and the restriction on the principle is admissible due to the state security.

Moreover, the Marshal pointed out that the CBA was subject to both internal supervision, carried out by the Prime Minister, and supervision carried out by the Sejm, as part of the supervision over government administration (on the basis of Article 95(2) of the Constitution).

Therefore, the Marshal of the Sejm concluded that the challenged provisions were consistent with both Article 47 and Article 51 of the Constitution in conjunction with Article 31(3) of the Constitution, as well as with Article 6 of the Council of Europe Convention 108.

II

At the hearing on 22 June 2009, the participants in the proceedings maintained the stances they had presented in writing. Additionally, the representative of the applicants, apart from challenging the Central Anti-Corruption Bureau Act as a whole, requested the Constitutional Tribunal to determine – if the Constitutional Tribunal had recognised all the allegations indicated in the application, or part thereof, as justified – that the provisions of the Central Anti-Corruption Bureau Act which were declared unconstitutional were inextricably linked with the said Act as a whole, and thus the whole Act was inconsistent with the Constitution.

III

The Constitutional Tribunal has considered as follows:

1. The issue of non-conformity of the Central Anti-Corruption Bureau Act as a whole to Article 2, Article 7, Article 10, Article 20, Article 22, Article 30, Article 31(3), Article 42(1), Article 47, Article 50, Article 51 and Article 202(1) of the Constitution; to Article 7(1), Article 8 and Article 18 of the Convention for the Protection of Human Rights and Fundamental Freedoms; to Article 20 of the Criminal Law Convention on Corruption as

well as the Preamble and Articles 5-7 of the Council of Europe Convention No. 108 for the Protection of Individuals with regard to the Automatic Processing of Personal Data.

On 9 November 2007, the applicant – a group of Deputies of the Sejm of the Republic of Poland (hereinafter: the applicant) – referred to the Constitutional Tribunal for it to determine the non-conformity of provisions (indicated in the application) of the Central Anti-Corruption Bureau Act of 9 June 2006 (Journal of Laws - Dz. U. No. 104, item 708, as amended; hereinafter: the Central Anti-Corruption Bureau Act) to the indicated regulations of the Constitution as well as the Convention for the Protection of Human Rights and Fundamental Freedoms (Journal of Laws - Dz. U. of 1993 No. 61, item 284, as amended; hereinafter: the Convention for the Protection of Human Rights).

In a letter of 30 January 2008, a group of Sejm Deputies (as the applicant) supplemented and extended the scope of the application of 9 November 2007, referred to the Constitutional Tribunal, by alleging the non-conformity of the Central Anti-Corruption Bureau Act as a whole to Articles 2, 7, 10, 20, 22, 30, 31(3), 42(1), 47, 50, 51 and 202(1) of the Constitution, and also the infringement, by that Act as a whole, of the provisions of Article 7(1), Article 8 and Article 18 of the Convention for the Protection of Human Rights, Article 20 of the Criminal Law Convention (Journal of Laws - Dz. U. of 2005 No. 29, item 249; hereinafter: the Criminal Law Convention) and the Preamble and Articles 5-7 of the Council of Europe Convention No. 108 for the Protection of Individuals with regard to the Automatic Processing of Personal Data (Journal of Laws - Dz. U. of 2003 No. 3, item 25; hereinafter: the Council of Europe Convention 108).

As the alternative to the above, the applicant submitted an application to the Constitutional Tribunal for it to determine that particular provisions of the Central Anti-Corruption Bureau Act, indicated in the application and challenged by the applicant, were unconstitutional and contrary to the indicated provisions of the Conventions.

Formulating the application for the Tribunal to determine that the Central Anti-Corruption Bureau Act as a whole was inconsistent with the indicated provisions of the Constitution, and contrary to the regulations of the Conventions, the applicant (a group of Deputies) did not, in fact, provide sufficient argumentation for such ultimate allegations. Neither did the applicant present arguments, in particular, supporting the thesis that the non-conformity of the provisions challenged by the applicant to the indicated higher-level norms of the Constitution and the contradiction between the provisions and the convention regulations indicated in the application results in the non-conformity of the said Act as a whole to the indicated higher-level norms for review.

In this situation, the Constitutional Tribunal concludes that the allegation of non-conformity of the Central Anti-Corruption Bureau Act as such (as a whole) to the higher-level norms has not been substantiated by the applicants in a way that is required by the provisions of the Constitutional Tribunal Act of 1 August 1997 (Journal of Laws - Dz. U. No. 102, item 643, as amended; hereinafter: the Constitutional Tribunal Act). For that reason, and within the indicated scope, the proceedings before the Constitutional Tribunal are subject to discontinuation. However, the allegations of unconstitutionality concerning particular provisions (regulations) of the challenged Act that should be examined are those presented in the previous version of the application (dated 9 November 2007), and supplemented with a pleading of 30 January 2008, with regard to the indicated provisions of the Constitution and the cited regulations of the Conventions.

2. The allegation of unconstitutionality of Article 1(3) and Article 2(1)(1)(b)-(d) of the Central Anti-Corruption Bureau Act.

The object of the allegations which have been substantiated separately by a group of Deputies is a number of provisions of the Central Anti-Corruption Bureau Act indicated in the

application. In the first place, the applicant challenges the provisions of Article 1(3) as well as Article 2(1)(1)(b), (c) and (d) of the said Act.

Article 1(3) contains a legal definition of the term "corruption". Pursuant to that provision, "corruption, within the meaning of the Act, shall be promising, offering, giving, demanding or accepting by any person, directly or indirectly, any undue advantage, whether financial, personal or other, for him/herself or any other person, or shall be accepting an offer or promise of such advantages in exchange for taking action or refraining from action in the performance of public functions or in the course of economic activity".

In turn, Article 2(1)(1)(b), (c) and (d) specifies the tasks of the Central Anti-Corruption Bureau (CBA) as a state institution (secret service) aimed at combating corruption in public and economic life, and in particular in state and local self-government institutions, as well as aimed at combating activity against the economic interests of the state.

In the applicant's view, these provisions are inconsistent with Article 2, Article 31(3), Article 42(1), and also with Article 20 and Article 22 of the Constitution as well as with Article 7(1) of the Convention for the Protection of Human Rights.

Pursuant to the challenged Act, the CBA has been established as a secret service responsible for combating corruption in public and economic life, and in particular in state and local self-government institutions, as well as responsible for combating activity against the economic interests of the state (Article 1(1) of the the Central Anti-Corruption Bureau Act). The Tribunal holds the view that on no account may it be assumed that the mere establishment of an institution such as the Central Anti-Corruption Bureau infringes on the Constitution. The Constitutional Tribunal has not been established to review the usefulness of institutional solutions adopted by the legislator. The starting points for its decisions are always: the assumption that the legislator acted in a reasonable way and the presumption of constitutionality of properly enacted statutes.

In accordance with challenged Article 2(1)(1)(b), (c) and (d) of the said Act, the tasks of the CBA shall include: "(…) identification, prevention and detection of offences against: (...) b) the administration of justice, specified in Article 233, elections and referenda, specified in Article 250a, the public order, specified in Article 258, the credibility of documents, specified in Articles 270-273, property specified in Article 286, business transactions, specified in Articles 296-297 and Article 299, trading in currency and securities, specified in Article 310 of the Act of 6 June 1997 – the Polish Penal Code, and also offences referred to in Articles 585-592 of the Act of 15 September 2000 – the Polish Commercial Companies Code (...) as well as those specified in Articles 179-183 of the Act of 29 July 2005 on Trading in Financial Instruments (...) if they are related to corruption or activity against the economic interests of the state, c) financing political parties, specified in Articles 49d and 49f of the Act of 27 June 1997 on Political Parties (...) if they are related to corruption, d) tax obligations and settlements concerning subsidies and grants, specified in Chapter 6 of the Act of 10 September 1999 - the Polish Penal Fiscal Code (...), if they are related to corruption or activity against the economic interests of the state; as well as prosecuting the perpetrators of those offences".

The Tribunal states that the legislator has not merely set out the CBA's tasks in a general way. In Article 2 of the Central Anti-Corruption Bureau Act, he has indicated the specific tasks which the CBA is to carry out. These tasks shall be: identification, prevention and detection of the enumerated offences (Article 2(1)(1)(b), (c) and (d)), provided that combating these offences falls within the scope of the CBA's tasks, and as long as the offences are related to corruption within the meaning of Article 1(3) of the said Act. In this context, it is difficult to overestimate the role of the legal definition of corruption for specifying the CBA's competence ratione materiae.

It follows from the mere wording of challenged Article 2(1)(1)(b), (c) and (d) of the said Act that its enactment does not result in creating new types of prohibited acts (and thus – there are no grounds to claim that it results in restricting the freedoms of individuals). Enumerating the CBA's tasks of clearly refers to certain offences mentioned in the binding criminal regulations: those contained in codes as well as those enacted outside them. If a given offence is related to corruption (as defined in the Central Anti-Corruption Bureau Act, in its Article 1(3)), then the prosecution, identification and detection of such offences (as well as prevention thereof) fall within the scope of the CBA's remit.

It does not follow from Article 2(1)(1)(b), (c) and (d) that, in particular, criminal liability will be assigned to persons other than those who are liable on the basis of previously enacted statutory provisions. Therefore, there is no extension of the scope ratione materiae and ratione personae as regards criminal liability, which would be incompatible with the terms of Article 42(1) of the Constitution as well as Article 7(1) of the Convention for the Protection of Human Rights. The content of Article 2(1)(1)(b), (c) and (d) of the challenged Act does not lead to restrictions on the exercise of constitutional rights and freedoms which would be contrary to Article 31(3) of the Constitution. Also, there is no ambiguity in the case of the regulation under assessment here which, by enumerating particular criminal law regulations, specifies the scope of the CBA's competence in a way that does not infringe on the requirements of appropriate legislation, derived from Article 2 of the Constitution. Due to these circumstances, the Constitutional Tribunal has concluded that Article 2(1)(1)(b), (c) and (d) of the said Act is consistent with Article 2, Article 31(3) and Article 42(1) of the Constitution as well as with Article 7(1) of the Convention for the Protection of Human Rights. At the same time, the Tribunal has not found, in the application and the argumentation contained therein, any arguments for substantive linking the list of prohibited acts set out in Article 2(1)(1)(b), (c) and (d) - the identification, prevention and detection of which fall within the CBA's competence - with the principle of social market economy (Article 20 of the Constitution) and with the constitutional principle of freedom of economic activity, construed broadly, (Article 22 of the Constitution). For that reason, the Constitutional Tribunal has regarded Articles 20 and 22 of the Constitution as higher-level norms which are inadequate for the constitutional review of Article 2(1)(1)(b), (c) and (d) of the said Act.

Challenged by the applicant, Article 2(3) of the said Act stipulates that the Central Anti-Corruption Bureau may carry out preliminary proceedings and deal with all the acts exposed during the course of proceedings, if they are related, in respect of their scope ratione materiae and ratione personae, to the act which constitutes the basis for instigating the proceedings. Falling outside the scope of assessment, as not challenged by the applicant, the degree of concentration of powers to carry out preliminary proceedings by one and the same authority (also conducting activities which are operational in character), the Constitutional Tribunal has not seen, in the content of that provision, the infringement of the principle of *nullum crimen sine lege*, set out in Article 42(1) of the Constitution, neither has it seen a clash with the regulation of Article 31(3) and Article 2 of the Constitution to the extent indicated by the applicant. In the view of the Constitutional Tribunal, the applicant has not presented arguments indicating the infringement by the aforementioned Article 7(1) of the Convention for the Protection of Human Rights. Also, there is no substantive connection here between Article 2(3) of the Central Anti-Corruption Bureau Act with Articles 20 and 22 of the Constitution, which were indicated as higher-level norms for constitutional review.

The Tribunal holds the view that, in the light of the Central Anti-Corruption Bureau Act, determining whether, in a given case, the CBA remains competent to identify and detect offences requires an answer in the form of affirmative conjunction to the two following questions: a) is it an offence specified in Article 2(1)(1)(b), (c) and (d), and then – b) is this offence related to corruption. A functionary of the CBA, acting on the basis of and within the

scope of the challenged Act, in the first place has the obligation to determine whether he/she is dealing with an offence specified in Article 2(1)(1)(b), (c) and (d), and then to determine whether that offence bears the characteristics referred to in Article 1(3) of the said Act. The object of the proceedings by the CBA may not be offences enumerated in Article 2(1)(1) of the challenged Act, if they are not related to corruption.

The mere connection between given conduct and corruption does not determine that the said conduct falls within the scope of the CBA's activity which consists in identifying and detecting offences. It is also necessary for a given act to constitute one of the offences enumerated in Article 2(1)(1)(b), (c) and (d) (making reference to the criminal law regulation before the entry into force of the Central Anti-corruption Bureau Act).

By contrast to the stance of the applicant, the Constitutional Tribunal holds the view that the phrase "if they are related to corruption", as used in Article 2(1)(1)(b), (c) and (d), does not lead to the extension of the scope of ratione materiae of prosecution. In fact, the legal regulation adopted in the Central Anti-Corruption Bureau Act leads to opposite results. It actually limits the scope the CBA's competence in the realm of crime detection. The act falling within the scope of the CBA's remit must be – in the first place – an offence specified in the indicated criminal law regulations (in Article 2(1)(1)(b), (c) and (d) of the said Act). It must bear the characteristics of corruption within the meaning of Article 1(3) of the said Act. Thus, the CBA's remit is limited only to those categories of offences, set out in Article 2(1)(1) (b), (c) and (d) of the said Act which, in addition, bear a characteristic of corruption within the meaning specified in Article 1(3) of the said Act.

In the view of the Constitutional Tribunal, one may not accept the formulation of the applicant's allegation concerning the non-conformity of the challenged provisions to the principle of adequate specificity of a prohibited act. The applicant is right when stating that Article 42 of the Constitution obliges the legislator to specify a prohibited act in such a way that neither the addressee of a criminal law norm nor the organs of public authority which are responsible for applying the law will have any doubts whether a given corrupt action bears the characteristics of a prohibited act and is subject to prosecution by the CBA. The legislator may not require the citizen to be aware of a legal prohibition if he himself is not capable of precisely specifying its limits. Such a solution would be not only contrary to the requirement of statutory specificity of a prohibited act, it would also indirectly clash with the principle of statutory regulation of the individual's rights and freedoms, derived from Article 31(3) of the Constitution, as this principle does not entail merely the obligation to enact a statute. It also contains "the requirement of completeness of statutory regulation; the regulation has to independently specify all the basic elements of the restriction on a given right and freedom so that, on the basis of the provisions of a statute, it will be possible to delineate the complete scope (outline) of that restriction" (the judgment of the Constitutional Tribunal of 12 January 2000, Ref. No. P. 11/98, OTK ZU No. 1/2000, item 3).

In the view of the Tribunal, Article 1(3) as well as Article 2(1)(1)(b), (c) and (d) of the Central Anti-Corruption Bureau Act are not penal provisions as such. Taken together, they were to serve the legislator to delineate the scope of the CBA's activity within the framework of the already binding legal regulations concerning prohibited acts (cf. comments by the First President of the Polish Supreme Court, Prof. L. Gardocki, on the Deputies' bill on operational activities – Sejm Paper No. 353 of 19 June 2008, p. 4).

Moreover, the applicant makes the allegation that there was no, in his opinion, desirable narrowing down of the definition of corruption in the private sector in Article 1(3) of the Central Anti-Corruption Bureau Act by means of the premisses of "socially detrimental reciprocity". In the applicant's view, the lack of the said narrowing down leads to practical difficulties in distinguishing socially detrimental corruption from ordinary contractual provisions which are formulated within the framework of civil-law freedom to contract. Such

wording, according to the applicant, remains inconsistent with the principle of a democratic state ruled by law (Article 2 of the Constitution) and the principle of proportionality (Article 31(3) of the Constitution).

The Constitutional Tribunal has considered the argumentation for the aforementioned assertions of the applicant. The Tribunal has noted that the premiss of "socially detrimental reciprocity" is derived neither from the Constitution nor from legal codes. Nevertheless, it constitutes a recognised doctrinal construct rendering the perception of corruption as a socially detrimental phenomenon, subject to penalty. The lack of characteristics of "socially detrimental reciprocity" should be regarded within the private sector as tantamount to the lack of social detriment, which in turn constitutes a premiss that certain conduct should be penalised.

As regards economic activity within the private sector, what applies is the principle of freedom of economic activity which is correlated with the freedom of contractual relations. This rule refers to the freedom of private entities, without including the persons who perform public functions (who can also participate or influence the relations in the private sector). The freedom of economic activity is protected constitutionally under Article 22 of the Constitution. The restriction may be imposed on this freedom only by means of statute and only for important public reasons (Article 22 of the Constitution). Moreover, when restricting the exercise of the freedom of economic activity, one should take into account general rules for imposing restrictions as regards the exercise of rights and freedoms, as provided for in Article 31(3) of the Constitution.

In this situation, the Constitutional Tribunal takes the stance that including economic activity from the private sector in the scope of the term of corruption, within the meaning of Article 1(3) of the Central Anti-Corruption Bureau Act, without narrowing down the definition of the term with the premisses of "socially detrimental reciprocity", may infringe on the exercise of the freedom of economic activity, as specified in Article 22 of the Constitution. This infringement may take place when the premisses of its admissibility, set out in Article 22 *in fine* as well as Article 31(3) of the Constitution, are not duly respected. In addition, the lack of the indicated narrowing down of the definition of corruption leads to ambiguity in delineating a demarcation line between the admissible (and socially harmless) exercise of the freedom of economic activity and activity which bears the characteristics of "socially detrimental reciprocity" (and for that reason it remains punishable, as provided for in Article 7(1) of the Convention for the Protection of Human Rights).

For these reasons, the Constitutional Tribunal has stated that Article 1(3) of the Central Anti-Corruption Bureau Act, challenged by the applicant, insofar as it defines corruption in the private sector as the conduct of any person performing a public function, without narrowing down the definition with the premisses of "socially detrimental reciprocity", is inconsistent with Article 22 and Article 31(3) of the Constitution. As the Public Prosecutor-General has aptly observed, where there are no premisses of "socially detrimental reciprocity", it is impossible to justify direct interference with the constitutionally protected freedom of economic activity with important public reasons.

In the view of the Tribunal, the regulation indicated here does not meet the requirements of appropriate legislation either, as regards precise delineation of the scope of the term "corruption" in the private sector, and thus infringes Article 2 of the Constitution. In the judgment of 30 October 2001, Ref. No. K. 33/00, the Tribunal stated that: "By means of vague wording of provisions, the legislator may not grant excessive freedom to determine, in practice, the scope ratione personae and ratione materiae of restrictions on the constitutional rights and freedoms of the individual to authorities responsible for applying the provisions.

The Constitutional Tribunal states that the regulation of Article 1(3) of the Act does not provide for a sufficiently precise distinction between activities in the private sector which

manifest the exercise of economic activity and the freedom to contract (and should not be penalised) and the activities which, due to bearing the characteristics of socially detrimental reciprocity, justify deeming them punishable within the broad framework of Article 7(1) of the Convention for the Protection of Human Rights (see M. A. Nowicki, "Komentarz do art. 7 Konwencji o ochronie praw człowieka i podstawowych wolności", [in:] *Wokół Konwencji Europejskiej. Komentarz do Europejskiej Konwencji Praw Człowieka*, Warszawa 2009)

The definition of corruption, contained in Article 1(3) of the Central Anti-Corruption Bureau Act, may not be perceived as one *per se* creating prohibited acts. It does not create liability for an act that is subject to penalty, nor does it extend the scope of such liability over any persons. Therefore, the provision of Article 1(3) remains neutral in the context of the principle expressed in Article 42(1) of the Constitution. For that reason, the Tribunal has stated that the provision is not inconsistent with Article 42(1) of the Constitution.

The Tribunal shares the view that the definition of corruption plays a fundamental role in specifying the scope of the CBA's competence. The Constitutional Tribunal has admitted that the Public Prosecutor-General aptly stated that the legal definition of corruption, contained in Article 1(3) of the Central Anti-Corruption Bureau Act, groundlessly extended the scope of the term to include the activities within the framework of private transactions which did not involve persons performing public functions, at the same time making no reference to the specifying factor of "socially detrimental reciprocity" which was well-known in the field of criminal law. The Tribunal has, in this regard, considered Article 1(3) of the challenged Act to be inconsistent with Article 2, Article 22 and Article 31(3) of the Constitution.

With regard to persons performing public functions and as regards activities in the public realm which encompasses the activities that remain outside the boundaries of the private sector, the applicant has not attempted to prove a clash (and has not presented the arguments for a clash) between the provision of Article 1(3) of the said Act and the indicated higher-level norms for constitutional review, i.e. Article 2, Article 22 and Article 31(3) of the Constitution. In this context, the Tribunal holds the stance that, within the scope not taken into account in point 1 of the judgment, Article 1(3) of the said Act enjoys the presumption of constitutionality.

As regards the allegation of non-conformity of Article 1(3) of the Central Anti-Corruption Bureau Act to Article 20 of the Constitution (i.e. to the constitutional principle of social market economy), the Tribunal has stated that, in fact, the applicant did not substantiate the allegation formulated in that way. Regardless of that, the Tribunal has pointed out that the principle of social market economy has the status of a systemic principle in the Constitution. It does not have any substantive relation to the issue of prosecuting prohibited acts which involve corruption. In this situation, Article 20 of the Constitution is an inadequate higher-level norm for review of constitutionality of Article 1(3) of the said Act.

With regard to the infringement of the principles of appropriate legislation, which constitute the elements of the constitutional principle of a democratic state ruled by law (Article 2 of the Constitution), as a result of the use of imprecise and ambiguous terms in the definition of corruption, set out in Article 1(3) of the said Act, the Constitutional Tribunal has considered, in particular, the issue of specificity of the statement contained in that provision which stipulates that "corruption (...) shall be promising, offering, giving, demanding or accepting by any person, directly or indirectly, any undue advantage, whether financial, personal or other, for him/herself or any other person". Moreover, the Tribunal has analysed the wording contained in the final part of Article 1(3): "or shall be accepting an offer or promise of such advantages in exchange for taking action or refraining from action in the performance of public functions or in the course of economic activity".

According to the Tribunal, the use of wording "directly or indirectly", with regard to the activities which constitute the forms of corruption – i.e. "promising, offering, giving, demanding, accepting (...) an undue advantage" – makes it unclear whether corruption is committed by one or more persons or entities participating in the indicated activities related to the undue advantage. This makes it impossible to precisely determine what form and scope of indirect activity (e.g. of a person imparting information, making a suggestion or promise) justifies levelling the charge of corrupt practice.

Secondly, the wording "whether financial, personal or other", as used in Article 1(3) of the Central Anti-Corruption Bureau Act, lacks clarity. This wording – having a form of enumeration with an alternative – does not meet the requirements of formal logic. The opposite of "financial advantage" is "non-financial advantage", whereas the meaning of the wording "personal or other" (where "other advantage" may be neither "financial advantage" nor "personal advantage") is not clear. It does not meet the requirements of formulating the commonly understood alternative.

The third element of Article 1(3) of the challenged Act, the meaning of which lacks clarity, is the wording of the final part of the provision: "in exchange for taking action or refraining from action in the performance of public functions or in the course of economic activity". It is unclear, in particular, whether the wording "in the course of economic activity" refers to taking any action (refraining from any action) "in the course of economic activity" (also in the entirely private sector), or whether it refers only to the actions triggering the duties of economic operators towards the state or other public authorities (institutions), e.g. local self-government or a self-governing organisation representing a given profession.

Additionally, the Constitutional Tribunal notes that the wording of Article 1(3) of the Act, which is syntactically complex and contains a number of elements specifying the concept of corruption (separated by repeated use of the conjunction "or", which is used to formulate an alternative), contains a logical error of amphibology (amphiboly). In Article 1(3) of the said Act, the mistake consists in the lack of explicitness whether the final elements of enumerated characteristics of corruption (i.e. the phrases: "in exchange for taking action or refraining from action" and "in the performance of public functions or in the course of economic activity") refer to all the previously listed forms of corruption specified with verbs, or whether they refer only to those constituting the last two elements of the alternative, i.e. to "accepting an offer or promise of such advantages".

The indicated syntactic ambiguity of the challenged regulation displays the characteristics of the error of amphibology (amphiboly), which consists in formulating a statement which is syntactically ambiguous (Z. Ziembiński, *Logika praktyczna*, Warszawa 2001, p. 141; E. Nieznański, *Logika dla prawników*, Warszawa 2006, p. 77).

In a compound sentence – the legislator has chosen such a structure for Article 1(3) of the challenged Act, by the repeated use of the conjunction of ordinary alternative ("or") – particular conjunctions must be regarded as essential, and the scope of reference of each of the conjunctions needs to be delineated unambiguously (A. Malinowski, *Redagowanie tekstu prawnego. Wybrane wskazania logiczno-językowe.* Warszawa 2008, p. 144).

In the view of the Constitutional Tribunal, the requirement of unambiguity should be met, in particular, in the case of legal (statutory) definitions. They require that a defined concept (*definiendum*) be assigned solely to the meaning set out in the definition thereof (regardless of the meaning the defined concept has in general language). The purpose of legal definition of a given term is to eliminate or reduce its vagueness. If this was the purpose of the wording in Article 1(3) of the challenged Act, then – in the opinion of the Constitutional Tribunal – it has not been sufficiently achieved.

The reference to the selected excerpts from international (convention) regulations does not constitute sufficient justification for the emergent ambiguity in the definition of

corruption. When implementing the regulations into national law, the national legislator should ensure the precision of the legal concepts and provisions used as well as their coherence with the internal (national) legal system, including the Constitution. Since the collective definition of corruption in a compound sentence comprising multiple clauses poses editorial difficulties, what should be considered is the method of defining particular forms of corruption separately, as applied in Chapter II of the Criminal Law Convention on Corruption (mentioned by the applicant as the point of reference for the review by the Constitutional Tribunal in the case under examination).

3. The allegation of non-conformity of Article 2(1)(2)-(5) of the Central Anti-Corruption Bureau Act to the Constitution.

Challenged by the applicant, the regulations of Article 2(1)(2)-(5) of the said Act provided for (*inter alia*) the following kinds of surveillance tasks carried out by the CBA: "2) exposing and counteracting the instances of breach of the provisions of the Act of 21 August 1997 on restrictions on the conduct of economic activity by persons performing public functions; 3) documenting the grounds for and initiating the implementation of the provisions of the Act of 21 June 1990 on the return of undue advantages gained at the expense of the State Treasury or other state legal entities (...); 4) exposing the instances of breach of procedures, specified by legal provisions, for taking and implementing decisions with regard to: carrying out privatisation and commercialisation, providing financial support, awarding public procurement contracts, disposing of the property of entities or entrepreneurs referred to in Article 1(4), granting concessions, permits, and exemptions within the scope ratione personae and ratione materiae, as well as granting discounts, preferences, quotas, tariff ceilings, loan sureties and guarantees; 5) verifying the correctness and truthfulness of asset declarations or declarations about conducting economic activity by persons performing public functions, who are referred to in Article 115(19) of the Act of 6 June 1997 – the Penal Code, submitted pursuant to separate provisions".

According to the applicant, the said provisions result in entrusting the CBA with the powers from the realm of state audit. In the view of the applicant, this infringes on the constitutionally established remit of the Supreme Chamber of Control (hereinafter: NIK) as "the chief organ of state audit" (Article 202(1) of the Constitution). The applicant's reservations do not concern the fact of granting such powers to the CBA, but the placing of the Bureau within the structure of the state as an element of government administration, deprived of guarantees of independence, granted to the NIK, and at the same time subordinate to the Prime Minister. In the applicant's opinion, this leads to the infringement of the principle of separation of powers, enshrined in Article 10 of the Constitution.

According to the Constitutional Tribunal, the sole fact that one organ of the state is assigned to tasks which bear resemblance to the tasks of another organ of the state, without at the same time being granted the same powers, does not lead to the infringement of a "constitutionally established" position of the other organ. However, this may imply redundant use of efforts and resources of both organs of the state. Also, there are no doubts that, on the basis of various legal provisions, the oversight tasks similar to the tasks of the NIK are assigned (to a varied extent) to many other organs of public authority. Nevertheless, if carrying out the tasks, by exercising the powers granted to particular organs of the state, does not normatively rule out the exercise of the constitutional tasks and powers of the NIK, then one may not *eo ipso* speak of the unconstitutionality of the legal solutions.

In that situation, in the view of the Tribunal, the challenged provisions – taking into account the presumption of their constitutionality – may not be regarded as inconsistent with Article 202(1) of the Constitution. The applicant's argumentation of in this regard, in the opinion of the Tribunal, is neither sufficient nor convincing; in particular, the applicant,

despite the requirement specified in Article 32(1)(4) of the Constitutional Tribunal Act, has not sufficiently substantiated the presented allegation and has not provided convincing proof in support thereof.

The allegation of non-conformity of the challenged provisions to Article 10 of the Constitution amounts to the assertion that the far-reaching surveillance powers of the CBA functionaries, who are subordinate solely to the Prime Minister, may also be exercised with regard to the representatives of the legislative and judicial branches of government. However, in the applicant's view, in a democratic state ruled by law, based on the separation of powers, the organs of the state that are solely subordinate to the executive branch should not be entrusted with such broad, and thus uncontrolled, powers to affect the realm of rights enjoyed by the representatives of the legislative and judicial branches.

Also, this allegation put forward by the applicant has not been sufficiently substantiated. Firstly, Article 10 of the Constitution, taken literally, does not contain regulations guaranteeing the independence (as such) of the branches of government enumerated therein or their representatives (functionaries). Such regulations are contained in other provisions of the Constitution as well as in relevant statutes; however, the applicant did not allege the infringement of those constitutional provisions, in the application submitted to the Constitutional Tribunal. Secondly, it does not follow from the challenged provision that it would in any way exclude the constitutional or statutory guarantees of necessary independence of public functionaries, carrying out tasks with regard to the representatives (members) of particular branches of government, specified in Article 10 of the Constitution, including the legislative and judicial branches. What is of significance here is also the fact that Article 10 of the Constitution neither directly refers to the CBA, nor literally mentions the institution called the Central Anti-Corruption Bureau (established as an institution of ordinary legislation).

Also, the applicant has not provided relevant and convincing arguments indicating the conflict between the challenged provision and the content of Article 2 of the Constitution. Within that scope, the presumption of constitutionality of the challenged provision has not been refuted.

4. The allegation of non-conformity of Article 5(2) and (3), Article 6(1) as well as Article 12(1) of the Central Anti-Corruption Bureau Act to the Constitution and the convention regulations.

Moreover, the applicant alleges that Article 5(2) and (3), Article 6(1) and Article 12(1) of the Central Anti-Corruption Bureau Act are inconsistent with Articles 2 and 10 of the Constitution and Article 20 of the Criminal Law Convention on Corruption, ratified by the Republic of Poland.

The provisions of the said Act that are indicated here are systemic in character. Article 5(2) stipulates that: "The Head of the CBA shall be central authority of government administration, supervised by the Prime Minister, acting with the assistance of the CBA, which is an office of government administration". Article 5(3) states that "the Prime Minister or a member of the Council of Ministers appointed by the Prime Minister co-ordinates the activity of the CBA, the Internal Security Agency, the Foreign Intelligence Agency, the Military Counter-Intelligence Service and the Military Intelligence Service". Pursuant to Article 6(1), "the Head of the CBA shall be appointed for 4 years and dismissed by the Prime Minister, following a consultation with the President of the Republic of Poland, the Advisory Authority for Secret Service Matters as well as the Sejm committee which is competent with regard to secret service matters". In accordance with Article 12(1) of the said act, "the Prime Minister shall outline the directions of the CBA's activity by way of guidelines".

In the view of the applicant, in a democratic state ruled by law, an institution entrusted with such a wide scope of powers, and having such great capabilities to interfere with the

rights and freedoms of the individual, should be subject to supervision and control mechanisms, other than those applied within the framework of government administration. It is particularly necessary to protect the state and its citizens against a situation where an "anti-corruption secret service" constitutes "the armed forces" of the government, and is free from effective supervision by other organs of the state than the government. In the applicant's view, *de lege lata* the structural placement of the CBA does not protect against negative consequences of the lack of external supervision over the CBA.

In the applicant's opinion, the way of structuring the supervision and control over the CBA, the way of giving instructions to the Head of the CBA as well as the way of appointing and dismissing the Head of the CBA also infringe on Article 20 of the Criminal Law Convention. Pursuant to that provision: "Each Party shall adopt such measures as may be necessary to ensure that persons or entities are specialised in the fight against corruption. They shall have the necessary independence in accordance with the fundamental principles of the legal system of the Party, in order for them to be able to carry out their functions effectively and free from any undue pressure. The Party shall ensure that the staff of such entities has adequate training and financial resources for their tasks".

In the view of the applicant, the measures which fall within the remit of the Prime Minister and which are aimed at exerting influence on the CBA's activities (issuing guidelines, coordinating and supervising the activities of the Bureau, appointing and dismissing the Head of the Bureau), together with the lack of real external control over the Prime Minister's actions and the secret service itself, create room for "undue pressure", as referred to in Article 20 of the Criminal Law Convention on Corruption. In particular, one may point out here the risk of political pressure consisting in targeting the CBA's activities at particular persons or groups.

According to the Constitutional Tribunal, the applicant's allegations are not convincing. Firstly, the Constitution itself does not contain precise rules as to where secret service established to combat corruption should be placed within the systems of the organs of the state. The legislator, creating a new institution (a secret service), leaves some freedom as regards placing the Head of the CBA within the system of the organs of the state in general, and within the system of government administration in particular. The institutional solutions, contemporarily applied in other democratic states, are diverse; however, approaches similar to the one taken with regard to placing the CBA within the system of the organs of the Republic of Poland – are not rare. In this situation, the challenged provisions may not be deemed inconsistent with Article 2 (to the extent not specified by the applicant).

In the view of the Tribunal, the applicant has neither determined the extent nor specified the way in which Article 5(2)-(3), Article 6(1) and Article 12(1) of the Central Anti-Corruption Bureau Act infringe Article 10 of the Constitution; in particular, the applicant has not indicated whether and to what extent the challenged regulations infringe on the constitutional imperative of balance between the powers, or whether and to what extent they clash with the principle of separation of powers, also included in Article 10 of the Constitution. Due to the fact that the application lacks precision within the relevant scope, it is impossible to regard Article 10 of the Constitution as a point of reference for the assessment of constitutionality of the challenged provisions indicated here. Therefore, the Constitutional Tribunal has not shared the applicant's view on the relations between the challenged provisions of the said Act and Article 10 of the Constitution.

Secondly, contrary to what the applicant maintains, making the Head of the CBA subordinate only to one organ of the state, i.e. the Prime Minister, may potentially facilitate the effective performance of functions by the CBA and the Head of the CBA, in a way which would be free from unspecified – and thus "undue" – pressure from other entities or persons;

in particular, this eliminates a possibility of interference with the CBA's activities by many organs of the state and institutions which are interested in those activities.

Multi-directional influences on the CBA could result in weakening the effectiveness of the activities of the Bureau as well as blurring the responsibility for setting the directions for such activities. Making the Head of the CBA subordinate solely to the Prime Minister excludes – in a legal sense – secondary influences. Moreover, this facilitates adequate specificity of the political and personal responsibility for the functioning of the Bureau and targeting its activities. This subordination does not limit the specialisation of the persons acting on behalf of the CBA, and the CBA itself, as regards combating corruption. The Prime Minister is competent to direct the functioning of the CBA as a whole and to conduct supervision, which should not be regarded tantamount to limiting "necessary independence" with regard to undertaking and conducting particular operational activities and preliminary proceedings. At the same time, making the CBA and the Head of the CBA subordinate to the Prime Minister may prevent surrendering to "undue pressure" from other persons or institutions. Therefore, such subordination of the CBA meets the basic requirements set out in Article 20 of the Criminal Law Convention on Corruption.

5. The assessment of constitutionality of Article 22 of the Central Anti-Corruption Bureau Act and its conformity to Articles 8 and 18 of the Convention for the Protection of Human Rights.

Another regulation of the Central Anti-Corruption Bureau Act challenged by the applicant is Article 22. This relatively extensive provision of the said Act, as it comprises ten paragraphs, concerns obtaining and processing information by the CBA. Pursuant to that provision, within the scope of its competence, the CBA may obtain information, including confidential information, store, verify and process it (paragraph 1). Furthermore, in order to prevent or detect offences specified in Article 2(1)(1), which has already been analysed, and in order to identify relevant, and important in that regard, persons, the CBA may process information, including personal data from the data files run pursuant to separate provisions by other organs of public authority and state organisational units; in particular, this concerns the following: the Register of Economic Activity, the National Register of Taxpayers, the National Criminal Register, the National Court Register, Universal Electronic System for Registration of the Population, the Register of the Entities of the National Economy, the Central Register of the Insured and Central Register of Contribution Payers, the Central Register of Vehicles and Drivers as well as the National Centre for Criminal Information.

The administrators of the data stored in the aforementioned registers shall be obliged to disclose them free of charge to the Central Anti-Corruption Bureau (paragraph 2). The said data are transferred, in particular, via data storage media or teletransmission (paragraph 3).

Within the scope of its competence, the CBA may also obtain all necessary personal data. This also concerns, where justified by the character of the carried out tasks, the data indicated in Article 27(1) of the Act of 29 August 1997 on the Protection of Personal Data (Journal of Laws - Dz. U. of 2002 No. 101, item 926, as amended; hereinafter: the Personal Data Protection Act). Moreover, the CBA may make use of personal data and other information obtained in the course of operational activities by the services and institutions of the state which are authorised in that regard, and process them, within the meaning of the Personal Data Protection Act, without the knowledge and consent of a data subject. Pursuant to the challenged provision, the administrator of a given data file is obliged to provide certain personal data referred to in paragraph 4, upon presentation of an authorisation in a functionary's name (and to the extent indicated in that authorisation) issued by the Head of the CBA. The functionary of the CBA shall present the said authorisation and his/her service ID card (paragraph 5).

In accordance with the challenged Act, personal data obtained in order to detect an offence are stored for as long as they are necessary for carrying out the statutory tasks of the CBA. The CBA functionaries conduct verification of the said data no less frequently than every 10 years from the date the data are obtained, erasing unnecessary data during the verification process (paragraph 6). Personal data revealing racial or ethnic origin, political opinions, religious or philosophical beliefs, religious affiliation, party or trade-union membership, as well as data concerning health, addictions or sexual life of persons who are suspected of committing indictable offences, but who have not been convicted of those offences, are subject to destruction, carried out by a committee and recorded in relevant minutes after the relevant ruling becomes legally valid (paragraph 7). The challenged provision additionally contains authorisation for the Prime Minister to issue relevant executive provisions (paragraphs 8-10).

The applicant challenges entire Article 22 of the said Act which sets out the rules for collecting and processing personal data by the CBA. In his opinion, the first and fundamental defect of the regulation on collecting and processing personal data by the CBA arises from the definition of corruption which has been adopted in the Act, which specifies the scope of competence of the CBA, and thus the scope of activities conducted with the use of the personal data indicated here. As the applicant attempts to prove, the scope of those activities may be, in the light of the Act, much broader than the combating of corruption within the proper (statutory) meaning of the term. In the applicant's view, this results in the CBA's crossing of the boundaries of admissible inference with the right to private life (Article 47 of the Constitution) and the right to personal data protection (Article 51 of the Constitution).

The CBA has been established as a secret service responsible for: combating corruption in public and economic life, investigating and detecting offences which involve corruption, and preventing such offences. Combating corruption is the duty of the state. This may be regarded as necessary in a democratic state ruled by law, also in the context of premisses leading to the restriction of the exercise of the individual's rights and freedoms, pursuant to Article 31(3) of the Constitution and Article 8 of the Convention for the Protection of Human Rights.

The CBA may obtain, collect, verify and process the information referred to in Article 22 of the Central Anti-Corruption Bureau Act solely within the scope of its competence. This also refers to the processing of personal data obtained from institutions, services and the organs of public authority, referred to in Article 22(2) and (4).

In the view of the Constitutional Tribunal, provided that the CBA's activities remain strictly within the scope specified by statute, there are no sufficient grounds to state that the provisions of Article 22(1)-(3) of the Central Anti-Corruption Bureau Act are inconsistent with the right to private life and the right to information autonomy, and that hence they infringe the constitutionally protected dignity of the person. Bearing in mind the presumption of constitutionality, which has not been challenged in a convincing way by the applicant, the indicated provisions of Article 22(1)-(3) of the said Act should be regarded as consistent with Article 47 in conjunction with Article 31(3), Article 51 in conjunction with Article 31(3) and Article 30 of the Constitution, and also with the related provisions of Articles 8 and 18 of the Convention for the Protection of Human Rights. Additionally, the Constitutional Tribunal has not seen here any clash between the indicated regulations and the Preamble as well as Articles 5 to 7 of the Council of Europe Convention 108.

By contrast, there is a different situation with regard to the issue of constitutionality of the challenged provisions of Article 22 of the Central Anti-Corruption Bureau Act, which should guarantee the proper level of protection of the right to private life and the right to personal data protection to every individual, i.e. the level which is consistent with

constitutional and, in particular, with international (convention) standards. This concerns the provisions of Article 22(4)-(7) of the said Act, which have been challenged in the application.

In the opinion of the applicant, the challenged provisions do not contain the desirable restriction that the CBA collects personal data provided that they are necessary for carrying out given proceedings effectively, whereas such a requirement explicitly arises from Article 51(2) of the Constitution. The wording of the indicated regulations of the Central Anti-Corruption Bureau Act is, in the applicant's opinion, too broad and, as such, excessively interferes with the area of privacy, hence clashing with the provision of Article 47 of the Constitution.

According to the applicant, the principle of proportionality is not observed with regard to the scope of the legislator's interference and the protection of the individual's privacy. In the applicant's view, the restriction on the right to private life, without specifying the objectives of the restriction, goes beyond the requirement that the scope of interference of public authorities needs to be specified by statute and that such manner of specifying the interference is necessary in a democratic society (Article 8(2) of the Convention for the Protection of Human Rights). This also goes beyond the boundaries of imposing a restriction on the right to private life only for the purposes for which the said restriction has been prescribed (Article 18 of the Convention for the Protection of Human Rights). Additionally, the applicant alleged that Article 22(6) of the Central Anti-Corruption Bureau Act was inconsistent with Article 5(e) *in fine* of the Council of Europe Convention 108, insofar as it prescribed the verification of data collected by the CBA no less frequently than every 10 years from the date the data are obtained. Indeed, Article 5(e) of the Council of Europe Convention 108 allows for storing data "for no longer than is required for the purpose for which those data are stored". In the applicant's view, the period specified in the Central Anti-Corruption Bureau Act is, in the light of the quoted provision of the Convention, much too long.

What is even more serious - in the opinion of the applicant – is the allegation that there is no reason for the CBA to collect the so-called sensitive data, as referred to in Article 22(7) of the Central Anti-Corruption Bureau Act. According to the applicant, in a state ruled by law, the legislator may not allow a secret service to collect the most sensitive data only because they may prove potentially useful for the service. It is, in particular, Article 18 of the Convention for the Protection of Human Rights - referred to in this context by the applicant - that prohibits introducing restrictions to the right to private life "for any purpose other than those for which they have been prescribed". Moreover, particular guarantees concerning personal data are contained in Article 5(c) and (d) of the Council of Europe Convention 108, whereas with regard to sensitive data – in Article 6 of the said Convention. The regulations emphasise that collecting data is legitimate only when this is indispensable for the achievement of the set goals. Article 6 of the Council of Europe Convention 108, in principle, rules out the possibility of automatic processing of sensitive data, unless appropriate safeguards are provided.

In the view of the applicant, if it is at all possible to prove a connection between fighting corruption and the necessity for collecting sensitive data, this is such a loose connection that it is difficult to accept the sacrifice of a strictly protected good i.e. "sensitive" data. Moreover, in the applicant's opinion, Article 22(7) of the Central Anti-Corruption Bureau Act, in its current wording, does not guarantee that it will not be exploited to collect "sensitive" data for other purposes (not specified in the Act). In this context, what is particularly vital is the lack of supervision over the CBA's activities by the Inspector General for the Protection of Personal Data.

The applicant alleged that Article 22(7), enumerating the so-called sensitive data (including data about sexual life) which may be processed by the CBA, infringed the right to

intimacy. According to the applicant, the right is subject to constitutional guarantees set out in Article 30 of the Constitution, i.e. the protection of the inherent and inalienable dignity of the person, as well as subject to the international law protection of human rights and freedoms.

The applicant put forward the allegation of the lack of judicial review to determine the legality of the CBA's activities, within the scope referred to in Article 22 of the Central Anti-Corruption Bureau Act. Moreover, he challenged, as unconstitutional, the fact that there was no possibility of verifying and deleting untrue or incomplete information, or information obtained in a way which was inconsistent with the Act, since this was contrary to Article 51(4) of the Constitution. The applicant also challenged the fact that there was no possibility of making the collected data available to persons whom the data concerned.

There has been a view in the previous jurisprudence of the Constitutional Tribunal that "the measures which remain at the disposal of public authorities allow for far-reaching interference with the right to private life". Nevertheless, if the principle of proportionality is not observed as regards determining the scope of and procedure for such interference, the interference of authorities may undermine the essence of the right to private life. Due to an immanent link between privacy and dignity, this may pose a threat to the individual's dignity, depriving the individual of information autonomy.

In the case K 4/04 (the judgment of 20 June 2005, OTK ZU No. 6/A/2005, item 64), the Tribunal adjudicated that the information autonomy of the individual entailed protecting any personal information and assigning fundamental importance to the consent of the person in question to disclosure of information concerning him/her. This also concerns surveillance – which is virtually unrestrained – within the scope of operational activities of the specialised services of the state, as well as the possibility of disseminating information collected in that way – with or without the participation of authorities. These events lead to the individual's deprivation of the right to private life. They may also, in certain circumstances, result in the infringement of human dignity.

In the statement of reasons for the judgment in the case K 4/04, the Constitutional Tribunal stressed that, when drafting a provision which considerably interfered with the realm of the individual's privacy, the legislator should take into account not only the principles of appropriate legislation (including the requirement of specificity), but also the proportionality of the applied measure.

The operational activities of the specialised services of the state are justified as long as the underlying goal is the protection of values of a democratic state ruled by law. The constitutional requirement is that they need to pass the test of "being necessary in a democratic state ruled by law". It is not enough if those activities are useful, inexpensive or easily applicable by authorities. And the argument that similar measures are applied in foreign states does not settle the issue. It is justified to apply necessary measures in the sense that they protect values which are essential in a democratic state, in a way (or to a degree) which could not be attained by any other means. At the same time, this should be "measures which would be the least burdensome for the persons or entities whose rights or freedoms are restricted, as a result of applying those measures" (cf. the statement of reasons for the judgment of the Constitutional Tribunal of 3 October 2000, sygn. K. 33/99, OTK ZU No. 6/2000, item 188, pp. 1003 and 1004).

In the view of the Constitutional Tribunal, the model of a democratic state requires the observance of the principle of proportionality as regards regulating (restraining) the individual's freedom of action. This principle is fulfilled where: (1) the introduced regulation can lead to the achievement of set objectives, (2) the regulation is indispensable for the protection of the public interest it is linked to, (3) the effects of the introduced regulation remain proportionate to the burdens imposed by it on the citizen.

The principle of proportionality remains immanently linked to the prohibition against excessive interference in the realm of constitutional rights and freedoms of the individual. While determining whether given interference was necessary and was carried out only within an indispensable scope, what is taken into consideration is the nature of particular rights and freedoms. More stringent standards concern personal and political rights rather than economic and social ones (cf. the rulings of the Constitutional Tribunal of: 26 April 1995, Ref. No. K. 11/94, OTK in 1995, Part I, item 12; 31 January 1996, Ref. No. K. 9/95, OTK ZU No. 1/1996, item 2). In the case of competitiveness of the constitutionally protected goods, which occurs in this case – as a clash between the constitutional right to private life, the confidentiality of communication as well as the protection of information autonomy on the one hand and public security reasons on the other – it is necessary for the legislator to maintain a clear balance between clashing interests.

In the view of the Constitutional Tribunal, there is, moreover, a close connection between threats to the person's dignity, which constitutes the basis of constitutional rights and freedoms, and any measures that interfere with the individual's privacy. As regards privacy (which, at the constitutional level, is protected in a multi-faceted way and encompasses several rights and freedoms, specified in Articles 47-51 of the Constitution), the said connection is special (nevertheless, it is not the same in the case of each particular constitutional right and freedom). The preservation of human dignity requires respect for his/her purely personal realm, where he/she is not threatened by the necessity to "be with others" or to share intimate experiences with others.

The realm of privacy is composed of various circles, which are open (legally) to a larger or smaller extent to external influence, where the constitutional approval for authorities' interference which has legal effects is not equal (cf. the judgments of the European Court of Human Rights of: 16 February 2000, in the case of Amann v. Switzerland, Application No. 27798/95; 4 May 2000, in the case of Rotaru v. Romania, Application No. 28341/95; 9 November 2006, in the case of Leempoel and S.A. Ed. Ciné Revue v. Belgium, Application No. 64772/01; 22 May 2008, in the case of Iliya Stefanov v. Bulgaria, Application No. 65755/01). The possibility of interference with different circles of privacy is not the same for every circle. It is justified that, for instance, there are more stringent requirements for legality of interference with the inviolability of the home, by an authority using taps, than for the interference with the confidentiality of correspondence (which was stressed, in particular, by the Federal Constitutional Court in its judgment of 3 March 2004, *Grosser Lauschangriff* (surveillance law)).

Surveillance carried out by the police or the CBA is aimed at preventing, detecting and determining the perpetrators of certain offences and gathering evidence for the commission of the offences. However, the surveillance may be carried out only as subsidiary activity, i.e. when other measures are useless or ineffective. This is explicitly stated in Article 19(1) of the Act of 6 April 1990 on the Police (Journal of Laws - Dz. U. of 2002 No. 7, item 58, as amended). The surveillance should fall within the scope necessary for the achievement of the set goal of the surveillance. These three restrictions (usefulness, subsidiarity of activity, indispensability of surveillance) are intended for minimising the unnecessary – from the point of view of the purpose of operational activity – interference with privacy. Moreover, the implementation of that principle requires effective control which would prevent excessive interference. Within the framework of standards of a democratic state ruled by law, it is admissible to interfere with the realm of privacy quite substantially, as long as that interference is surrounded with proper procedural guarantees and, consequently will not lead to an infringement of dignity of the person subjected to surveillance (as the Tribunal pointed out in the judgment of 12 December 2005, Ref. No. K 32/04, OTK ZU No. 11/A/2005, item 132).

Analysing the grounds for the applicant's allegations, the Constitutional Tribunal primarily took into consideration the circumstance that Article 47 of the Constitution guaranteed that everyone had the right to legal protection of his/her private life and the right to make decisions about his/her personal life. However, a view that prevails in the doctrine is that with regard to persons who apply for positions involving the performance of public functions, or who already perform such functions, the right to private life is subject to restriction. Although one's intimate life (in a broader sense than it's commonly understood) is under full legal protection, the protection of the remaining aspects of private life is subject to restriction on the grounds of "justified concern" (the judgment of the Constitutional Tribunal of 21 October 1998, Ref. No. K. 24/98, OTK ZU No. 6/1998, item 97).

As regards "the information autonomy of the individual", apart from obligations imposed on state authorities, Article 51 of the Constitution provides for two subjective rights:

– the right of access to documents and data files (although the ordinary legislator may set restrictions, as it follows from Article 51(3) of the Constitution, but his freedom within that scope is greater than in the case of restrictions provided for in Article 49 of the Constitution),

– "eveyone's" right to demand the correction or deletion of untrue or incomplete information, or information acquired by means contrary to statute (Article 51(4) of the Constitution).

In the view of the Constitutional Tribunal, what is important is the wording of the last regulation. Unlike Article 51(3) of the Constitution, it does not provide for a possibility of restrictions introduced by ordinary statute. In that respect Article 51(4) is constructed in an identical way as Article 47 of the Constitution. Article 51(4) provides for a special power which arises from Article 47 of the Constitution, which guarantees the right to present/shape one's own public image. The said right encompasses the demand to correct and delete information which is incomplete, incorrect or obtained by means contrary to statute. The scope of that right does not exclude information obtained in the course of operational activities. In the case where data obtained from operational activities are not disclosed to the data subject at the beginning or in the course of operational activities, the possibility of exercising the right referred to in Article 51(4) of the Constitution is, in fact, limited.

In this context, in the opinion of the Constitutional Tribunal, it is justified to recognise the allegation that Article 22(4)-(7) of the Central Anti-Corruption Bureau Act is inconsistent with Article 51(4) of the Constitution.

The provision of Article 51(4) takes precedence, in the systematics of provisions of the Constitution, over the provision in Article 51(5) of the Constitution. Article 51(5) stipulates that principles and procedures for collection of and access to information shall be specified by ordinary statute. *Argumentum a rubrica* indicates, in the context of the Polish Constitution, the object, scope and guarantees related to carrying out operational activities (which are indispensible – in principle – in a modern state) are regulated by ordinary legislation (Article 51(5) of the Constitution). These provisions should fall within the scope of constitutional boundaries set out in Article 49 and Article 51(1)-(3) of the Constitution. The Constitution does not give grounds for the ordinary legislator to have his say (i.e., *inter alia,* to introduce statutory restrictions) with regard to the right guaranteed in Article 51(4).

Where the (ordinary) legislator interferes with the realm of constitutionally guaranteed rights or freedoms of the individual, without constitutional authorisation to "co-specify" them, the assessment of proportionality of that type of interference should be done with the application of much more stringent criteria than in the situations where the Constitution gives the legislator the possibility of introducing restrictions to a constitutionally regulated right or freedom.

In the view of the European Court of Human Rights, as regards the privacy of the individual (protected by legal guarantees under Article 8 of the Convention), it is admissible for the branches of government (the legislative, executive and judiciary branches) to interfere with the realm of privacy, as long as the interference meets specific criteria. Each instance of restrictive interference should, in particular, meet the requirements of a 3-stage evaluation test. The requirements concern: the source of restriction, the need for the restriction and the values for the sake of which the restriction is introduced. The existence of the following is indispensable, according to the European Court of Human Rights:

a) a sufficiently precise and specific legal basis for the interference with the realm of freedoms (rights) by way of statute; it is not admissible to introduce restrictions (here: restrictions on privacy) by way of legal acts of a different rank than statutes (see the ECHR judgment of 2 August 1984 in the case of Malone v. the United Kingdom, Application No. 8691/79; the judgment of 26 March 1987 in the case of Leander v. Sweden, Application No. 9248/81),

b) the necessity of that interference, considered from the point of view of the requirements of a democratic state ruled by law; it is not enough to make reference only to the factor of usefulness; it is indispensable to prove the necessity with regard to a particular restriction (specified in respect of its scope and manner) introduced by ordinary statute, which respects the standard of an enlightened, open and tolerant state with well-trained police forces which are capable of acting in a diligent, professional and open-minded way, and which regard interference with the individual's protected rights as a last resort, and not as a factor which facilitates the work of the police (see the ECHR judgments of: 6 September 1978, in the case of Klass and Others v. Germany, Application No. 5029/71; 6 June 2006, in the case of Segerstedt-Wiberg and Others v. Sweden, Application No. 62332/00; 22 May 2008, in the case of Iliya Stefanov v. Bulgaria, Application No. 65755/01; 22 May 2008, in the case of Kirov v. Bulgaria, Application No. 5182/02; 1 July 2008 in the case of Liberty and Others v. the United Kingdom, Application No. 58243/00),

c) the purpose of interference (the protected public interest), mentioned in Article 8 of the Convention for the Protection of Human Rights (i.e. national security, public safety, the economic well-being of the country, the prevention of disorder or crime, the protection of health or morals, or the protection of the rights and freedoms of others).

At the same time, it is not enough to make verbal mention of the purpose to effectively legitimise a restriction. It is necessary to show that there is a real need for taking restrictive measures, and that they should be taken in the name of protecting the principles of a democratic order. Excessive interference where, while collecting material which is useful for operational reasons, sort of "by the way" data concerning private issues and morality – which fall outside the scope of conducted surveillance - are obtained in the course of operational activities is tantamount to authorities' activity going beyond the scope of permitted interference with the realm of privacy (see the judgment of 12 December 2005, Ref. No. K 32/04; the ECHR judgment of 25 June 1997, Application No. 20605/92, in the case of Halford v. the United Kingdom; as well as: E. Gruza, A. Rasz, "Procesowo-kryminalistyczne aspekty podsłuchu", *Studia Iuridica* No. 46/2006, pp. 118-121 and the jurisprudence cited therein).

In this context, in the view of the Constitutional Tribunal, what weighs in favour of the non-conformity of Article 22(4)-(7) of the Central Anti-Corruption Bureau Act to the indicated higher-level norms for constitutional review is the following:

– allowing the CBA to collect and process sensitive data within the scope which is not indispensable for the purposes of prosecuting corruption and does not justify the departure from a general prohibition against automatic processing of sensitive data, as well as creates a risk of use of those (strictly protected) data for purposes which are not specified by statute (cf.

the ECHR judgment of 25 March 1998 in the case of Kopp v. Switzerland, Application No. 23224/94);

– adopting a lengthy (10-year) period for obligatory verification of data collected in the CBA data files and the lack of sufficient, and statutorily-guaranteed, protection against unauthorised access or against the use which would be inconsistent with the law and the original reason for obtaining them.

Taking into consideration the above findings, the Constitutional Tribunal shared the applicant's reservations regarding the lack of a sufficient balance between the scope of the CBA's interference with the realm of privacy of the individual - as regards obtaining (also: in a confidential way), collecting as well as processing sensitive data and data which are in no way closely related to the problem of corruption - and the value constituted by the prevention, detection and combat of corruption. At the same time, the Tribunal has declared that Article 22(4)-(7) of the Central Anti-Corruption Bureau Act, insofar as it allows the CBA to collect the data indicated in Article 27(1) of the Act of 29 August 1997 on the Protection of Personal Data and to use such data and information obtained as a result of operational activities without knowledge and consent of data subjects – without guaranteeing instruments for overseeing the way of obtaining and verifying data and the way of deleting data which are unnecessary for carrying out the CBA's statutory tasks – is inconsistent with Article 47 and Article 51 in conjunction with Article 31(3) and Article 30 of the Constitution.

Within the same scope, considering the assessment which indicates both the lack of documented necessity to interfere with privacy (which constitutes a condition for meeting the standard specified in Article 8(2) of the Convention for the Protection of Human Rights) and the lack of effective safeguards against the use of collected data – during the time they are stored by the CBA – for purposes other than the combat of corruption legitimised by statute (which is explicitly prohibited by Article 18 of the Convention for the Protection of Human Rights), the Constitutional Tribunal has stated that Article 22(4)-(7) of the Central Anti-Corruption Bureau Act does not meet the standards set out in Article 8 and Article 18 of the Convention for the Protection of Human Rights as well as those specified in the Preamble and Articles 5-7 of the Council of Europe Convention 108, which are equivalent in terms of content.

Moreover, the Tribunal has stated that the provisions of Article 22(8)-(10) of the challenged Act clash with the requirement of a statutory form of regulation, as set out in Article 51(5) of the Constitution.

6. The question of constitutionality of the CBA's surveillance powers.

The Central Anti-Corruption Bureau Act authorises the CBA functionaries to carry out surveillance activities in order to expose the cases of corruption in state and local self-government institutions as well as any breach of duties by persons performing public functions, and also activity against the economic interests of the state (Article 13(1)(2)).

The activities involve verifying whether persons performing public functions abide by the following provisions: 1) the Act of 21 August 1997 on restrictions on the conduct of economic activity by persons performing public functions (Journal of Laws - Dz. U. of 2006 No. 216, item 1584, as amended); 2) other statutes imposing restrictions on starting and conducting economic activity by persons performing public functions (Article 31(1)).

The surveillance activities also involve the examination and oversight of procedures, specified by legal provisions, for taking and implementing decisions with regard to: carrying out privatisation and commercialisation, providing financial support, awarding public procurement contracts, disposing of state or council property, granting concessions, permits, and exemptions within the scope ratione personae and ratione materiae, as well as granting discounts, preferences, quotas, tariff ceilings, loan sureties and guarantees (Article 31(2)). The surveillance, within the indicated scope, concerns persons performing public functions,

entities of the public finance sector within the meaning of the Act of 30 June 2005 on Public Finances (Journal of Laws - Dz. U. No. 249, item 2104, as amended), entities which are not included in the public finance sector but which receive public funds, as well as entrepreneurs (Article 31(3)).

The applicant has noted that there is no proviso in Article 31(3) of the challenged Act that among entrepreneurs only those receiving public funds are subject to such surveillance; however, at the same time, there is such a proviso with regard to the entities which are not included in the public finance sector. According to the applicant, this leads to unfair treatment of entrepreneurs in comparison to entities which are not included in the public finance sector. As a result, Article 31(3) of the said Act is inconsistent with Article 2 and of Article 32(1), first sentence, the Constitution.

In accordance with the established jurisprudence of the Constitutional Tribunal, "the principle of equality, expressed in Article 32(1) and (2) of the Constitution, entails that all the subjects of rights and obligations, to the same extent characterised by a certain essential feature, should be treated equally, i.e. should be neither favoured nor discriminated against" (the judgment of the Constitutional Tribunal of 23 October 2001, Ref. No. K 22/01, OTK ZU No. 7/2001, item 215). At the same time the principle of equality entails that the subjects of rights and obligations that are not characterised by a certain essential feature, shared by all the subjects, are treated differently. While examining the conformity of legal regulation to the constitutional principle of equality, it should be established whether there is any similarity between the subjects, and thus whether it is possible to indicate a shared essential feature which justifies equal treatment of the subjects.

If the legislator distinguishes between the subjects of rights and obligations which are characterised by a shared essential feature, he departs from the principle of equality. In the view of the Constitutional Tribunal, such departure is admissible if three conditions are met. "Firstly, the distinctions introduced by the legislator must be rationally justified. They must be related to the purpose and content of the provisions which contain the norm under review. Secondly, there must be appropriate proportion between the significance of the interest such a distinction between similar subjects is to serve and the significance of interests which would be undermined in the case of different treatment of similar subjects. Thirdly, such a distinction between similar subjects must be based on constitutional values, principles or norms" (the judgment of the Constitutional Tribunal in the case K 22/01).

The Constitutional Tribunal has emphasised many times that what follows from the principle of equality expressed in Article 32(1) of the Constitution is the requirement of equal treatment of the subjects of rights and obligations within a certain class (category). The assessment of each legal regulation, from the point of view of the principle of equality, must therefore be preceded by a thorough assessment of the legal situation of the subjects and an analysis of their shared and distinct features (cf. the statement of reasons for the judgment of 28 May 2002, Ref. No. P 10/01, OTK ZU No. 3/A/2002, item 35).

In the light of the principle of equality construed in this way, it is difficult to allege that the challenged provision of the Central Anti-Corruption Bureau Act has infringed the said principle. Within the category of subjects singled out by the legislator to be subjected to surveillance by the CBA functionaries, those which are characterised by a shared essential (relevant) feature to the same extent (for instance: all public figures, all entrepreneurs) are treated equally.

Dividing the subjects under the category of entities which do not belong to the public finance sector into entities receiving public funds and entities that do not receive such funds, which is justified within that category, does not have to refer to a different category of subjects such as entrepreneurs. Moreover, considering the object of surveillance activities which are referred to in Article 31(2) of the Central Anti-Corruption Bureau Act, such treatment of the

category of entrepreneurs is justified. Indeed, only entrepreneurs, and not the subjects from the category of entities not included in the public finance sector (e.g. foundations or associations), may be granted concessions and permits for conducting a specific economic activity. Entrepreneurs also participate in commercialisation and privatisation procedures. In addition, entrepreneurs are most often parties to proceedings concerning public procurements. Thus, it should be concluded that, equal treatment of all entrepreneurs in the challenged provision was based on a relevant criterion which was objective in character and was directly related to the object of the regulation. For that reason, Article 31(3) of the Central Anti-Corruption Bureau Act should be regarded as consistent with Article 32(1) of the Constitution.

In the statement of reasons for the judgment, the Constitutional Tribunal has not found more specification for the allegation that the said provision was inconsistent with the adequate principles, indicated by the applicant, which arise from Article 2 of the Constitution. Neither has the Tribunal found convincing argumentation in support of that allegation. Guided by the presumption of constitutionality, the Constitutional Tribunal has not shared the applicant's view on the non-conformity of Article 31(3) of the challenged Act to Article 2 of the Constitution.

7. The CBA's surveillance powers and the constitutional freedom of economic activity.

The applicant alleged that Article 31(3) in conjunction with Article 32 and Article 33 of the Central Anti-Corruption Bureau Act was inconsistent with Article 20 and Article 22 in conjunction with Article 31(1) of the Constitution. In the applicant's opinion, the said non-conformity consisted in the fact that the forms and rules of carrying out surveillance, in the case of entrepreneurs, were not neutral to economic activity. They might hinder or even stifle the activity. Bearing in mind *ratio legis* of the challenged provisions, which is the protection of the principle of rule of law and the realm of economy against instances of corruption, the applicant stressed that constitutional values also included the freedom of economic activity (guaranteed in Article 20 of the Constitution), which might only be restricted due to a vital public interest (as required by Article 22 of the Constitution). The restriction on the freedom of economic activity must fulfil the requirement of necessity. Thus, the freedom of economic activity may, in the applicant's opinion, yield to the protection of rule of law only under the condition that the protection of rule of law may not be guaranteed in any other way.

In accordance with Article 32, the Central Anti-Corruption Bureau carries out surveillance activity on the basis of an annual surveillance scheme, approved by the Head of the CBA (paragraph 1). However, on the basis of a regulation by the Head of the CBA, the Bureau may carry out ad hoc surveillance activities (paragraph 2). The CBA conducts surveillance in compliance with the surveillance scheme approved by the Head of the CBA or a person authorised to act on his behalf (Article 33(1)). Surveillance is conducted by the CBA functionaries on the basis of service ID cards and authorisations in their names issued by the Head of the CBA or a person authorised to act on his/her behalf (paragraph 2). The surveillance should be completed within the period of 3 months, and in the case of an entrepreneur – with the period of 2 months (paragraph 3). Where this is particularly justified, the period of surveillance of persons other than entrepreneurs may be extended for a period specified by the Head of the CBA; however, the extension of the said period should not exceed 6 months (paragraph 4). Where the circumstances justify carrying out immediate surveillance and, in particular, where the risk of the loss of evidence occurs, surveillance may be initiated after the presentation of the functionary's service ID card to a person subjected to surveillance or a person authorised by him/her or a to person performing a public function (paragraph 5). In such a case, the person subjected to surveillance or a person authorised by him/her and a person performing a public function should be immediately, but no later than

within 3 days of the date when surveillance begins, presented with an authorisation to initiate surveillance. Documents acquired in the course of surveillance activities which have not been carried out in compliance with this obligation do not constitute evidence in the surveillance proceedings (paragraph 6)

The authorisation to carry out surveillance shall contain: 1) the name and surname as well as the number of the service ID card of the functionary who conducts surveillance; 2) the indication of a person or entity subjected to surveillance and the date of completion of surveillance; 3) the detailed scope of surveillance; 4) an instruction on the rights and obligations of the person or entity subjected to surveillance (paragraph 7). The Prime Minister has been designated to specify, by regulation, the template of the authorisation to carry out surveillance, the authority issuing the authorisation and the scope ratione materiae of the authorisation, taking into consideration the unification of information contained in the authorisation (paragraph 8).

Formulating the allegation of non-conformity of the cited regulations to Articles 20 and 22 in conjunction with Article 31(1) of the Constitution, the applicant paid particular attention to the provisions of Article 31(3) *in fine* in conjunction with Article 33(3) and (4) as well as Article 32(2) of the Central Anti-Corruption Bureau Act.

Assessing the validity of the applicant's allegations, the Constitutional Tribunal once again stresses that the freedom of economic activity is not absolute. By analogy to other constitutional freedoms (and rights) of the individual, it may be subject to restrictions imposed by the legislator. Also, Article 22 of the Constitution stipulates that imposing restriction on the freedom of economic activity is admissible only by statute, and only due to important public interest.

In accordance with the established jurisprudence of the Constitutional Tribunal, economic activity, because of its character – and, in particular, because of its close link to the interests of other persons as well as the public interest – may be subject to restrictions, to a larger extent than personal or political rights and freedoms. There is a legitimate interest of the state in creating a legal framework for economic activity which will make it possible to minimise the negative effects of free-market mechanisms, provided those effects emerge in the realm which is vital to the state due to the protection of commonly cherished values (the judgment of the Constitutional Tribunal of 8 April 1998, Ref. No. K. 10/97, OTK ZU No. 3/1998, item 29).

Such a negative effect is, *inter alia*, the problem of corruption. In the case of that problem, freeing economic activity completely from any restrictions would deprive the state of indispensable control measures. It could also threaten security, public order or constitutionally protected citizens' rights. Counteracting corruption should encompass appropriate legislative measures which ensure that competent services of the state will be equipped with effective measures, including control measures. In this context, the assessment should be carried out with regard to Article 31(3) in conjunction with Article 32 and Article 33 of the Central Anti-Corruption Bureau Act.

In the view of the Constitutional Tribunal, the applicant has not presented convincing arguments which would allow to rule out the conviction that the challenged solutions were introduced because of an important public interest, within the meaning of Article 22 of the Constitution. In that situation, guided by the presumption of constitutionality of the challenged statutory regulations, the Tribunal declares Article 31(3) in conjunction with Articles 32 and 33 of the Central Anti-Corruption Bureau Act - insofar as it provides for surveillance activities which are necessary for the protection of the state's security, public order or important public interest – to be consistent with Article 22 in conjunction with Article 31(3) of the Constitution. At the same time, the Tribunal states that the applicant has not proven a connection between Article 31(3) of the challenged Act and the principle of

social market economy, as expressed in Article 20 of the Constitution. The indicated higher-level norm for constitutional review is inadequate in that regard.

8. The inspection of the condition of immovable property and other tangible assets which are in possession of persons performing public functions (Article 40 of the Central Anti-Corruption Bureau Act) and the constitutional and convention protection of inviolability of the home and privacy.

Challenged by the applicant, Article 40 of the said Act constitutes the legal basis for carrying out an "inspection" in order to "determine the condition of the the immovable property and other tangible assets indicated in an asset declaration" of persons performing public functions. The inspection is carried out by the functionary verifying such declarations (paragraph 1). The inspection of immovable property or other tangible assets is carried out in the presence of the person who has submitted the declaration or a person authorised by that person. The inspection has a (potentially) probative character, as it reveals and confirms the attributes, condition and location of objects in order to explain the circumstances which are subject to examination.

The applicant challenges the provisions permitting an inspection in that regard, alleging in the *petitum* of the application (together with its subsequent extension) that they are inconsistent with Articles 2, 47 and 50 of the Constitution as well as with Article 8 of the Convention for the Protection of Human Rights. However, in the substantiation, the applicant argues that there has been an infringement of the indicated higher-level norms in conjunction with Article 31(3) of the Constitution.

Article 50 of the Constitution guarantees the inviolability of the home. The search of the home, a room or a vehicle may only take place in the cases specified in the Act and in the manner specified therein. It is assumed in the doctrine that the inviolability of the home is a fundamental personal freedom of the individual, serving particularly his/her mental integrity and being clearly related to the declared dignity of the individual. This value is obviously related to the right to private life (Article 47 of the Constitution) and may be regarded as one of its manifestations (cf. P. Sarnecki, commentary to Article 50, [in:] *Konstytucja Rzeczypospolitej Polskiej. Komentarz*, Vol. 3, L. Garlicki (ed.), Warszawa 2003, p. 1).

Pursuant to Article 40 of the Central Anti-Corruption Bureau Act, inspection concerns only persons performing public functions. The Constitutional Tribunal may not overlook that fact that the convention requirements and the relevant jurisprudence in this regard do not exclude public officials from the protection of privacy (see the judgment of the ECHR of 25 June 1997, Ref. No. 20605/92, in the case of Halford v. the United Kingdom).

In this context, the issues of admissibility and proportionality of interference with the indicated rights and freedoms acquire key significance. A question arises whether the possibility of inspection solely for the purpose of assessing the condition of the immovable property and other tangible assets indicated in an asset declaration of a person performing a public function falls within the scope of interference with the inviolability of the home, which is admissible and proportionate to the public interest.

In accordance with the jurisprudence of the Constitutional Tribunal, "when assessing the proportionality of the challenged regulation, one should take into consideration general principles which determine the unconstitutionality of a statutory regulation, due to the lack of proportionality in the legislator's action (the judgment of 13 March 2007, Ref. No. K 8/07). In the jurisprudence concerning the consequences of Article 31(3) of the Constitution, the Tribunal has stressed that the allegation of infringement of proportionality needs to be verified by answering three test questions regarding the norm which is reviewed by the Tribunal: 1) can it bring about the results which the legislator intended (the criterion of usefulness of the norm); 2) is it necessary (indispensable) for the protection of public interest

which it is related to (the criterion of necessity); 3) does its effects remain proportionate to the burdens and restrictions imposed on the citizen (the criterion of proportionality *sensu stricto*). The individual criteria of usefulness, indispensability and proportionality *sensu stricto* constitute the content of "necessity" expressed in Article 31(3) of the Constitution.

The Constitutional Tribunal has consistently indicated that "if a given goal is possible to be achieved by means of a different measure which imposes milder restrictions on the rights and freedoms, then the application of a harsher measure by the legislator goes beyond what is necessary, and thus infringes the Constitution (cf. in particular: the judgment of 12 January 2000, Ref. No. P. 11/98, OTK ZU No. 1/2000, item 3 and the judgment of 10 April 2002, Ref. No. K 26/00, OTK ZU No. 2/A/2002, item 18)" (see the judgment of the Constitutional Tribunal in the case K 8/07).

At the same time, the Constitutional Tribunal does not examine the usefulness of given regulation and its pragmatic potential for achieving the goal set by the legislator. The object of the Tribunal's review is not – in particular – a question whether a given issue could be regulated in a "better" or "different" way. By contrast, the Tribunal examines whether particular legal regulations infringe the Constitution. Such an infringement – within the scope which is relevant here – may be a breach of the principle of proportionality (Article 31(3) of the Constitution). The scope of review conducted by the Constitutional Tribunal includes the examination whether the burdensome aspects of given regulation are adequate (burdensome aspects "experienced" in the context of constitutionally protected goods and values) and whether the purpose of the regulation is constitutionally legitimate (see the judgment of the Constitutional Tribunal in the case K 8/07).

The introduction of inspection aimed at assessing the condition of immovable property or other assets indicated in an asset declaration could, in itself, be regarded as proportional, provided that the aforementioned criteria of usefulness, necessity and proportionality *sensu stricto* have been fulfilled.

The legal institution of inspection must be regarded as favourable for the assumed *ratio legis* of the Central Anti-Corruption Bureau Act. This relatively drastic measure may have a positive impact, motivating those who perform public functions to prepare their asset declarations with increased diligence. In turn, this may enhance transparency of property relations, by facilitating supervision and by creating conditions which are not favourable to corruption. Therefore, the challenged regulation corresponds with the first of the aforementioned premisses of the test verifying the appropriate application of the principle of proportionality, namely it may be regarded as useful for achieving *ratio* of the norm under review.

Another criterion which must be met by proportional regulation is the necessity of the legislator's interference, by means of the norm under examination, in the situation where achieving a set goal is not possible in a different way. Within that scope, the assessment of constitutionality of Article 40 of the Central Anti-Corruption Bureau Act is partly different than previously.

In the literature on the subject, it has been established that "the more drastic authorities' interference (as regards its object, scope, manner and effects) with the realm of constitutionally protected fundamental rights, the more stringent premisses should govern the procedure constituting the guarantee of that interference (cf. L. Garlicki, commentary to Article 31(3) of the Constitution, [in:] *Konstytucja Rzeczypospolitej Polskiej. Komentarz*, Vol. III, L. Garlicki (ed.), Warszawa 2003; K. Wojtyczek, *Granice ingerencji ustawodawczej w sferę praw człowieka w Konstytucji RP*, Kraków 1999, p. 136 and subsequent pages; K. Wojtyczek, "Zasada proporcjonalności", [in:] *Prawa i wolności obywatelskie w Konstytucji RP*, B. Banaszak, A. Preisner (eds.), Warszawa 2002, p. 667 and subsequent pages. The line of jurisprudence of the Constitutional Tribunal is similar, e.g. the judgments

of: 12 January 1999, Ref. No. P. 2/98, OTK ZU No. 1/1999, item 2, 22 September 2005, Ref. No. Kp 1/05, OTK ZU No. 8/A/2005, item 93, 12 December 2005, Ref. No. K 32/04, OTK ZU No. 11/A/2005, item 132, 18 January 2006, Ref. No. K 21/05, OTK ZU No. 1/A/2006, item 4)" (Ref. No K 8/07).

A comparison of the legal institution of inspection, as specified in the Central Anti-Corruption Bureau Act, with the institution of search as referred to in the Code of Polish Criminal Procedure, to some extent, leads to a surprising result. In the case of far-reaching interference with the same rights and freedoms, the conditions for carrying out search which is aimed at obtaining material evidence, i.e. objects which come from the site of an offence or prove that the offence has been committed by a suspect, are much more stringent than the conditions for carrying out inspection which is merely aimed at determining assets indicated in the asset declaration of a person who is obliged to file such a declaration.

In particular, what raises concern is the lack of any guarantee regulations, as regards storing and using data obtained during inspection; such regulations would safeguard every person's right to private life (guaranteed in Article 47 of the Constitution) and would ensure that persons or entities subject to inspection would have a status (at least) comparable to the status of persons or entities that have been subject to search (Article 50, second sentence, of the Constitution).

The challenged regulation concerns constitutionally protected subjective rights. This is primarily the inviolability of the home, but also the right to private life. There are particular doubts as to whether a measure introduced in the Central Anti-Corruption Bureau Act is really the only measure leading to the achievement of the goal intended by the legislator.

Challenged by the applicant, the provision of Article 40 of the Central Anti-Corruption Bureau Act does not specify the manner of storing and further processing of the data obtained in the course of inspection. It does not indicate any safeguards against access to those data by third parties or against accidental disclosure of collected data, comprising – for instance – information on the assets owned by a public functionary and the members of his/her family as well as by other members of his/her household, their particular assets, the location of the assets in immovable property under inspection, access to the assets by other persons, and the degree of securing them against theft. Moreover, the period and manner of storing the said data in the CBA's organisational units have not been determined; neither has the group of the functionaries of the Bureau who have more or less free access to the data obtained in the course of inspection.

The Constitutional Tribunal holds the view that the lack of appropriate guarantee regulations which regulate the manner and period of storing data obtained in the course of inspection considerably weakens the protection of the right to private life with regard to both public functionaries whose immoveable property was subject to inspection, within the meaning of Article 40 of the Central Anti-Corruption Bureau Act, as well as third parties that remain outside the scope ratione personae of the inspection. This primarily concerns the members of the family living together with the person subject to inspection as well as other members of the household. Additionally, the insufficient number of guarantee provisions refers to the very manner of storing the data obtained pursuant to Article 40 of the challenged Act, the protection thereof against accidental disclosure and "leak" outside the group of authorised CBA functionaries, against the access to data by functionaries who do not carry out inspection or apply any other measure with regard to persons whose immovable property is subject to inspection.

The Constitutional Tribunal states that legislative omission which occurs in the context of Article 40 of the Central Anti-Corruption Act, in its consequences, infringes on the protection of private life, which is contrary to the content of Article 47 of the Constitution and Article 8 of the Convention for the Protection of Human Rights and Fundamental Freedoms.

Article 40 of the Act leads to excessive interference with the inviolability of the home or premises as regards the scope ratione personae (with regard to persons living together with the person subject to inspection), as well as insufficient securing of the data obtained in the course of inspection against the access of third parties and the use of the data for the purposes other than those determined by the scope of the Central Anti-Corruption Bureau Act. In that regard, the lack of appropriate safeguards infringes on the constitutional protection of private life (Article 47 of the Constitution and Article 8 of the Convention). It also restricts the constitutional protection of the inviolability of the home or premises, which is guaranteed - *inter alia*, by statutory specification of instances of inspection and statutory regulation of the manner of inspection – in Article 50 of the Constitution.

In this context, the Constitutional Tribunal regards Article 40 of the Central Anti-Corruption Bureau Act, insofar as it provides for carrying out the inspection of immovable property or other assets without specifying the manner of using or storing the data obtained this way - in particular, data concerning third parties that are not obliged to file asset declarations - as inconsistent with the requirements of Articles 47 and 50 in conjunction with Article 31(3) of the Constitution as well as Article 8 of the Convention for the Protection of Human Rights and Fundamental Freedoms. As far as non-conformity to Article 2 of the Constitution is concerned, the presumption of constitutionality – in the light of the applicant's argumentation – has not been challenged.

9. Depriving the Inspector General for the Protection of Personal Data of his/her powers and the guarantees of the proper level of protection of the right to private life and the right to personal data protection.

Apart from the aforementioned provisions of the Central Anti-Corruption Bureau Act, the applicant also challenged Article 43(2) of the Personal Data Protection Act, as amended by Article 178 of the Central Anti-Corruption Bureau Act. The applicant alleged that the said provision was inconsistent with Article 2 as well as Article 47 and Article 51 in conjunction with Article 31(3) of the Constitution as well as with the Preamble and Article 6 of the Council of Europe Convention No. 108 for the Protection of Individuals with regard to the Automatic Processing of Personal Data.

The challenged provision stipulates that: "with regard to data files referred to in paragraph 1 points 1 and 3, as well as files referred to in paragraph 1 point 1a, processed by the Internal Security Agency, the Foreign Intelligence Agency, the Military Counter-Intelligence Service, the Military Intelligence Service as well as the Central Anti-Corruption Bureau, the Inspector General for the Protection of Personal Data has none of the powers specified in Article 12(2), Article 14(1) and (3)-(5) as well as in Articles 15-18". The amendment introduced by Article 178 of the Central Anti-Corruption Act to that provision is the inclusion of the Central Anti-Corruption Bureau among the secret services enumerated therein. The files which this provision concerns are data files "subject to state-secrecy restrictions for reasons of national defence or security, protection of life and health of people, the protection of property or security and the public order" (paragraph 1(1)) and "concerning people belonging to a church or another religious organisation with a regulated legal situation, processed for needs of the church or the religious organisation" (paragraph 1(3)) as well as data files with data "which have been obtained as a result of operational activities by the functionaries who are competent to carry out such activities" (paragraph 1(1a)).

The powers which, pursuant to that provision, no longer fall within the scope of the Inspector General for the Protection of Personal Data (hereinafter: GIODO), include:

– the GIODO's power to issue administrative decisions and examine complaints concerning the execution of provisions on personal data protection;

– the right of entrance, between 6.00 a.m. and 10.00 p.m., for the inspectors of the

GIODO upon presentation of authorisations in their names and service ID cards, to the room where data are processed outside the data file, as well as the right to carry out the necessary examination or other checks in order to assess the conformity of the processing of data to the Act;

– the right of access to any documents and data which are directly related to the object of the checks and the right to make copies thereof;

– the right to inspect devices, carriers and computer systems used for processing data;

– the right to commission the preparation of expert opinions and other forms of evaluation.

Moreover, in the case of any breach of the provisions on personal data protection, the Inspector General may not, by means of an administrative decision, order the CBA to restore the proper legal state (Article 18 of the Personal Data Protection Act).

In the opinion of the applicant, the above state of affairs concerning the CBA infringes the guarantees of the right to private life, set out in Article 47 and Article 51 in conjunction with Article 31(3) of the Constitution, as well as Article 2 of the Constitution, and:

– Article 6 of the Council of Europe Convention No. 108 for the Protection of Individuals with regard to the Automatic Processing of Personal Data – due to the fact that it does not provide appropriate protection as regards processing data disclosing racial background, political views, religious beliefs or others, as well as personal data concerning health or sexual life;

– the Preamble to the Council of Europe Convention No. 108 for the Protection of Individuals with regard to the Automatic Processing of Personal Data – insofar as it does not lead to "extending the scope of rights and fundamental freedoms of every individual, and in particular the right to protection of private life", and results in weakening or, in fact, eliminating actual control over collecting and processing personal data by the CBA.

The Constitutional Tribunal has not shared the arguments of the applicant. Firstly, the applicant challenged the said provision as a whole, but he did not prove that the restrictions imposed on the powers of the Inspector General for the Protection of Personal Data were not fully justified, i.e. with regard to all the secret services enumerated therein. In fact, the applicant limited his allegations to the CBA's activities.

Strictly specified by statute, the application of special rules - different than those commonly applicable – for handling files containing data processed by secret services does not, in principle, raise constitutional doubts. Therefore, the applicant did not prove why narrowing down the scope of powers of the Inspector General for the Protection of Personal Data, only with regard to the CBA, infringes on the indicated constitutional higher-level norms for review, especially in relation to the principle of proportionality, as well as that it clashes with the indicated provisions of Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data (ETS No. 108). The challenged provision does not exclude all the powers of the Inspector General for the Protection of Personal Data which have been granted to him/her in the Personal data Protection Act. Still, also with regard to data files processed by the CBA, the tasks assigned to the Inspector General for the Protection of Personal Data include, *inter alia*, reviewing the compliance of processed data with the provisions on personal data protection, providing opinions on parliamentary bills and draft regulations concerning personal data protection, initiating and undertaking efforts as regards improving the protection of personal data protection (Article 12(1), (4) and (5) of the Personal Data Protection Act). The Inspector General, the Deputy Inspector General or the employees of the Bureau who are competent in that regard have retained the power to demand written or oral explanations, and to summon and question any person within the scope necessary to determine the facts of the case (Article 14(2) of the Personal Data Protection

Act). Therefore, it may not be stated that the GIODO has been "completely deprived of the possibility of controlling the activities of the services".

10. The assessment of conformity of § 3 and § 6(1) of the Regulation of the Prime Minister of 27 September 2006 on the scope, terms and procedure regarding the transfer of information to the Central Anti-Corruption Bureau by the organs, services and institutions of the state to: the Constitution, the Convention for the Protection of Human Rights and Fundamental Freedoms and the Council of Europe Convention No. 108 for the Protection of Individuals with regard to the Automatic Processing of Personal Data.

The applicant also requested the Tribunal to determine that § 3 and § 6(1) of the Regulation of the Prime Minister of 27 September 2006 on the scope, terms and procedure regarding the transfer of information to the Central Anti-Corruption Bureau by the organs, services and institutions of the state (Journal of Laws - Dz. U. of 2006 No. 177, item 1310; hereinafter: the Regulation of 27 September 2006) were inconsistent with: 1) Article 22(9) of the Central Anti-Corruption Bureau Act, and thus with: 2) Article 92(1) of the Constitution as well as Article 47 and Article 51(2) in conjunction with Article 31(3) and Article 51(5) of the Constitution; 3) with Article 8 in conjunction with Article 18 of the Convention for the Protection of Human Rights; 4) with the Preamble, Article 5(b) and (c), Article 6 and Article 7 of the Council of Europe Convention No. 108 for the Protection of Individuals with regard to the Automatic Processing of Personal Data.

The challenged Regulation was issued on the basis of Article 22(9) of the Central Anti-Corruption Bureau Act. In accordance with that provision, "the Prime Minister shall specify, by way of a regulation, the scope, terms and procedure regarding the transfer of information to the Central Anti-Corruption Bureau by the organs, services and institutions of the state, referred to in paragraphs 2 and 4, taking into consideration the way of documenting that information as well as entities that are authorised to provide it".

The provision of Article 22(2), which is referred to in the authorisation, stipulates that "in order to prevent or detect offences specified in Article 2(1)(1), as well as to identify persons, the CBA may process information, including also personal data from data files maintained on the basis of separate provisions by other organs of public authority and state organisational units, and in particular from: the Register of Economic Activity, the National Register of Taxpayers, the National Criminal Register, the National Court Register, Universal Electronic System for Registration of the Population, the Register of the Entities of the National Economy, the Central Register of the Insured and Central Register of Contribution Payers, the Central Register of Vehicles and Drivers as well as the National Centre for Criminal Information. The administrators of data collected in those registers are obliged to make the data available free of charge".

Additionally, Article 22(4) provides that "within the scope of its competence, the CBA may also collect all indispensable personal data, including – where it is justified by the character of tasks – the data indicated in Article 27(1) of the Act of 29 August 1997 on the Protection of Personal Data (Journal of Laws - Dz. U. of 2002 No. 101, item 926 and No. 153, item 1271 as well as of 2004 No. 25, item 219 and No. 33, item 285), and also make use of personal data and other information obtained as a result of operational activities by the organs, services and institutions of the state as well as process them, within the meaning of the Personal Data Protection Act, without any knowledge and consent of the person whom these data concern".

The procedure for transferring data to the CBA by the entities indicated in Article 22(4) of the Central Anti-Corruption Bureau Act, has been set out in § 4 of the said Regulation. In accordance with § 4(1) thereof: "the head of an organisational unit of the CBA which has been authorised to carry out operational activities, keep records or maintain

archives - or a person authorised by him/her – shall request the head of a relevant unit or department of the entities referred to in Article 22(4) of the Act to provide data, by submitting a paper application or an electronic one. According to § 4(2), "data are transferred to the CBA by the head of a unit or department of a given entity or a person authorised by him/her, upon presentation of an authorisation issued in the name of a given CBA functionary, as referred to in Article 22(5) of the Act". By contrast, § 5 of the Regulation stipulates that "the application for the provision of information shall include data concerning persons, events or issues which allow for finding information in files regarding operational activities, records and archives, as well as it specifies the scope of needed information".

There is a different regulation concerning the transfer of data by the entities indicated in Article 22(2) of the Central Anti-Corruption Bureau Act. Namely, § 3 of the Regulation of 27 September 2006 stipulates that these entities "provide files, data and information, by means of IT systems, to the CBA's organisational units which are authorised to carry out operational activities or keep records or maintain archives in the manner specified in separate agreements concluded with the CBA". By contrast, § 6(1) stipulates that the entities "may, by way a of decision or on the basis of separate agreements, consent to provide the CBA's organisational units with collected files, data or information by means of IT devices and systems, without the necessity to apply for access in writing whenever such access is needed".

Such a differentiation in procedures which consists in imposing "much lighter requirements" on the action of transferring data to the CBA, in the case of the entities referred to in Article 22(2) of the Central Anti-Corruption Bureau than with regard to the entities referred to in Article 22(4), is challenged by the applicant. In his opinion, the manner of using data collected by the entities referred to in Article 22(2) has been left to internal agreements between the CBA and those entities. Above all, the challenged provisions of the Regulation provide for the possibility of lifting the obligation to apply for access to data in writing whenever such access is needed. Moreover, they require neither the identification of persons who transfer relevant data to the CBA, nor the identification of the CBA functionaries who receive the data.

The Constitutional Tribunal shares the applicant's negative evaluation as regards the implementation of authorisation contained in Article 22(9) of the Central Anti-Corruption Bureau Act by the challenged provisions. In the first place, it should be pointed out that neither Article 22(9) nor any other provisions of the said Act provide grounds for differentiating between the ways of transferring data by the entities indicated in Article 22(2) and (4). This way, by formulating the challenged provisions of the Regulation, constitutional requirements concerning statutory authorisation were breached.

By leaving the method for accessing data as an issue subject to internal agreements between the CBA and the entities indicated in Article 22(2), the provisions of the Regulation challenged by the applicant may lead to a shift from providing data upon application to direct and unrestricted access to data (without the necessity, on the part of the CBA, to apply for access in writing whenever such access is needed). Consequently, the said provisions by facilitating the functioning of the Bureau, do not guarantee the individual sufficient protection of his/her right to private life and the right to personal data protection at a level which would meet constitutional standards, and in particular the requirement of statutory regulation in the case of principles and manner of collecting information which derives from Article 51(5) of the Constitution, as well as international standards (specified in Article 8 in conjunction with Article 18 of the Convention for the Protection of Human Rights; the Preamble and Article 5(b) and (c), Articles 6 and 7 of the Council of Europe Convention 108). Moreover, the provisions are inconsistent with the content of Article 22(9) in conjunction with Article 22(2) of the Central Anti-Corruption Bureau Act.

For these reasons, the Constitutional Tribunal is bound to regard § 3 and § 6(1) of the Regulation of 27 September 2006 as inconsistent with the above-mentioned higher-level

norms for review from the Constitution, and in particular from the Conventions. With regard to the remainder, due to the non-conformity of these provisions to Article 51(5) of the Constitution and Article 22(9) in conjunction with Article 22(2) of the Central Anti-Corruption Bureau Act, the Constitutional Tribunal has deemed it appropriate to discontinue the proceedings on the grounds that issuing a ruling is useless (Article 39(1)(1) of the Constitutional Tribunal Act).

For the above reasons, the Constitutional Tribunal has adjudicated as in the operative part of the judgment.

Dissenting Opinion
of Judge Ewa Łętowska
to the Judgment of the Constitutional Tribunal
of 23 June 2009 in the case K 54/07

Pursuant to Article 68(3) of the Constitutional Tribunal Act of 1 August 1997 (Journal of Laws - Dz. U. No. 102, item 643, as amended), I submit my dissenting opinion to the judgment of 23 June 2009 in the case K 54/07, to points 1 and 3 of the judgment and to part of the statement of reasons.

I hold the view that: Article 1(3), Article 2(1)(1)(b), (c) and (d), Article 2(1)(2) and (4) of the Central Anti-Corruption Bureau Act of 9 June 2006 (Journal of Laws - Dz. U. No. 104, item 708, No. 158, item 1122 and No. 218, item 1592, of 2008 No. 171, item 1056 as well as of 2009 No. 18, item 97) are inconsistent with Article 2 of the Constitution.

Statement of Reasons

1. In the challenged Act, the mechanism authorising the Central Anti-Corruption Bureau (hereinafter: the CBA; the Bureau) to interfere with the realm of the individual's constitutionally protected rights has been constructed in an unconstitutional way. On the one hand, this mechanism is comprised of the provisions which delineate the scope of activity, tasks and powers in a literal sense – to undertake actions by the CBA functionaries with regard to individuals, within the scope of individuals' freedoms and privacy. On the other hand, this mechanism is comprised of a system of procedural and institutional guarantees which are different than the guarantees arising from the regulation of the scope of tasks and powers of the CBA. The assumption is that guarantees concerning powers consist in binding a public authority (here: the CBA) in a precise way with the adequate and clear definition of norms which legitimise undertaking specific actions by the CBA (the conduct of the functionaries). These guarantees work *ex ante*. Other procedural and institutional guarantees concern the (external) supervision over the CBA, the powers and procedures enabling the individual affected by the CBA's activity to protect his/her private realm, as well as giving the organs of the state which are external in relation to the CBA – the awareness which is necessary for conducting oversight (supervision). These guarantees work mostly in the course of an intervention and after it has been carried out. The said mechanism is complementary in respect of its components: where there are deficiencies in the regulation of powers (the regulation being too broad, loose, unclear or imprecise), then the precision and efficient rendering of procedural and institutional guarantees may lead to the situation that the reviewed regulation will pass the test of constitutionality. And the other way round: the more precise and transparent application of norms governing powers, the higher the chances for a successful test of constitutionality of the Act, even with other defects of the regulation of procedural and institutional guarantees. Such rendering of the constitutional issue is even more needed, as in the last 20 years the number of the authorities that apply operation techniques (in the case of which it is especially difficult to assign indispensable guarantees) has increased from four (the Police, the Border Guard, the Office for State Protection, the Military Information Services) to ten (the Police, the Border Guard, the Government Protection Bureau, the Internal Security Agency, the Foreign Intelligence Agency, the Central Anti-Corruption Bureau, the Military Intelligence Service, the Military Counter-Intelligence Service, the Polish Military Gendarmerie and the state financial audit).

2. Therefore, from the point of view of constitutional review, I regard the assumption consisting in fragmenting the object of allegation (for the sake of an analysis of constitutionality) as conginitively deficient, since this narrows down the evaluation to particular excerpts of statutory regulation when juxtaposed with the higher-level norms for constitutional review. In such a case, the constitutional problem becomes blurred as it is narrowed down to the analysis of the excerpts of the provisions. However, even after eliminating the content which is considered to be unconstitutional from the challenged provisions governing powers, the judgment to which I submit my dissenting opinion still does not eliminate the basic problem: insufficient precision and clarity of those provisions. In fact, the problem consists in determining whether the statute under evaluation provides for an effective mechanism which guarantees the preservation of constitutionality at an approved level with regard to arbitrary interference of the public authority (here: the CBA) in the constitutionally protected sphere of the individual's rights and freedoms. This requires assessing the proportionality of the two components of the guarantee mechanism. With the more stringent restrictions and limitations on powers, there is a possibility of less stringent approach to other institutional and procedural guarantees; more general rendering of issues concerning powers will however be admissible if this is compensated by a better level of procedural and institutional guarantees. In this case, the application focused on the regulation of issues related to powers as the object of the allegation; however, the fact of alternative allegation of the Act as a whole created a possibility for the Tribunal to adopt a different review perspective. However, this has not been done.

3. In the previous jurisprudence (the judgment of 20 April 2004, Ref. No. K 45/02, OTK ZU No. 4/A/2004, item 30 and the judgment of 12 December 2005, Ref. No. K 32/04, OTK ZU No. 11/A/2005, item 132; and the signalling decision of 25 January 2006 - Ref. No. S 2/06, OTK ZU No. 1/A/2006, item 31 - has not yet been dealt with by the legislator, which is confirmed by the regulation under the present review), the Tribunal has covered the standard of guarantee in similar cases. The point was the manner of specifying the competence, institutional and procedural guarantees for these spheres of activity of public authorities which – being indispensible in a democratic society for the protection of society and the democratic state against social pathologies, terrorism and crime – require the application of measures that are, at their core, contrary to the individual's fundamental rights. Indeed, this necessitates the undertaking of operational activities often combined with drastic infringements on the individual's rights and freedoms (at many levels). There is a natural antinomy between operational activity on the one hand and privacy and information autonomy, which constitutes the object of constitutional protection, on the other. This antinomy imposes on the ordinary legislator, who regulates competence and other procedural/institutional guarantees, the obligation of particular attention and diligence. This also refers to the Constitutional Tribunal itself, carrying out the review of such statutes, which has the obligation to preserve its previous *acquis constitutionnel* and the obligations arising from the Convention for the Protection of Human Rights and Fundamental Freedoms (hereinafter: the Convention for the Protection of Human Rights). Naturally – and this should not be challenged – the investigative and operational activities must be characterised by *ex ante* confidentiality (also with regard to the persons who are subject to such activities). However, this does not exempt from (on the contrary, this actually imposes) the obligation to maintain particular precision and unambiguity of provisions which delineate the scope of interference (provisions governing powers), their forms and rendering, as well as procedures in accordance with which they are adopted. In the previous jurisprudence of the Constitutional Tribunal, (which in this respect remains consistent with the jurisprudence developed in the light of the Convention for the Protection of Human Rights), it has been emphasised that:

– operational activities "may be justified as long as their own goal is to protect the value of a democratic state ruled by law. The minimal requirement of constitutionality is that they need to pass the test of »being necessary in a democratic state ruled by law«. Hence, it is not enough if a given measure is applied by authorities because of its purpose, usefulness, cost-effectiveness or simplicity" (the judgment of 12 December 2005, Ref. No. K 32/04). Obviously, the attainment of that goal must "be verifiable" (supervision, protection measures for the party involved) with regard to a specific situation;

– an infringement on the principle of statutory specificity of interference with the realm of the individual's constitutional rights and freedoms may constitute a separate premiss of stating their non-conformity to the principle of a state ruled by law (Article 2 of the Constitution) - the judgment of 20 April 2004, Ref. No. K 45/02;

– since the activities of the authority (a functionary) "affect the sphere of the individual's freedom, the legislator should unambiguously outline the scope of the functionary's admissible interference and provide for appropriate procedural measures which allow to verify if a given order was justified" – the judgment in the case K 45/02. This may also take place after carrying out activities which have not led to the confirmation of suspicions (the information on ineffective surveillance that is being carried out, as a means of disciplining and counteracting the temptation to store data "just in case") – the judgments in the cases K 45/02 and K 32/04 as well as the decision in the case S 2/0;

– there is the issue of data obtained reflectively with regard to third parties (obtaining data "by the way") with whom the person under surveillance stays in touch or communicates or the issue of regulating the manner of handling the obtained data which should be deleted and destroyed in an effective way – cf. the judgment in the case K 32/04;

– the exclusion of operational autonomy of the functionaries (due to delineating the limits of their admissible intervention in an excessively vague and general way) – the judgments in the cases K 32/04 and K 45/02.

The judgment to which I submit this dissenting opinion does not contain an analysis aimed at examining whether the regulation under review corresponds to the above-indicated assumptions and standards.

4. The issue of the boundaries of the CBA's competence and the norm governing powers as the basis for undertaking particular activities by the CBA, including operational ones, is mainly caused by Article 1 and 2 of the challenged statute. The legislative technique applied here in order to specify what and when the CBA and its functionaries are allowed does correspond to the standards of appropriate legislation (the fluidity and blurriness of the boundaries, the "open-ended character" of the powers, the lack of predictability of the intervention). The Act under review assumes the classic way of formulating the powers by (in a way which renders the limits too broadly and imprecisely) of the authority being the CBA. On the basis of those tasks (numerously carried out by means of operational techniques), conclusions are drawn as to what such an authority is supposed to do in order to carry out its tasks (the reasoning from a goal to means). Therefore, it is impossible to predict in advance on the basis of Articles 1 and 2 of the Act which – in assumption – are to delineate the boundaries of powers. This entails that even an arbitrary decision of the CBA may always be regarded as falling within "the scope of the tasks" of the Bureau, and the Bureau – when making a decision about undertaking activities - remains outside external supervision. Thus, the legislator introduced an operational autonomy of the CBA functionaries. Indeed, these activities may be carried out, *inter alia*, in order to "identify (disambiguating what this stands for was not possible even at the hearing), prevent and detect other offences", which legitimise the CBA's operational activities even in the face of considerably abstract threats, the occurrence of which is highly unlikely.

Indeed it is the CBA functionaries who decide about undertaking the activities, and such a decision is not subject to anybody's verification, even *ex post*. Moreover, in accordance with Article 2(1)(2) and (4), the CBA's activities include the following: "exposing and counteracting the instances of breach of the provisions of the Act of 21 August 1997 on restrictions on the conduct of economic activity by persons performing public functions", and in particular "exposing the instances of breach of procedures, specified by legal provisions, for taking and implementing decisions with regard to: carrying out privatisation and commercialisation, providing financial support, awarding public procurement contracts, disposing of the property of entities or entrepreneurs (...), granting concessions, permits, and exemptions within the scope ratione personae and ratione materiae, as well as granting discounts, preferences, quotas, tariff ceilings, loan sureties and guarantees". In fact, such activities concern not only potential or actual offences, but also the regular administrative operations regarding economic issues. Still, entire Article 2 (including the quoted fragments) sets out the boundaries of operational activities. In such a situation, these activities may be undertaken not only in order to detect offences (cf. Article 13(1)(3) of the Act). Such a regulation is not accompanied by institutional and procedural guarantees which safeguard against of the CBA's activities.

5. As it has been aptly indicated in the decision of the Constitutional Tribunal of 20 May 2009, in the case Kpt 2/08, competence entails authorising an organ of the state, by means of a legal provision (be it constitutional or statutory), to take specific action, the undertaking of which may be a legal obligation of that state organ or merely a prerogative to undertake a certain action, with consequences which are specified by law; the powers understood in such a way should not be regarded as tantamount to the systemic functions of particular state organs (the roles which are fulfilled within the constitutional system), with tasks (i.e. the consequences of specific actions of particular state organs which are legally determined as a goal to be achieved), or with the scope of their competence ratione materiae (the spheres of activity which are specified in respect of their objects). The allegation in the present case concerns the powers of the CBA, namely: when may it interfere with the constitutionally protected sphere of the individual, and by means of what specific actions may it legally interfere in such a way. This is a sphere that concerns the fundamental values, rights and freedoms of the individual (*inter alia*: protection against degrading treatment – Article 40 of the Constitution; personal inviolability and personal liberty – Article 41(1); respect for private and family life – Article 47; the privacy of communication – Article 49; the inviolability of the home – Article 50; the freedom of economic activity – Articles 20 and 22 of the Constitution).

6. In Articles 1 and 2 of the Central Anti-Corruption Bureau Act, the regulations concerning the role, objectives and tasks of the Bureau have been mixed disorderly, which is sufficient for decoding the spheres of activity which are specified in respect of their scope ratione materiae (the scope of competence, the area of activity) of that institution, but which does not, however, sufficiently specify the boundaries and circumstances of the legitimate activity of the CBA; let alone powers as authorisation to carry out the actions assigned to the CBA functionaries – which is set out in Article 3 of the said Act. However, it is the actions of the functionaries (indicated in Articles 14-23) may greatly interfere with the constitutionally protected sphere of the rights and freedoms of individuals. Although, in this regard, the Act under review stipulates that the CBA functionaries shall act "within the scope of tasks" indicated in Article 2 – such a statement is a classic case of lip service, which is merely verbal and not actual, as it is required by the principles of appropriate legislation. Indeed, even Article 2 of the said Act does not specify the boundaries of the activities set out therein (since

some of the boundaries arise from the content of Article 1(3) – in relation to specifying the term corruption as referred to in the Act, and in Article 1(4) – which stipulates about activity which is against the economic interests of the state, and this is rendered in a verbose manner. Moreover, Article 2 does not even regulate the tasks of the CBA exhaustively: in particular, what may raise doubts is the content of Article 13(1), which - despite being placed at the beginning of the chapter on the powers of the CBA functionaries – actually stipulates about operational and as well as investigative activities in order to prevent an offence and prosecute the perpetrators thereof; about surveillance activities in order to disclose cases involving corruption, the abuse by persons performing public functions and the activity against the economic interests of the state as well as about operational activities as well as information gathering and analysis activities in order to obtain and process information which is essential for combating corruption and the activity against the economic interests of the state. Such rendering does not at all refer to the particular powers of the functionaries or the tasks of the Bureau, but it refers to its role and the object of its activity, rendered by means of categories. Therefore, the conclusions about the existence of legitimising powers may be drawn here not only from the tasks, but also from the role and the object of activity.

7. What the Central Anti-Corruption Bureau Act lacks is simply an indispensible, and well-written, norm governing powers, being in accordance with the principles of appropriate legislation and aimed at specifying "the power of a constitutional organ of the state (...) to act with legally specified consequences" (cf. the decision of the Constitutional Tribunal, Ref. No. Kpt 2/08). This, in turn, determines the infringement of Article 2 of the Constitution (diligent legislation as regards the manner of formulating the provisions on powers, especially that this concerns a state organ resorting to operational techniques) by challenged Articles 1 and 2 of the Central Anti-Corruption Bureau Act. This is determined by:

– division of regulated matter between Articles 1 and 2 (and other provisions of the Act);

– an open-ended character of both provisions as a result of the width and imprecision of the boundaries of the terms of corruption (I am not going to elaborate on this, but the point is not only the defining defects of that term indicated in the judgment, but also other deficiencies, e.g. the term of "undue" and "other" advantage) and "the activity against the economic interests of the state". These terms will be defined by a CBA functionary himself/herself at the moment of undertaking the operational activity (obtaining data) *in concreto*, and without any supervision of the court, when the operational information will not be used in court proceedings, i.e. in a case when initial suspicions will prove to be inapt; whereas the obtained data may be stored for many years, with illusory guarantees for their review and destruction as redundant.

– the capacity of the terms used in Article 2(1)(2) and (4) of the Act ("exposing and counteracting the instances of breach of the provisions of the Act of 21 August 1997 on restrictions on the conduct of economic activity by persons performing public functions", and in particular "exposing the instances of breach of procedures, specified by legal provisions, for taking and implementing decisions with regard to: carrying out privatisation and commercialisation, providing financial support, awarding public procurement contracts, disposing of the property of entities or entrepreneurs (...), granting concessions, permits, and exemptions within the scope ratione personae and ratione materiae, as well as granting discounts, preferences, quotas, tariff ceilings, loan sureties and guarantees"). This means legitimising the CBA's activity in the entirety of the economic life. The Constitutional Tribunal criticised such kind of legislative technique for specifying the powers (as regards investigative activities, which resembles the situation of the CBA), *inter alia*, in the ruling

concerning the scope of competence of the Investigative Committee – the judgment of 22 September 2006, Ref. No. U 4/06, OTK ZU No. 8/A/2006, item 109.

8. In accordance with the view of the full bench of the Constitutional Tribunal, presented the judgment of 23 March 2006 (Ref. No. K 4/06, OTK ZU No. 3/A/2006, item 32) clearly indicates that "the principle of specificity, as stemming from the rule of law clause, does not [*a priori*] prevent the legislator from applying ambiguous phrases, provided that the determination of their content remains possible. However, as the meaning of ambiguous phrases in a specific situation may not be determined arbitrarily, the use of imprecise notions necessitates special procedural guarantees to ensure transparency and surveillance over the practice by which the notions in question are assigned specific content by an authority which decides about assigning content (cf. the judgment of the Constitutional Tribunal of 16 January 2006, Ref. No. SK 30/05). (...) The review of the constitutionality of the legislator's use of ambiguous notions must be particularly rigorous where legal provisions have application to the actions of public authorities intervening within the sphere of individuals' constitutional rights and freedoms. As the Constitutional Tribunal aptly stated in its judgment of 30 October 2001, Ref. No. K. 33/00, »by means of imprecise wording of provisions, the legislator may not leave excessive freedom to the organs which are to apply them, as regards specifying the scope ratione personae and ratione materiae«". Likewise, in principle, the judgment of the ECHR of 31 January 2008, the case of Ryabov v. Russia, Application No. 3896/04. As long as terms lacking sufficient specificity are decoded by an independent court, that practice is regarded as consistent with the Constitution. However, this is different when the decoding of terms which lack sufficient specificity falls within the remit of the organ of public authority which is to carry out the evaluation whether there are conditions for undertaking activities which would interfere with the realm of the individual's rights and freedoms. The CBA alone decides about such activities, carried out in search of "independent" advantages of "other" than property or non-property character and the hypothetical possibilities of offences occurring and all with the use of operational techniques and a wide range of possibilities for obtaining data and making the use of the data files that already exist in the circumstances where "other means proved to be insufficient or there is high likelihood that they will be ineffective or useless" (Article 17 of the Act). The following question arises: who is to determine and verify that, with what measures and procedures, and at what moment. In accordance with the assumption underlying the Act, the decisive factor here is the CBA's operational autonomy. And this question is not resolved by the judgment to which I submit my dissenting opinion.

9. The CBA applies operational techniques. Many of its activities, and in particular those which concern obtaining data - which does not have to be linked with such techniques, but with other interference with information autonomy - also remain confidential, or even intentionally concealed. Such activities on the part of authority which protects the democratic order in this way must be protected with guarantees, so that they will be carried out with the sole purpose to safeguard the democratic order and only when carrying them out is absolutely necessary. It is obvious that any operational activity, arising from any political agenda – in order to be successful - requires discretion. However, it is inadmissible that decisions on the application of such techniques in particular cases, with regard to particular individuals, ultimately depended on the arbitrary assessment and the decision of the CBA as to when and in what circumstances the actions should be taken. One of the basic guarantees is determining the powers of the entity applying operational techniques in such a way that it would be clear when it is allowed to interfere with the protected realm of individuals and what actions within the scope of that interference it may undertake. Apart from the fact that the CBA's powers are

defined in an open-ended and "broad" way, which entails that the norms which specify that power do not play a guarantee function; also, there are no other guarantees which could be considered as compensatory for that shortage. The Act does not provide for, for instance, an obligation to notify *ex post* about the techniques applied and data obtained, in the case of a person who turned out to be without fault. In fact, such a guarantee (suggested in the judgment in the case K 32/04 and approved of in, for example, German legal system) enhances self-discipline among the functionaries of a service which applies confidential techniques and is involved in obtaining data. What is missing is a set of guarantees for effective destruction of data obtained unnecessarily. It is not enough to write down that something should be destroyed in front of a committee. Also, what should be ensured is an effective way of verifying – at least in a fragmentary way – whether this is really done so. There is not even an attempt to solve the problem of the data obtained reflectively (which could be regarded as a legislative omission in that case), for instance, in the case of tapping (when the tap was set up for one person and it is used in relation to the interlocutors of the one who is formally being tapped). In this situation, the imprecision in delineating the limits of the CBA's powers is not compensated with any other guarantees.

10. The Act on the Central Anti-Corruption Bureau does not provide for any guarantees for the possibility of exercising the right to access and correct data (this is possible as long as proportionality is maintained which arises from the secret character of the operations that are carried out – after the completion of a given operation). I sustain the argumentation here which was presented in points III(4) and (5) of the statement of reasons for the judgment in the case K 32/04. In particular, there is a need for introducing the obligation to provide *ex post* notification, as well as for introducing more effective procedures which would safeguard the activity of deleting and destroying unnecessary data. The following have been specified too broadly: the scope of data collection, the decision about making data available from another entity's data file and the time-limit for storing the data. Such evaluation is derived from the statement about the defective (too broad) delineation of the scope of the powers and tasks of the CBA. If the Act was more stringent in that last respect, this would result in milder criteria for assessment of other procedural guarantees. That is why comparative arguments (that in other countries guarantees regarding powers are weak) fail. Firstly, one should not assess single powers in the context of single actions of the functionaries, but rather they should be evaluated in groups. Secondly, assessment must take into account the entirety of guarantee mechanism (guarantees concerning powers as well as institutional and procedural guarantees of a different type and their complementariness), since in the context of Polish law – the Central Anti-Corruption Bureau Act lacks more in specificity ("is broader"), as regards powers, than the Act on the Police, which even with uniform guarantees for operational activities gives an effect of lowering the standard (in comparison to the Act on the Police).