112/7/A/2009

JUDGMENT
of 16 July 2009
Ref. No. Kp 4/08*

In the Name of the Republic of Poland

The Constitutional Tribunal, in a bench composed of:

Bohdan Zdziennicki – Presiding Judge
Zbigniew Cieślak
Maria Gintowt-Jankowicz
Mirosław Granat
Marian Grzybowski
Adam Jamróz
Marek Kotlinowski
Teresa Liszcz
Ewa Łętowska
Marek Mazurkiewicz – 2nd Judge Rapporteur
Janusz Niemcewicz – 1st Judge Rapporteur
Andrzej Rzepliński
Mirosław Wyrzykowski,

Krzysztof Zalecki - Recording Clerk,

having considered, at the hearing on 16 July 2009, in the presence of the applicant, the Sejm and the Public Prosecutor-General, an application by the President of the Republic of Poland, submitted pursuant to Article 122(3) of the Constitution of the Republic of Poland, to determine the conformity of:

Article 19 in conjunction with Article 1(37)(a) of the Act of 4 September 2008 amending the Act on trading in financial instruments and certain other acts to Article 2, Article 7, Article 21(1), Article 9 in conjunction with Article 91(1) and (2), as well as to Article 227(1) of the Constitution,

adjudicates as follows:

1. Article 19 in conjunction with Article 1(37)(a) of the Act of 4 September 2008 amending the Act on trading in financial instruments and certain other acts:

a) is inconsistent with Article 227(1) in conjunction with Article 2 and Article 21(1) of the Constitution of the Republic of Poland,

b) is not inconsistent with Article 7, Article 9 and Article 91(1) and (2) of the Constitution.

2. Article 19, in conjunction with Article 1(37)(a) of the Act referred to in point 1, is not inextricably linked to the whole Act.

* The operative part of the judgment was published on 23 July 2009 in the Official Gazette - *Monitor Polski* (M. P.) No. 46, item 683.

STATEMENT OF REASONS

I

1. Pursuant to Article 122(3) of the Constitution, the President of the Republic of Poland requested the Tribunal to determine the conformity of Article 19 in conjunction with Article 1(37)(a) of the Act of 4 September 2008 amending the Act on trading in financial instruments and certain other acts (hereinafter: the Act) to Article 2, Article 7, Article 21(1), Article 9 in conjunction with Article 91(1) and (2), as well as to Article 227(1) of the Constitution.

The challenged provisions in proposed Article 1(37)(a) of the Act exclude the National Bank of Poland (hereinafter: the NBP) from holding shares in the National Depository for Securities (hereinafter: the KDPW or the National Depository); moreover, in the case where the NPB does not sell its shares held in the KDPW, it is deprived of its right to vote attached to the shares (Article 19 of the Act). The President drew attention to the fact that the regulations contained in the challenged provisions which concerned the status of the NBP as a shareholder of the KDPW were introduced as a result of the government's own amendment (Sejm Paper No. 64-A, 6th term) to the bill (Sejm Paper No. 64, 6th term). Before submitting the paper with the said amendment to the Sejm, with regard thereto, the government had received the Opinion of the European Central Bank of 21 May 2008 at the request of the Polish Minister for Finance on a draft law amending the Law on trading in financial instruments and other legislation (CON/2008/20). The President pointed out that, in the opinion of the Central European Bank, "the draft law does not comply with the principle of central bank independence as it forces NBP to dispose of its assets, namely all its shares held in KDPW. (…) the NBP's shareholder status may be modified, if and when needed, in agreement with the NBP's decision-making bodies, at the market price" (p. 5 point 3.3. of the ECB opinion). In the opinion of the applicant, pursuant to the challenged regulation, the legislator obliges the central bank to dispose of the shares within the time limit specified by statute, in default of which the bank loses the right to vote attached to the shares, which means the loss of ownership rights. In the ECB opinion, such an obligation of the National Bank of Poland is contrary to the principle of central bank financial independence, ensuing from Article 108 of the Treaty establishing the European Community.

In the opinion of the President, the object of the activity of the National Depository for Securities falls within the statutory scope of the NBP's tasks, due to the fact that it encompasses the coordination of monetary settlements; moreover, the activity of the National Depository with regard to processing the State Treasury bonds, as a potential collateral for the credit operations of the central bank, requires meeting the EU standards. The National Depository plays a fundamental role on the state's financial market and is of key significance for the stability of the entire financial system. The scope of the tasks of the National Depository and their connection with the NBP's tasks, in the realm of conducting monetary policy, indicates that the legislator's decisions concerning the rights of the bank which ensue from holding the KDPW's shares are directly related to the area of activity of the central bank protected by the constitutional principle of the NBP's independence. The independence of national central banks is also guaranteed by the primary EU law. The challenged regulation infringes on the NBP's independence, which is enshrined in Article 227(1) of the Constitution.

According to the President, there is an established view in the doctrine of law that the guarantees of ownership which arise from Article 21(1) of the Constitution also refer to public legal entities. It should be deemed that the constitutional principle of ownership

protection also refers to the NBP. The statutory requirement to dispose of shares held in the KDPW, with the sanction of not being able to exercise the right to vote attached to the shares, infringes on the principle of ownership protection, as set out in Article 21(1) of the Constitution. The adopted regulation does not guarantee the equivalence of transactions, since it weakens the negotiating position of the bank in negotiations regarding the disposal of shares.

In the view of the President, the primary EU law is partly constituted by Article 108 of the Treaty establishing the European Community, which requires that the independence of the national central bank be respected. The challenged provisions infringe on the said independence, which raises doubts as to their conformity to Article 9 and Article 91(2) of the Constitution.

In the opinion of the President, it follows from Article 2 and Article 7 of the Constitution that all the procedural requirements which are binding for the legislator in accordance with the legislative procedure need to be taken into account in the legislative process. What follows from the EU law is the requirement to consider an ECB opinion in the course of parliamentary work on a statute. The ECB opinion was not presented in the explanatory note to the Sejm Paper No. 64-A which contained the government's own amendment introducing the challenged provisions. The fact that the ECB opinion was not presented in the course of parliamentary work should be regarded as a serious breach of procedure, since this made it impossible for the Polish Parliament to adopt a decision based on all the elements it should have at its disposal.

2. In a letter of 12 November 2008, the Public Prosecutor-General expressed the view that Article 19 in conjunction with Article 1(37)(a) of the Act was consistent with Article 2 and Article 7, as well as with Article 21(1) and Article 227(1) of the Constitution; as to the reminder, the proceedings are subject to discontinuation, pursuant to Article 39(1)(1) of the Constitutional Tribunal Act of 1 August 1997 (Journal of Laws – Dz. U. No. 102, item 643, as amended), on the grounds that the pronouncement of a judgment was useless.

In the view of the Public Prosecutor-General, holding shares in the National Depository for Securities is not a prerequisite for the fulfilment of the NBP's constitutional tasks. The assets of the bank are owned by the state, which may make sovereign decisions concerning the assets of a state legal entity. The challenged provisions are related to the planned privatisation of the depository company. Moreover, they adjust the regulations concerning the NBP to the content of Article 5(2) of the Act of 29 August 1997 on the National Bank of Poland (Journal of Laws - Dz. U. of 2005 No. 1, item 2, as amended; hereinafter: the Act on the NBP), which stipulates that the said entity may not hold shares in other legal entities, except for those that provide their services to financial institutions and the State Treasury. In that context, the challenged provisions remove the contradiction which exists between the two normative acts. Moreover, the shares held by the state's central bank in a joint-stock company may pose a potential threat to the bank's independence. The situation where the central bank carries out its supervision over the depository for securities, and at the same time it is its shareholder, my lead to the conflict of interests. The challenged regulations do not affect the independence of the central bank.

According to the Public Prosecutor-General, the requirements of central bank independence that arise from the Community law are reflected in the Constitution. There are no grounds to analyse the challenged provisions in the light of Article 9 in conjunction with Article 91(1) and (2) of the Constitution. Therefore, the examination of conformity of the challenged provisions to these higher-level norms for review is useless.

In the view of the Public Prosecutor-General, the ECB opinion is not justified, insofar as it states that the drafted regulations infringe on the independence of the national central bank, since the legislator, who shapes the functions of the central bank, may not be regarded as a third party which affects the independence of the bank.

The Public Prosecutor-General expressed the view that, as it followed from the legislative process in the Sejm, the content of the EBC opinion was known to the Deputies, including those of them who criticised the proposals put forward by the Council of Ministers. The said opinion was published on 21 May 2008 by the ECB, i.e. after the draft of the government's own amendment had been accepted by the Council of Ministers. In that state of affairs, any change to the drafted amendment, including its explanatory note, would require a re-examination of the drafted amendment by the government. Making reference to the constitutional higher-level norms for review contained in Articles 2 and 7 of the Constitution, i.e. general systemic norms, the applicant did not prove the infringement thereof which consisted in the unconformity of the procedure for enacting the amending Act to the regulation of the legislative process. The mere fact of failing to include information which is not legally specified as obligatory in the explanatory note to the drafted government's own amendment, and hence the information which had no significant impact on the course of the legislative process, does not constitute an infringement of constitutional standards derived from the indicated higher-level norms for constitutional review.

According to the Public Prosecutor-General, the regulation introduced by the legislator does not remain contrary to the constitutional guarantee of the protection of ownership and other property rights.

3. The Polish Financial Supervision Authority (hereinafter: the PFSA), at the request of the Constitutional Tribunal, expressed its opinion in a letter of 27 November 2008.

In its view, the legislator's solution regarding the group of shareholders of the National Depository for Securities (KDPW) remains an irrelevant issue, from the point of view of the powers of the PFSA and the objectives for which this body was created. The choice made by the legislator has no direct impact on the safety of trading or on the effectiveness of the protection of the capital market, although the functioning of the KDPW does directly affect the stability of the state's financial system and the value of Polish currency. The introduced change does not infringe on the values and public goods, which the PFSA is to safeguard by means of the powers vested therein.

In the opinion of the PFSA, when assessing the Act of 4 September 2008 amending the Act on trading in financial instruments and certain other acts, what is of significance is the fact that this Act introduces the demonopolisation of the institutions which clear transactions on the regulated stock exchange market and the OTC market, as well as the demonopolisation of the institutions which carry out settlements relating to those transactions. The entities which are authorised to clear and settle transactions, apart from the KDPW, include clearing and settlement houses. For that reason, it was necessary to grant administrative law powers to the National Bank of Poland (NBP) with regard to all clearing and settlement institutions. By the decision of the legislator, the form of legal supervision exercised by the NBP over clearing and settlement institutions has been changed. In lieu of the supervision exercised by means of instruments related to holding the KDPW's shares, the legislator provided for the following administrative law form: the right to request information.

In the view of the Polish Financial Supervision Authority, in the light of the Constitution and the EU law, the central bank must possess sufficient financial means

which enable it to effectively carry out its tasks. This requirement is met by Articles 60 and 61 of the Act on the NBP, which establish the NBP's own funds, including the statutory fund of PLN 1.5 billion.

According the Polish Financial Supervision Authority, the change of the status of the NBP, in relation to the KDPW, actually consists in depriving the NBP – after the lapse of 18 months from the day of entry into force of the Act – of its right to vote attached to the shares. The lapse of the said period does not entail that the right to dispose of shares will expire. The adopted solution interferes with ownership rights to a minimum degree, and at the same time provides for a sufficient period for the NBP to make relevant adjustments. The legislator's action aims at the protection of certain public goods, namely the principle of equal treatment and the transposition of the EU law into Polish law.

4. In a letter of 3 December 2008, the Marshal of the Sejm requested the Tribunal to determine that Article 19 in conjunction with Article 1(37)(a) of the Act is consistent with Article 2, Article 7, Article 21(1), Article 9 in conjunction with Article 91(1) and (2), as well as with Article 227(1) of the Constitution.

In the view of the Sejm, the obligation arising from Article 4 of the Council Decision of 29 June 1998 on the consultation of the European Central Bank by national authorities regarding draft legislative provisions, 98/415/WE (OJ L 189 of 3.7.1998, p. 42), is fulfilled when an ECB opinion is received before the end of legislative work on a given legal act, within such a time limit that it may at all be taken into consideration by a body ultimately enacting the legal act which is the object of consultation. The explanatory note to the government's own amendment submitted to the Sejm on 26 May 2008 (Sejm Paper 64-A) did not actually contain the Opinion of the European Central Bank of 21 May 2008 at the request of the Polish Minister for Finance on a draft law amending the Law on trading in financial instruments and other legislation (CON/2008/20), as the issue date of that opinion coincided with the date of submitting the government's own amendment to the Marshal of the Sejm. In a letter of 25 June 2008 addressed to the Chairperson of the Sejm's Public Finance Committee and the Chairperson of the Subcommittee on Public Finance, the President of the NBP provided information that on 21 May 2008 the ECB published its opinion issued at the request of the Minister of Finance with regard to the aforementioned government's own amendment. The ECB opinion was known to the Deputies and was available at the stage of debating the bill, which is confirmed, *inter alia*, by the speech of Deputy Wiesław Janczyk at the 20th session of 6th term of the Sejm.

The Sejm pointed out that the passed bill differed, as regards the scope indicated in the President's application, from the proposal originally included in the government's own amendment prepared by the Council of Ministers. The government's own amendment stipulated that, after the lapse of the said time limit for the disposal of the KDPW's shares, the NBP would not be able to exercise its rights attached to the shares; whereas, in the final wording of the Act, it was assumed that after the lapse of the said time limit for the disposal of the KDPW's shares, the NBP would not be able to exercise only its right to vote attached to the shares.

In the view of the Sejm, the legislator has the possibility of modifying the scope of the NBP's ownership rights, which follows from his competence to set out a mission and the scope of powers of that body which are necessary for carrying out the mission. The boundaries of regulatory freedom in that regard are delineated in Article 227 of the Constitution, and in particular in paragraph 1 thereof. The provisions which deprive the NBP of its right to vote attached to the shares do not prevent that institution from carrying out its constitutional tasks and do not limit its independence to the extent it would infringe on the Constitution or the EU law. The standard of independence specified in *acquis*

communautaire is applicable merely to those powers of the NBP, which fall within the scope of application of Article 105 of the Treaty establishing the European Community. In the context of national and other requirements of independence, in order to properly exercise its powers, the NBP does not need to be a shareholder of the KDPW. The basic criteria for appropriateness of the decisions - adopted with regard to the KDPW - which concern the shape of the regulation of its functioning is rather the fact whether the adopted provisions actually ensure the appropriateness of transactions and settlements carried out via the KDPW; at the same time, in the context of the NBP's monetary policy, it should primarily be ensured that the KDPW will meet the requirements for the proper security and speed of transactions, the requirements that the settlements be final, and also, consequently, that adequate supervisory or audit powers will be guaranteed to the NBP.

In the view of the Sejm, in the light of the jurisprudence of the European Court of Justice, financial independence consists in guaranteeing such means to the national central bank, so that it could autonomously carry out its tasks. The means that are at the disposal of the national central bank may not depend on the political will of decision-makers who are outside the national central bank; and the procedure for the implementation of the budget should be devised in such a way that the central bank could carry out its statutory tasks properly, acting independently of the political discretion of the entity disposing of the budget funds. Obliging the NBP to dispose of shares held in the KDPW does not infringe on that standard. As the challenged provisions do not infringe on Article 108 of the Treaty establishing the European Community, which sets out the principle of central bank independence, the challenged regulations are also consistent with Article 9 and Article 91(2) of the Constitution.

5. In a letter of 1 April 2009, the Marshal of the Sejm provided the Tribunal with a copy of the letter of 25 June 2008 by the President of the NBP, Ref. No. DSP-WSRPW-BW-073-2-1963/08, addressed to the Chairperson of the Sejm's Public Finance Committee, together with the document entitled "Material on excluding the NBP from holding shares in the KDPW S.A. by means of the provisions proposed in the bill amending the Act on trading in financial instruments and certain other acts", which had been enclosed with the letter. The said document contained information on the ECB opinion of 21 May 2008 (CON/2008/20) which stipulated that the drafted provisions were contrary to the principle of central bank independence. The Marshal of the Sejm explained that the members of the Public Finance Committee had received the said letter together with the enclosed material during the work on the bill.

6. The Constitutional Tribunal requested the Monetary Policy Council to present the stance in the case under examination. In a letter of 9 April 2009, the President of the NBP sent the opinions of the Monetary Policy Council and the Management Board of the NBP.

6.1. In the view of the Monetary Policy Council, in accordance with the resolution of 7 April 2009, Ref. No. 1/RPP/2009, the activity of the National Depository for Securities (KDPW) has no direct impact on the fulfilment of the NBP's functions: "being responsible for the value of Polish currency", "having the exclusive right to issue money" and "formulating and implementing monetary policy", but it may be related to the implementation of monetary policy determined by the Council, which is carried out by the Management Board of the NBP. This ensues from the fact that, maintaining the depository for securities, and in particular for Treasury bonds, the KDPW makes it possible, and at times determines, the use of those instruments of monetary policy, the object or guarantee

of which are, or are supposed to be, securities registered in the KDPW, within the scope of responsibility for the value of the currency.

6.2. By the resolution No. 10/13/DSP/2009, the Management Board of the NBP expressed the view that the KDPW is of particular significance for the implementation of monetary policy by the NBP. Also, the NBP should have a strong and effective instrument at its disposal to affect the KDPW, in the form of the shareholders' governance at least until the moment of entry into force of the amendments to the Constitution, relating to Poland's accession to the euro zone. The loss of ownership rights over the KDPW may have a negative impact on the monetary policy implemented by the NBP, since the new supervisory instruments for the NBP, to be applied in relation to the KDPW, proposed by the legislator, may not be regarded as sufficient to carry out the said constitutional function of the central bank. The entry into force of the challenged provisions may also have a negative impact on carrying out the process of Poland's accession to the euro zone. In the foreseeable period, the KDPW will lose monopoly only in the formal sense, and not the actual one, in the area of registering the dematerialised financial instruments as well as clearing and settling transactions on the regulated stock exchange market and the OTC market.

According to the NBP, in order to plan and carry out certain operations as part of devising the monetary policy, it is necessary to provide the necessary technical infrastructure. In particular, it is indispensable to provide mechanisms which guarantee a quick, effective and repeated intraday registration and clearing of appropriate securities. The use of certain instruments of monetary policy has become possible only after the KDPW's shift from a one-session system to a multi-session system, as well as after launching the system for real time gross settlement. What had a decisive impact on the preparation and implementation of the aforementioned changes was the fact that, in 1999, the NBP became a shareholder of the KDPW. The malfunctioning of the KDPW's system has triggered, and may trigger, disturbances in the operating activity of banks, which affects the whole payment system in Poland. Also, what is of significance for the implementation of monetary policy is the cooperation between the NBP and the KDPW, when fulfilling the function of the state's central bank, namely when issuing Treasury bonds.

In the view of the Management Board of the NBP, the central bank having the ownership rights due to holding shares in the KDPW, possesses instruments which allow it to have a direct impact on the areas of the KDPW's activity, which are of significance for the proper fulfilment of the constitutional function to formulate and implement monetary policy as well as for the proper fulfilment of the tasks related to that function, such as monetary policy operations, supervision over the functioning of the payment system, or also the activity aimed at enhancing the stability of national financial system.

In the view of the Management Board of the National Bank of Poland, the challenged provisions infringe the principle of central bank independence, which is enshrined in the Constitution and in the Treaty establishing the European Community. Moreover, they lead to diminishing effectiveness of supervision over the systems for securities settlement, which may lead to the decrease in efficiency and effectiveness of carrying out monetary policy operations. The NBP's obligation to dispose of the said shares by the NBP within the set time limit creates a risk of the understated price due to such a sale, and even more so that the group of admissible shareholders of the deposit is restricted by statute; carrying out such actions related to the sale of shares will require the consent of the Minister of the State Treasury, which may result in prolonging the whole process of sale. The exclusion of the NBP from the list of potential shareholders of the

National Depository for Securities (KDPW) may indicate the discriminatory treatment of the NBP, in contrast to the other shareholders of the National Depository.

The Management Board of the NBP expressed the view that, in the course of legislative work over the challenged bill, the principle of a democratic state ruled by law had been infringed, and the challenged provisions might infringe on the principle of appropriate legislation which arose from Article 2 of the Constitution. Article 46(3) of the Act, in its new wording, does not have to be at all understood as a provision which undeniably deprives the NBP of the right to be a shareholder of the National Depository. The new Act stipulates that the group of shareholders of that company shall include, *inter alia*, banks, legal entities and organisational units which conduct activity within the scope of registering securities, clearing or settling transactions carried as part of the trade in securities or the coordination of the regulated market, which have their registered offices in the territory of the EU Member States or a state which is a member of the Organisation for Economic Co-operation and Development (OECD), and which are subject to supervision by an appropriate supervisory organ of a given state. The National Bank of Poland (NBP) is also a bank, although it is a particular bank; moreover, it carries out the indicated activity, although due to its independence, it is not subject to supervision by another organ of the state.

According to the Management Board of the NBP, being a shareholder of the National Depository for Securities (KDPW) is not inconsistent with Article 5(2) of the Act on the NBP. Article 46(3) of the Act on trading in financial instruments has a character of a specific provision, in relation to the norm of Article 5(2) of the Act on the NBP. Also, it is not justified for the legislator to undertake action which is aimed at excluding the NBP from holding shares in the National Depository, in order to increase the attractiveness of the stock exchange in the process of its planned privatisation.

7. In a letter of 28 April 2009, the Marshal of the Sejm informed the Constitutional Tribunal that on 1 April 2009 the parliamentary club of the Civic Platform submitted a new bill amending the Act on trading in financial instruments and certain other acts which is equivalent to the Act of 4 September 2008 on trading in financial instruments and certain other acts, which has been under examination as to its constitutionality, but does not include Article 19 in conjunction with Article 1(37)(a) of that Act which has been challenged in the present case by the President.

II

The hearing on 16 July 2009 was attended by the representatives of the President of the Republic of Poland, the Sejm and the Public Prosecutor-General. The participants maintained the stances they had presented in writing, and provided the Tribunal with relevant clarifications.

III

The Constitutional Tribunal has considered as follows:

1. *A priori* review and its scope.

1.1. Pursuant to Article 122(3) of the Constitution, the President of the Republic of Poland presented, in his application lodged with the Tribunal, the allegation that Article 19 in conjunction with Article 1(37)(a) of the Act of 4 September 2008 amending the Act on

trading in financial instruments and certain other acts is inconsistent with Article 2, Article 7, Article 21(1), Article 9 in conjunction with Article 91(1) and (2) as well as with Article 227(1) of the Constitution. Before examining the legitimacy of the presented allegations, what should be analysed, in the first place, is the scope of the jurisdiction of the Constitutional Tribunal, as part of *a priori* constitutional review of statutes.

On the one hand, the boundaries of review are set in that procedure by Article 122(3) of the Constitution, which stipulates that "the President of the Republic may, before signing a bill, refer it to the Constitutional Tribunal for an adjudication upon its conformity to the Constitution". On the other hand, what should be taken into consideration is the content of Article 42 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): "The Tribunal shall, while adjudicating on the conformity of the normative act or ratified international agreement to the Constitution, examine both the contents of the said act or agreement as well as the power and observance of the procedure required by provisions of the law to promulgate the act or to conclude and ratify the agreement". Also, the content of Article 66 of the Constitutional Tribunal Act is of significance here: "The Tribunal shall, while adjudicating, be bound by the limits of the application, question of law or complaint".

1.2. *A priori* review has a special character in the system of Polish review of legal norms. Its fundamental purpose is the elimination of normative acts which are inconsistent with the Constitution, before the procedure for enacting them is completed. The advantage of that form of review is guaranteeing legal protection and avoiding the complications related to removing the effects of unconstitutional normative acts. During an *a priori* review, the Tribunal does not yet know the way and consequences of application of a provision under examination.

Part of the unique character of *a priori* review in Poland is the monopoly the President has as regards initiating the review, which remains closely related to his duty to ensure observance of the Constitution, which he is entrusted with pursuant to Article 126(2). The effective functioning of that form of review requires an appropriate pace of proceedings and adjudicating, so that the moment of completing the legislative process will not be delayed too much in time. The unique character of *a priori* review is manifested, *inter alia*, in the regulations concerning the object of review and the higher-level norms for review. *A priori* review concerns only statutes. For that reason, the higher-level norms for *a priori* substantive review are solely constitutional norms. Article 122(3) and (4) does not provide for a direct review of conformity of a statute to international agreements.

1.3. In the light of Article 91 of the Constitution, which regulates the position of an international agreement in the system of sources of law, two types of legal infringements may be identified, which are not directly related to infringing on an international agreement. First of all, it is possible to imagine regulations which would specify the place of international agreements in the Polish system, in a different way than it has been done in Article 91(2), for instance by giving precedence to statutes in the case of clash with international agreements. The provisions of Article 91(1) and (2) may then constitute a basis for declaring the unconstitutionality of such statutes which introduce different regulations concerning the position of international agreements in the Polish system of sources of law. Nothing prevents the Constitutional Tribunal from declaring such

unconformity to Article 91(1) and (2) of the Constitution, as part of *a priori* review, since the higher-level norm is not an international agreement, but Article 91 of the Constitution itself.

Secondly, there may be a situation where the content of legal norms established in a Polish normative act is inconsistent with a given provision of the Constitution, when applying the interpretation of the provision which is consistent with the content of norms of the Treaty concerning the accession of the Republic of Poland to the European Union, ratified by the Republic of Poland and introduced into the Polish legal order. Then, as part of *a priori* review, the Constitutional Tribunal is competent to determine the infringement of a relevant provision of the Constitution indicated by the applicant, taking into account that the content of the challenged provision of a statute is inconsistent with the provision of the Constitution which is relevant in respect of its scope ratione materiae, and which is interpreted – due to the adopted accession obligations – "pursuant to the rule that the interpretation of the Constitution should be carried out in accordance with the principle of favourable predisposition towards the process of European integration" and the Community legal order (cf. the judgment of the Constitutional Tribunal of 12 January 2005, Ref. No. K 24/04, OTK ZU No. 1/A/2005, item 3). Indeed, in such a case, a norm of Community law is not the sole and direct higher-level norm for *a priori* review, but it specifies the meaning of a given constitutional norm which constitutes the higher-level norm for review.

1.4. A formal review of normative acts has a different character from a substantive review thereof. Acting within the scope of relevant competence and in accordance with relevant procedure as regards enacting a legal act, is of considerable significance for determining the sheer existence of a given normative act and, consequently, its applicability in the legal system as well as its legal effects. Significant formal defects constitute an independent premiss of unconstitutionality of a given normative act under examination (Article 42 of the Constitutional Tribunal Act). The Tribunal is competent to carry out this review *ex officio*, in relation to the provisions indicated by an applicant, and this occurs even when the initiator of the review did not formulate appropriate allegations and higher-level norms for review in the application initiating the review of norms (*ex officio* review, cf. the judgment of the Constitutional Tribunal of 28 November 2007, Ref. No. K 39/07, OTK ZU No. 10/A/2007, item 129). The procedural review is most appropriate within the short period of time after the enactment of a given normative act, when the significance of defects leads to the conclusion that a legal act has not become effective. The optimal moment for such a review is *a priori* review. The lapse of time may be regarded as a factor imposing lenient treatment of less essential procedural defects, due to the severe consequences of such a review for the legal system (cf. Z. Czeszejko-Sochacki, L. Garlicki, J. Trzciński, *Komentarz do ustawy o Trybunale Konstytucyjnym*, Warszawa 1999, p. 144).

The aforementioned principle that the Constitutional Tribunal should *ex officio* consider infringements in respect of competence and procedure also concerns *a priori* review, initiated by the President's application. Then the Constitutional Tribunal takes into consideration the entirety of the provisions regulating the procedure for enacting a given legal act, irrespective of their status in the hierarchy of sources of law.

2. The allegation of breaching the required procedure for enacting the Act.

2.1. Among the allegations presented in the application what should be considered, in the first place, is the allegation of breach of procedure required by the provisions of law

to enact the challenged provisions of the Act. The infringement of those provisions may constitute a separate basis for declaring the unconstitutionality of the Act; in the event of stating the procedural infringement, it is not indispensable to examine the content of the challenged provisions. In the view of the President, the infringement of that procedure consisted in failing to present the opinion of the European Central Bank in the course of parliamentary work.

Considering the significance of procedural review of normative acts, it should be noted that the regulations of legislative procedures contain requirements of varied significance. Some of the elements of legislative procedure are of fundamental significance, from the point of view of the principles of democratic legislation and they determine the non-conformity to Article 2 of the Constitution. Others regard matters of secondary importance and of technical character. It may not be assumed that every infringement of procedural provisions, no matter how insignificant, always constitutes a basis for declaring the unconstitutionality of a normative act and, as a result, a given legal act loses its binding force.

In the context of the provisions of the Constitutional Tribunal Act, two types of provisions which regulate the legislative procedure should be distinguished. On the one hand, what should be distinguished is the set of regulations concerning the essential elements of legislative procedure, e.g. submitting an amendment at such a stage of legislative proceedings that it will not go through the stages of at least two readings (cf. the judgment of the Constitutional Tribunal of 24 March 2004, Ref. No. K 37/03, OTK ZU No. 3/A/2004, item 321), or failing to subject a given text to necessary consultations, which ensue from the Constitution (cf. the judgment of the Constitutional Tribunal of 28 November 2007, Ref. No. K 39/07). On the other hand, there are regulations which are of lesser substantive significance. The infringement on essential elements of the legislative procedure constitutes the basis for declaring the unconstitutionality of a normative act under examination, whereas an infringement of matters which are less essential for the legislative process may not constitute such a basis.

When assessing the significance of infringements on legal norms which regulate the legislative procedure, what may be important is the frequency of those infringements and circumstances which accompany an infringement, e.g. taking action despite serious and well-known warnings about the unconstitutionality of a proposed solution, action which is aimed at preventing some of the members of parliament from participating in a specific debate, etc. The high incidence and repetitiveness of infringements on norms which regulate the legislative procedure may constitute one of the premisses for qualifying a given infringement as an essential one, from the point of view of constitutional review of law, and may justify the declaration of unconstitutionality of a given normative act under examination.

2.2. The doubts as to the conformity of the procedure applied for enacting the Act to the law are linked by the President with the following facts:

2.2.1. In a letter of 7 November 2007, the Prime Minister submitted to the Sejm the government's bill amending the Act on trading in financial instruments and certain other acts (Sejm Paper No. 64, 6th term). The explanatory note to the bill included, *inter alia*, the information that "the bill was referred to the European Central Bank for an opinion to be issued thereon. The said opinion was presented in the document entitled «Opinion of the European Central Bank of 16 November 2006 at the request of the Polish Minister for Finance on a draft law amending the Law on trading in financial instruments» (CON/2006/53)". However, the Sejm Paper did not include the content of that opinion. The

first reading of the bill included in the Sejm Paper No. 64 was held on 9 January 2008, and further legislative work was carried out by the Sejm's Public Finance Committee.

During the work on the bill, the Council of Ministers drafted the government's own amendment to the bill of 8 November 2007. The drafted amendment encompassed, *inter alia*, assigning the following wording to Article 46(3) of the amended Act:

"The following may be the shareholders of the National Depository: companies running the stock exchange, companies running the OTC market, investment companies, banks, the State Treasury, international financial institutions where the Republic of Poland is a member, as well as legal entities or other organisational units whose activity involves registering securities, clearing and settling transactions made when trading in securities, or organising a regulated market, which have their registered offices in the territory of an OECD member country or partner country, and which are subject to supervision by the competent supervisory body of that country".

Moreover, the amending bill included Article 18a, with the following wording:

"1. Within the time limit of 12 months since the day of the entry into force of this Act, the National Bank of Poland shall be obliged to dispose of all the shares it holds in the National Depository for Securities, the recipients of which shall be an entity or entities indicated in Article 46(3) of the Act referred to Article 1, with the wording amended by this Act.

2. After the lapse of the time limit specified in paragraph 1, the National Bank of Poland may not exercise its rights attached to the shares of the National Depository for Securities".

2.2.2. The Minister of Finance requested the European Central Bank to issue an opinion on the aforementioned amendment. As a result, the ECB Executive Board presented the Opinion of the European Central Bank of 21 May 2008 at the request of the Polish Minister for Finance on a draft law amending the law on trading in financial instruments and other legislation (CON/2008/20), concerning the new elements introduced into the bill.

After receiving the ECB opinion, on 26 May 2008 the Council of Ministers submitted to the Sejm the government's own amendment to the bill amending the Act on trading in financial instruments and certain other acts (Sejm Paper No. 64-A, 6th term). It contained, *inter alia*, the above-mentioned provisions regarding the National Depository for Securities, but the explanatory note thereto did not contain any information on the content of the opinion issued by the ECB with regard to that bill, and neither was the opinion presented to the Parliament.

On 25 June 2008, the President of the National Bank of Poland submitted a letter to the Marshal of the Sejm (DSP-WSRPW-BW-073-2-1963/08), in which he expressed his protest against the plan to exclude the National Bank of Poland from holding shares in the National Depository for Securities. The President of the NBP informed about the content of the ECB opinion in that case, and requested that the stance of the NBP be presented to all the Deputies. On 26 June, the letter of the President of the NBP was referred for publication by the Marshal of the Sejm, and disseminated as a supplement to the Sejm Paper No. 64-A.

In this context, there is a doubt as to whether the legislative proceedings were carried out in accordance with the procedure required by regulations for enacting the challenged provisions.

2.2.3. It follows from the analysis of the legislative proceedings concerning the bill that the issues regulated in the challenged provisions constituted the object of controversy in the course of parliamentary work. The amendment drafted and submitted by the Council of Ministers was considered during the first reading in the Sejm at the 19th session on

9 July 2008. It follows from the arguments in the discussion that the content of the ECB opinion, published in Polish and English on the Internet, was known by some of the interested Deputies. During the debate, Deputy Wiesław Janczyk also posed the question: "Are the representatives of the government and the Ministry of Finance familiar with the ECB opinion that the requirement to sell shares held in the National Depository for Securities (KDPW) by the National Bank of Poland infringes on the independence of the national bank?" (verbatim record from the 19th session of the Sejm of the Republic of Poland on 9 July 2008 [the first day of the Sejm's session], p. 86).

The Sejm referred the government's own amendment to the Sejm's Public Finance Committee. The Permanent Subcommittee on Financial Institutions of the Sejm's Public Finance Committee resolved that the National Bank of Poland should not be excluded from holding shares in the KDPW, thus rejecting that part of the amendment. At the sessions on 21 July 2008, the Sejm's Public Finance Committee adopted the report by the Subcommittee, which does not encompass the government's amendments aimed at eliminating the NBP from the list of shareholders of the KDPW. As a result, the changes proposed by the Council of Ministers, with regard to the shares of the KDPW, were not included in the bill prepared by the Sejm's Public Finance Committee, presented in the Sejm for the second reading.

During the second reading, the chairperson of the Committee, Deputy Zbigniew Chlebowski proposed an amendment that, after the lapse of the time limit specified by statute for the disposal of shares, by the NBP could not exercise its right to vote attached to the shares held in the KDPW. The said amendment was adopted by the Sejm during the third reading on 26 July 2008, and was preserved at further stages of the legislative proceedings concerning the bill in the Senate.

The ECB opinion was still the object of the Deputies' concern during the third reading. Deputy Jerzy Polaczek asked the representative of the government whether the ECB had issued a negative opinion on the NBP's obligation to dispose of shares held in the KDPW (verbatim record from the 20th session of the Sejm of the Republic of Poland on 25 July 2008 [the fourth day of the debate], p. 571). The ECB opinion was also the object of the Senators' concern during the consideration of the bill passed by the Sejm at the session on 6 August 2008: the content of the opinion was presented at the session by the First Deputy of the President of the NBP (the Senate of the Republic of Poland, the 17th session of the 7th term, verbatim record, p. 8), and Senator Jan Dobrzyński expressed his views on the opinion (the Senate of the Republic of Poland, the 17th session of the 7th term, verbatim record, p. 14).

3. The opinion of the Central European Bank and its significance for the case under examination.

3.1. The consultative powers of the Central European Bank are governed by the Treaty establishing the European Community (Journal of Law - Dz. U. of 2004, No. 90, item 864/2; hereinafter: the Treaty or the Treaty establishing the European Community) and the Council Decision of 29 June 1998 on the consultation of the European Central Bank by national authorities regarding draft legislative provisions, 98/415/WE (OJ L 189 of 3.07.1998, pp. 446-447; hereinafter: the Decision or the Council Decision). Pursuant to Article 105(4) of the Treaty, the ECB shall be consulted by national authorities regarding any draft legislative provision in its fields of competence, but within the limits and under the conditions set out by the Council in accordance with the procedure laid down in Article 107(6) of the Treaty. More detailed rules concerning providing consultation have been regulated in the aforementioned Council Decision of 29 June 1998. Pursuant to Article 2 of

the Decision, the authorities of the Member States shall consult the ECB on any draft legislative provision within its field of competence pursuant to the Treaty and in particular on:

– currency matters,
– means of payment,
– national central banks,
– the collection, compilation and distribution of monetary, financial, banking, payment systems and balance of payments statistics,
– payment and settlement systems,
– rules applicable to financial institutions insofar as they materially influence the stability of financial institutions and markets.

Article 4 of the Decision specifies the obligations of the Member States as regards consulting the ECB. Pursuant to that Article, "each Member State shall take the measures necessary to ensure effective compliance with this Decision. To that end, it shall ensure that the ECB is consulted at an appropriate stage enabling the authority initiating the draft legislative provision to take into consideration the ECB's opinion before taking its decision on the substance and that the opinion received from the ECB is brought to the knowledge of the adopting authority if the latter is an authority other than that which has prepared the legislative provisions concerned". The provisions of the EU Law generally impose, on national authorities, the obligation to submit a motion to the ECB, requesting the ECB for its opinion. The indication of competent national authorities requires reference to the national law.

In the context of Polish law, it should be assumed that the aforementioned obligation rests with the authority enacting a given legal act. In the case of a bill, the said obligation rests with the author of the bill, with the proviso that - in the case of a bill being introduced by a group of Deputies or a Sejm committee, or a group of citizens - the obligation to issue a motion requesting an opinion falls on the Marshal of the Sejm. There is no doubt that the Council of Ministers has the obligation to submit a motion to the ECB to request an opinion on a draft normative act which concerns matters falling within the scope of the competence of the bank.

It clearly follows from the provision presented above that, upon the receipt of the opinion, the authority which requested it has a legal obligation to undertake action which would ensure that the content of the opinion is presented to the Sejm and the Senate. If it was the Council of Ministers that requested the opinion, the obligation rests with the Council of Ministers.

3.2. The Treaty establishing the European Community and the Council Decision do not in detail regulate the object of the opinion or the content included therein. The opinion of the ECB may concern both the issue of conformity of the proposed legal act to the EU law, as well as the purposefulness of the solutions put forward by national authorities. Providing opinions on certain draft legal acts by the ECB is aimed, *inter alia*, at drawing the state's attention to a possible infringement of the EU law or to the negative impact of a proposed legal act on the implementation of objectives of the European Community. They are to ensure the observance of the EU law and the determination and conduct of national policies by the governments of the Member States, taking into consideration the requirements of European integration.

The views presented in the opinion are not binding for the organs of the Member States. The fact that an opinion of the ECB is not implemented does not bring about any legal consequences.

3.3. The analysis of the above-mentioned provisions leads to the conclusion that the content of the government's own amendment fell within the scope of the consultative powers of the ECB. Polish authorities had a legal obligation to request the ECB for its opinion in relation to the government's own amendment to the bill amending the Act on trading in financial instruments and certain other acts, and to present that opinion to the authority adopting the legal act. In the case under examination, competent national authorities fulfilled the obligation to request the ECB for an opinion. However, the Council of Ministers did not fulfil the obligation to present the opinion to the Sejm and the Senate at the moment of submitting the government's own amendment. The information about the opinion and its content reached the Sejm Deputies, but this happened via unofficial channels and already at the stage of parliamentary work on the text of the government's own amendment. Therefore, what requires consideration is the question whether the indicated infringement may be regarded as a breach of the procedure, the observance of which is required by the provisions of law for enacting a statute; and if so, whether the significance of that infringement justifies the declaration of unconstitutionality by the Tribunal in the case of the challenged provisions of the Act.

3.4. In the context of the case under examination, doubts may primarily arise as to whether the obligation of the Council of Ministers - to provide the Sejm and the Senate with the ECB opinion on the bill - constitutes an element of the procedure for enacting statutes. The power to enact statutes is vested in the Sejm and the Senate, and the obligation under discussion rests on the authority which is only competent to initiate the legislative proceedings. In the view of the Constitutional Tribunal, the said obligation constitutes one of the elements of legislative procedure, as it is related with the access of the Parliament and its members to the information which is necessary for diligent fulfilment of their legislative function.

3.5. Assessing the seriousness of the particular infringement of law by the Council of Ministers, the Tribunal draws attention to the following issues.

Firstly, since January 2005, all the ECB opinions have been published on the websites of that institution, right after sending the opinions to the authorities requesting them, unless there are particular reasons which justify withholding the publication. Thus, the opinion was available on the Internet to all concerned, and the Deputies and the Senators could easily familiarise themselves with its content. In the aforementioned letter of 25 June 2008, which was disseminated as an appendix to the Sejm Paper No 64-A, the President of the National Bank of Poland also drew attention to the content of that opinion. It followed from the speeches of the Deputies and Senators that the interested Members of Parliament familiarised themselves with the content of the ECB opinion. The fact that the said opinion was not presented to the Sejm did not really limit the possibility of accessing the document by the Members of the Polish Parliament. Therefore, the said infringement of law had no effect on the possibility of conducting a democratic debate in the Parliament; neither did it result in limiting the rights of the parliamentary opposition.

Secondly, the main purpose of the provisions imposing the obligation on the author of a given bill to present the results of consultation and the received opinions is to enable the Sejm to thoroughly analyse the bill. The Sejm has a numerous legal instruments at its disposal to ensure the protection of its powers and the receipt of documents which would not be presented to the Parliament. The Marshal of the Sejm may return a bill or a draft resolution to the author thereof, if the explanatory note accompanying the bill does not meet the requirements specified in Article 34(2) and (3) of the Resolution of the Sejm of the Republic of Poland of 30 July 1992 – the Rules of Procedure of the Sejm of the

Republic of Poland (M. P. of 2009 No. 5, item 47). The Sejm may request that an opinion of a particular authority be presented, provided that the binding law introduces the obligation to request such consultation. The fact that the Council of Ministers infringed the obligation to present the content of the opinion, together with the explanatory note to the bill, did not make it impossible for the Sejm to request the opinion to be sent by the Council of Ministers. Ensuring the protection of the rights of the Parliament, in its relations with the government is first and foremost the task of the Parliament. As regards the examined legislative procedure, the Parliament did not deem it indispensable to exercise the above-mentioned powers, and the Sejm - in its stance on the case under examination, in the letter of 3 December 2008 by the Marshal of the Sejm, which was presented to the Tribunal – did not find any infringement as far as the obligations by the Council of Ministers towards the Parliament.

3.6. In the light of the above-mentioned facts, the Tribunal states that the Council of Ministers infringed its obligations, by not providing the Sejm with the opinion presented by the ECB on the government's own amendment to the bill amending the Act on trading in financial instruments and certain other acts. In a democratic state ruled by law, such infringements of law should not occur. However, this infringement did not make it impossible for the Deputies and Senators to familiarise themselves with the content of the ECB opinion and take it into consideration at the stage of voting over the bill.

In the view of the Constitutional Tribunal, the negligence by the Council of Ministers, which occurred in the context of this case, does not constitute such a serious infringement of the legislative procedure which would justify the declaration of unconstitutionality of the provisions under examination, since the Deputies actually had an opportunity to familiarise themselves with the ECB opinion (cf. the judgment of the Constitutional Tribunal in the case K 39/07, with reference to the constitutionally admissible validation of the lack of a formal written opinion, in the situation where an opinion-giving representative expressed his/her opinion orally at a session of the Sejm).

At the same time, the Constitutional Tribunal draws attention to the necessity to change the existing practice and the necessity to observe the binding law. The high incidence of such infringements of norms which regulate the legislative procedure may, in the future, weigh in favour of adopting a different assessment of constitutional consequences of similar negligence, if they recur.

4. The National Bank of Poland as a central bank which carries out monetary policy, and the constitutional principle of central bank independence.

4.1. The constitutional tasks, powers and responsibilities of the National Bank of Poland are set out in Article 227 of the Constitution; paragraph 1 of the Article stipulates: "The central bank of the State shall be the National Bank of Poland. It shall have the exclusive right to issue money as well as to formulate and implement monetary policy. The National Bank of Poland shall be responsible for the value of Polish currency".

In its judgment of 28 June 2000, Ref. No. K 25/99 (OTK ZU No. 5/2000, item 141), the Constitutional Tribunal already analysed the normative content of Article 227(1) of the Constitution and the wording used therein. The Tribunal pointed out in the judgment that: "the contemporary functions of a central bank are as follows: 1) the function of the state's central bank, 2) the function of the issuer of money, 3) the function of the bank of banks. (...) The exclusive right to issue money, as referred to in Article 227(1), entails that, within that scope, the NBP acts as a monetary authority which controls the activity of the whole banking system by means of financial instruments. With that scope, the bank

participates in the issue of the so-called central money, primarily in the form of demand deposits of commercial banks and of the state budget, which are stored in their accounts in the central bank, and in the form of loans granted to the state (...). Moreover, the central bank is entrusted with vital macroeconomic functions; *inter alia*, the sale of foreign and national currency, as well as setting foreign currency exchange rates".

The central bank fulfils the function of the bank of banks by exerting influence on the banking system (commercial banks), in accordance with the assumptions of monetary policy, shaping the policy of interest rate, conducting the policy of refinancing banks and of assigning interest rates to refinanced loans, carrying out the policy of obligatory reserves of commercial banks placed in the central bank, as well as by organising an information system for the entire banking system.

4.2. As the institution implementing monetary policy, the National Bank of Poland (NBP) has various instruments at its disposal as regards exerting influence on commercial banks, applied in order to adjust the credit operations and investment activities of those banks to the priorities set in that policy. In the doctrine of financial law, two basic groups of the aforementioned instruments are distinguished: 1) classic instruments, the basic characteristic of which is an indirect character of the influence exerted by the central bank, without any legal effects (the policy of basic interest rate, open market operations and the system of obligatory reserves; sometimes this also includes the powers to set foreign currency exchange rates); 2) direct instruments based on the influence which has legal effects, exerted by the central bank on the other banks by means of the instruments of public law.

Monetary policy consists in shaping the demand for money in the economy, whereas its basic instruments have been specified in the Act of 29 August 1997 on the National Bank of Poland (Journal of Laws - Dz. U. of 2005 No. 1, item 2, as amended; hereinafter: the Act on the NBP). They include, in particular: determining the minimum reserve requirement ratio for banks, setting interest rates, issuing securities and being involved in open market operations. Also, the instruments of monetary policy, *inter alia*, include: the restriction of the volume of funds granted to borrowers by banks as well as the introduction of the requirement to hold non-interest-bearing deposits with the NBP against foreign funds used by banks and domestic entrepreneurs (Article 46(1) and (2) of the Act on the NBP).

4.3. One of the fundamental constitutional principles of the functioning of the National Bank of Poland is the principle of its independence. The Constitutional Tribunal has rendered the meaning of that principle in several of its judgments.

The Constitutional Tribunal has already drawn attention to the fact that, in order to carry out its constitutional tasks, the NBP "needs to be, to a large extent, independent". The Constitution does not explicitly formulate the principle of central bank independence; however, an analysis of constitutional provisions concerning the NBP leads to the conclusion that the said principle has been implicitly expressed in the Constitution. Enacting the constitutional provisions concerning the central bank, the constitutional legislator took into account three basic aspects of its independence. Financial independence consists in excluding the possibility of exerting financial influence on the decisions of the central bank or in eliminating the possibility of financing the expenditure of the government (budget deficit) directly or indirectly from the loans of the central bank. Functional independence is a broader concept as it also includes the independence in fulfilling other statutory functions of the central bank. Institutional independence primarily concerns the position of the central bank in the system of the organs of the state as well as

the way of appointing and dismissing the authorities of the bank (see the judgments of: 24 November 2003, Ref. No. K 26/03, OTK ZU No. 9/A/2003, item 95, pp. 1084-1085, as well as 22 September 2006, Ref. No. U 4/06, OTK ZU No. 8/A/2006, item 109, p. 1165).

Also, the constitution-maker indicates the institutional and functional separateness of the NBP funds and its monetary policy, in relation to the financial policy carried out by the Council of Ministers and the Sejm, in Article 220(2) of the Constitution, stipulating that the Budget Act "shall not provide for covering a budget deficit by way of contracting credit obligations to the State's central bank".

4.4. The Constitutional Tribunal has already pointed out the need to protect the independence of the central bank against external interference. Examining the constitutionality of one of the Sejm resolutions, the Constitutional Tribunal stated that "the statutory basis for granting additional powers to the central bank and the authorities thereof additional powers does not undermine the significance of the NBP's independence, also with regard to other matters than those set out in the Constitution. On the contrary, it is justified to assume that the legislator, also due to the said independence, has granted these powers to the NBP and not to other organs of the state" (the judgment of 22 September 2006, Ref. No. U 4/06, as above, p. 1165).

Making reference to the previous line of jurisprudence, the Tribunal states that the constitutional principle of the NBP's independence ensures the attainment of certain constitutional goals, and thus must be interpreted in the light of those goals. The main purpose for central bank independence is the protection of the value of Polish currency. Monetary policy must be carried out by the NBP within the scope set out in the Constitution, and in particular by the constitutional principle of social market economy and the obligation to implement the principles of social justice. It is pointed out in the literature on the subject that the independence of the central bank must have its limits, but the legislator should guarantee the said independence at such a level which is optimal from the point of view of the tasks set to be carried out by the central bank (see A. Wojtyna, *Szkice o niezależności banku centralnego*, Warszawa-Kraków 1998, p. 119). In the light of the views of scholars from the field of public finance, "the effectiveness of the central bank depends not so much on its independence per se, as on its ability to maintain effective interaction with other organs of the state" (C. Kosikowski, *Finanse publiczne w świetle Konstytucji RP oraz orzecznictwa Trybunału Konstytucyjnego*, Warszawa 2004, p. 248). Effective economic policy requires the coordination of monetary policy carried out by the central bank with other elements of economic policy carried out by the government, which in turn implies the creation of appropriate legal instruments facilitating such coordination (cf. A. Wojtyna, *op.cit.*, p. 119).

The constitutional principle of the NBP's independence primarily encompasses the realm of its constitutional tasks. The legislator may also entrust the central bank with other powers than those specified in the Constitution. When granting such powers, the legal regulations limiting the NBP's independence must have a form of a statute, and may not go beyond the necessary scope of regulatory freedom set out by the Constitution, and in particular by its Article 227 in conjunction with Article 2.

4.5. The Constitution requires that the legislator should entrust the NBP with the detailed powers which are indispensable for fulfilling the function of the state's central bank, the function of the bank of banks, and the functions within the scope of issuing money, determining and implementing monetary policy as well as being responsible for the value of Polish currency. The legislator should each time consider whether entrusting the NBP with additional functions and powers, which do not arise from systemic norms, would not

result in making it difficult for the NBP to carry out its basic constitutional tasks and functions. What is of fundamental significance for the adjudication in this case is the interpretation of the exclusive right of the NBP - specified in Article 227(1), second sentence, of the Constitution – *inter alia*, to implement monetary policy.

There is a view in the doctrine that the monetary policy of the NBP "should be understood as the activity of the central bank conducted on behalf of the state, which involves selecting macroeconomic monetary goals and attaining them by regulating the demand for and supply of money, by means of selected economic and administrative instruments" (cf. J. A. Krzyżewski, "Polityka pieniężna jako instytucja prawa konstytucyjnego", *Bank i Kredyt* 4/2000, Warszawa p. 5). Indicating the basic powers of the NBP, Article 227(1) of the Constitution is not limited to specifying that kind of tasks and powers, but it also outlines the scope of the bank's responsibility as regards the obligation to guarantee a proper monetary circulation in the country, with the following wording: "The National Bank of Poland shall be responsible for the value of Polish currency".

4.6. Rendering one of the NBP functions as formulating and implementing monetary policy was to ascribe the attributes of creativity to the activity of the Polish central bank. Such wording was adopted while editing the draft of the Constitution, as opposed to the wording suggested earlier, namely "to execute monetary policy". "Executing" might be understood as implementing monetary policy developed by a different organ of public authority (see J. Jaskiernia, T. Syryjczyk, *Biuletyn KKZN* No. XI, p. 137). Although the term "monetary policy" is specified neither in the Constitution, not in any other legal act of the binding law, still the law specifies the means of conducting the policy (see M. Sosnowska-Łozińska, "Konstytucyjne gwarancje niezależności instytucjonalnej Narodowego Banku Polskiego a wymagania Europejskiego Systemu Banków Centralnych", *Ius et Administratio*, No. 3/2004, p. 147) and the goal which consists in maintaining the price stability by the National Bank of Poland.

There is no clear-cut answer to the question whether, in the light of the Constitution, the right to formulate and implement monetary policy is - just as the right to issue money – an exclusive right of the NBP, or whether the NBP is to exercise it jointly with other entities. To a large extent, the answer depends on the results of the linguistic and logical interpretation of the provision of Article 227(1), second sentence. If it is assumed that the conjunction "as well as" plays a disjunctive function, unlike the conjunction "and", then this leads to the conclusion that developing monetary policy must involve, apart from the NBP, also other entities (see J. Ciemniewski, *Biuletyn KKZN* No. XXXVIII, p. 149; similarly, R. Tupin, "Sprawa nadrzędna – gospodarka", *Rzeczpospolita*, the Issue of 2 November 2001, p. C 3). However, if it is assumed that, in the context under examination, the phrase "as well as" may also have a conjunctive meaning, then the emphasis is on the exclusiveness of the NBP's powers within that scope. What weighs in favour of the second approach is also a functional interpretation – a need for precise assignment of responsibility for monetary policy (see M. Zubik, "Powoływanie członków Rady Polityki Pieniężnej w świetle zasady kadencyjności oraz działalności organów państwa", *Przegląd Sejmowy* No. 4/2005, p. 43; and also therein: P. Sarnecki, "W sprawie statusu organów centralnego banku państwa (art. 227 Konstytucji Rzeczypospolitej Polskiej)", pp. 106-107, with the emphasis that "exclusiveness" should be understood here "literally and broadly"). Apart from the arguments presented above, the following points also weigh in favour of the second approach: firstly, it does not endanger the paradigm of state's central bank independence; secondly, it does not prevent the NBP from cooperating, within the scope of formulating and implementing monetary policy, with other organs of

public authority, and in particular with the Council of Ministers and the Sejm - in the case of discrepancies, allowing the NBP to have the casting vote as regards carrying out its functions; thirdly, it does not regard only the results of a linguistic and logical interpretation as absolute, but it takes into account the functional interpretation, which is especially recommended in the case of interpreting the provisions of the Constitution; fourthly, only such an approach protects monetary policy from pressure from particular groups of interests, which trigger detrimental asymmetry of the consequences of that policy; and fifthly, it is completely consistent with the constitutional imperative of cooperation between the public powers.

4.7. It is underlined in the doctrine that the monetary policy referred to in Article 227(1) of the Constitution is separate from the financial policy (economy) of the state, which constitutes an excerpt of *tout court* policy, implemented by the Council of Ministers, within the meaning of Article 146(2) of the Constitution (cf. J. A. Krzyżewski, *Biuletyn KKZN* No. XLI, p. 93; T. Dębowska-Romanowska, "Istota i treść władztwa finansowego – samowola finansowa (samowola podatkowa), restrykcje finansowe – zagadnienia pojęciowe", [in:] *Konstytucja, ustrój, system finansowy państwa* T. Dębowska-Romanowska (ed.), Warszawa 1999 p. 352). Therefore, there is the problem of relation between Article 227(1), second sentence, and Article 146(2). Both those provisions should be treated equally as describing the functions of two different and mutually independent entities – the NBP and the Council of Ministers. However, particular powers of these entities may overlap, which should not be perceived as the unconstitutionality of the powers of the Council of Ministers, as regards formulating and implementing the policy referred to in Article 146(2) of the Constitution, as well as of the powers of the central bank, on the basis of Article 227(1) of the Constitution. As long as they do not deprive the NBP of its casting vote, they are not necessarily contrary to Article 227(1), second sentence, of the Constitution (cf. M. Zubik, "W sprawie statusu...", p. 102; differently by M. Dąbrowski, "Ograniczono konstytucyjne uprawnienia banku centralnego", *Rzeczpospolita*, the Issue of 5 December 1997, p. 17).

5. Article 19 in conjunction with Article 1(37)(a) of the Act of 4 September 2008 as the object of constitutional review in the case under examination.

5.1. The bill amending the Act on trading in financial instruments and certain other acts (Sejm Paper No. 64) was submitted on 7 November 2007 as a government's amendment. Its usefulness and indispensability was justified by the Council of Ministers with the obligation to implement the Community regulations to the Polish legal order, which arose from the accession of the Republic of Poland to the European Union.

The original scope of the government's bill provided for the implementation of the following directives of the European Parliament, the Council of the European Union and the Commission: Directive 2004/39/EC of the European Parliament and of the Council of 21 April 2004 on markets in financial instruments amending Council Directives 85/611/EEC and 93/6/EEC and Directive 2000/12/EC of the European Parliament and of the Council and repealing Council Directive 93/22/EEC (OJ L 145 of 30.04.2004, p. 1), Directive 2006/48/EC of the European Parliament and of the Council of 14 June 2006 relating to the taking up and pursuit of the business of credit institutions (OJ L 177 of 30.06.2006, p. 1), Directive 2006/49/EC of the European Parliament and of the Council of 14 June 2006 on the capital adequacy of investment firms and credit institutions (OJ L 177 of 30.06.2006, p. 201), Commission Directive 2006/73/EC of 10 August 2006 implementing Directive 2004/39/EC of the European Parliament and of

the Council as regards organisational requirements and operating conditions for investment firms and defined terms for the purposes of that Directive (OJ L 241 of 2.09.2006, p. 26). The aim of the new regulation was the introduction of solutions which would facilitate the development of the Polish capital market.

5.2. The objects of the changes proposed in that bill were the issues related to the broadly understood functioning of financial instruments markets (including, *inter alia*, the catalogue of financial instruments, capital adequacy of investment companies and credit institutions, brokerage activity and investment advisory activity, short-sale by means of the depository-settlement system, the regulated market, an alternative system of trading and compensation system), as well as the way of exercising the supervision over the market by the Polish Financial Supervision Authority (hereinafter: the PFSA). The proposed changes were to affect, in particular, investment companies (both domestic ones and foreign ones which conduct brokerage activity in the territory of the Republic of Poland by means of their subsidiaries), custodians, agents of investment companies, entities which organise and coordinate the regulated (stock and OTC) market, clearing and settlement houses, the National Depository for Securities (hereinafter: the KDPW), as well as the National Bank of Poland, as regards trading in securities issued by the State Treasury.

With regard to the amendments to the Act on trading in financial instruments, the bill provided for, *inter alia*, departing from a series of particular solutions which had been in use so far, and which were not reflected in the provisions of the Directive on markets in financial instruments and the provisions implementing that Directive. In particular, the bill provided for moving away from specifying particular elements of the rules of procedure for organising an alternative trading system. Maintaining those particular regulations, in the situation where they are not based on the EU law, would constitute – according to the government – in the light of the provisions of the directives, a restriction of free movement of capital and services.

The government forecast that the entry into force of drafted amendments to the Act would contribute to increasing the competitiveness of the market, especially by enabling the institutions of the Polish financial market to carry out activity, in accordance with the rules which were analogical to those which were binding in other EU Member States, as well as would ensure higher standards as regards the transparency and proper functioning of the market, by increasing the level of protection of investors, in a way which guarantees full concurrence with the norms set out in the Community law.

Apart from amending the main normative act – the Act of 29 July 2005 on trading in financial instruments (Journal of Laws – Dz. U. No. 183, item 1538, as amended; hereinafter: the Act on trading in financial instruments), the bill also provided for relevant changes in sixteen other acts, among which this mostly concerned the following: the Act of 26 October 2000 on commodity exchanges, the Act of 24 August 2001 on the finality of clearing in payment systems and securities clearing systems and rules of the supervision of these systems, the Act of 29 July 2005 on the supervision over the capital market, as well as the Act of 21 July 2006 on the supervision over the financial market.

5.3. The amendment submitted by the Council of Ministers on 26 May 2008 (Sejm Paper No. 64-A) to the government's bill on trading in financial instruments (Sejm Paper No. 64-A) - providing, *inter alia*, for proposals of statutory exclusion of the NBP from holding shares in the KDPW, which are now the object of constitutional review, the NBP's statutory obligation to dispose of the shares held in the KDPW, and the loss of the NBP's right to vote attached to the shares held in the KDPW – was provided with a different explanatory note.

It was indicated in the explanatory note to the amendment that: "the analysis of the issues related to the privatisation of the Warsaw Stock Exchange (WSE) has revealed that it will be beneficial for that company to, at least, tentatively resolve the issues of the National Depository for Securities (KDPW). The necessity to change the Act, as regards the payment of dividends on the KDPW's shares, ensues from the preparations for the privatisation of the Warsaw Stock Exchange carried out by the Ministry of Treasury. The restriction arising from the wording of Article 46(4) of the Act may constitute an impediment to effective privatisation of the said stock exchange. The possibility of paying out the dividend on the KDPW's shares – a company which is affiliated with the Warsaw Stock Exchange – to a large extent will facilitate gaining attractive shareholders for the WSE and will stabilise its shareholding. Moreover, deleting the said paragraph will make it possible to carry out diligent valuation of the company's shares, as well as it will encourage the potential shareholders to purchase the KDPW's shares. What is related to the above proposal is the introduction of the provisions which oblige the NBP to sell all its shares held in the KDPW to the entity or entities indicated in Article 46(3) of the Act. The status of a shareholder of the KDPW raises doubts in the context of Article 5(2) of the Act of 29 August 1997 on the National Bank of Poland, which prohibits the NBP from holding shares in other legal persons, except those providing services solely to financial institutions and the State Treasury. (...) The changes put forward in the said amendment to the bill amending the Act on trading in financial instruments provide for a complete shift from the shareholders' governance over the KDPW's activity, exercised so far by the NBP, to the model of oversight. These changes provide for supplementing the powers of the President of the NBP, which arise from the government's bill amending the said Act, with the right to request the KDPW to provide information on its activity with regard to clearing and settling transactions. However, they also provide for the necessity to dispose of the KDPW's shares by the NBP within the period of 18 months from the day the amendment enters into force. The introduction of those changes will entail, in particular, that the supervision over the KDPW's activity by the NBP will be carried out exactly within the same scope, in which the provisions of the amendment provide for the said supervision over other systems for clearing and settling securities which are in operation in the territory of the Republic of Poland, since neither current nor projected provisions provide for the NBP's capital participation in entities other than the KDPW which run such systems in the territory of the Republic of Poland. (...) It should also be added that the NBP's oversight over the KDPW's activity does not require having the status of the KDPW's shareholder. In fact, the said status may raise doubts as to the independence of the NBP's oversight over the KDPW's activity" (the explanatory note to the draft of the government's own amendment, the Sejm Paper 64-A, p. 8).

During the debate at the stage of the second and third reading, the Undersecretary of State in the Ministry of Finance suggested, *inter alia*, that "the NBP's presence in the KDPW is inconsistent with the law; namely, it is inconsistent with the Act of 29 August 1997 on the National Bank of Poland, where it is stated that the NBP should not hold shares in that type of companies. Therefore, the amendment to the Act that we propose follows not only from the plans for the privatisation of the stock exchange and the approach to privatisation thereof by the government, but also from the provisions of law, as so far the NBP has not adhered to the provisions contained in that Act" (verbatim record from the 20th session of the Sejm on 23 July 2008, p. 229); and the Undersecretary of State in the Ministry of Treasury stated that: "in the light of the Act of 29 August 1997 on the National Bank of Poland, the said amendment plays an ordering role. There is evident contradiction between the NBP's participation in the KDPW and Article 5(2) of that Act" (verbatim record from the 20th session of the Sejm on 25 July 2008, p. 571).

5.4. In its opinion of 21 May 2008, issued pursuant to Article 105(4) of the Treaty establishing the European Community, the European Central Bank criticised the proposed changes of the legal relations between the KDPW and the NBP, which are the object of constitutional review in the case under examination.

In its opinion, the ECB drew attention, *inter alia*, to the fact that "the draft law introduces new elements *inter alia* as regards the following issues related to securities clearing and settlement (...) [that] NBP's oversight powers over KDPW will be reduced, while NBP will obtain certain limited consultation and information powers in relation to KDPW and other clearing and settlement operators", and also that the presented version of the bill did not take into account "the need to assign tasks related to ensuring proper operation of the clearing and settlement process not only to KDPW but also to other clearing or settlement system operators which may be established in Poland".

Taking the principle of central bank financial independence as a starting point, which has appropriate reference to central banks in the EU, the ECB noted that "the concept of central bank financial independence in Article 108 of the Treaty should be seen from the perspective of whether any third party is able to exercise either direct or indirect influence over the ability of the national central bank (NCB) to fulfil its mandate. The draft law does not comply with the principle of central bank independence as it forces NBP to dispose of its assets, namely all its shares held in KDPW. (...) The ECB understands that the draft law does not substantially affect NBP's supervision of payment systems under the Law on settlement finality. However, the draft law foresees express specification of certain NBP's oversight powers over securities clearing and settlement systems", but "an oversight function is inherent in the central bank task of promoting a sound market infrastructure, in order to safeguard the effectiveness of monetary policy and the overall stability of the financial system". "The ECB further notes that in the particular case of NBP's oversight of KDPW the need to ensure the effectiveness of the oversight functions is supported by the systemic importance of KDPW in maintaining financial market stability in Poland, by the key role of KDPW settlement services in the operations implementing NBP's monetary policy and by the close operational link between KDPW and the NBP-operated payment systems, including the SORBNET-EURO system connected with the Eurosystem's TARGET system. In view of the above, the ECB recommends that the Polish authorities adopt solutions ensuring NBP's capacity to perform its oversight tasks, including in particular meaningful and direct access by NBP to information relevant for the performance of its financial stability role and NBP's long-term capacity to ensure the smooth functioning of the payment and settlement infrastructure relevant to its monetary policy and intraday credit operations".

In conclusion, "the ECB reiterates its earlier recommendation for NBP to be expressly made responsible, as one of its tasks, for the oversight of all securities clearing and settlement systems that operate or will operate in Poland, including the systems' rules, and given access to all information and data relevant to the performance of such oversight tasks".

6. Shares held in the KDPW by the National Bank of Poland.

6.1. The provisions of the Act of 4 September 2008 which have been challenged by the President of the Republic of Poland, and subjected to constitutional review in the case examined by the Tribunal, concern the NBP's shares held in the KDPW and the exercise of the NBP's rights attached to those shares, when "implementing monetary policy" by the NBP (Article 227(1) of the Constitution). The National Depository for Securities (KDPW)

is an institution which maintains the depository for securities and carries out a series of tasks related to settling securities transactions.

In the Polish legal system, there is the principle of dematerialisation of securities and of certain other financial instruments. They function in practice as digital entries on relevant accounts. Trading in such instruments requires the establishment of appropriate institutions which make it possible for the market to function, by operating bank accounts, making relevant entries and ensuring the correctness of these activities. Established in 1991 and registered on 7 November 1994 as a joint-stock company, the National Depository for Securities belongs to the institutions which make the functioning of the market for dematerialised financial instruments possible.

The activity of that institution is currently regulated primarily by the Act on trading in financial instruments, as well as the Act of 28 August 1997 on the organisation and functioning of pension funds (Journal of Laws - Dz. U. of 2004 No. 159, item 1667, as amended). The National Depository for Securities (KDPW) acts as a joint-stock company. The shares of the National Depository for Securities may solely be inscribed, and the shareholders of such a company may only be as follows (in accordance with the current wording of Article 46(3) of the Act on trading in financial instruments):

– companies running the stock exchange,

– companies running the OTC market,

– investment companies, banks, the State Treasury,

– the National Bank of Poland,

– legal entities and other organisational units whose activity involves registering securities, as well as clearing or settling securities transactions, or organising a regulated market, which have their registered offices in the territory of an EU Member State, or an OECD member state or partner country, and which are subject to supervision by the competent supervisory body of a given state.

The share capital of the National Depository for Securities is currently PLN 21 million. It has been divided into 21000 shares of the nominal value of PLN 1000, with a third of the shares owned by the State Treasury, another third by the Warsaw Stock Exchange, and the remaining third by the National Bank of Poland.

6.2. The National Depository for Securities (KDPW) maintains the depository for securities, clears and settles securities transactions, as well as runs a system for securing the liquidity of settlements, and carries out activities related to running the system for registering, clearing and settling the financial instruments which are not securities.

The Act enumerates a series of particular tasks of the KDPW. The institution shall:

– operate deposit accounts for those involved in the depository and clearing system. The accounts are used for registering dematerialised securities and other financial instruments not being securities which have been admitted to trading on the regulated stock exchange market or OTC market, or introduced into the alternative trading system;

– supervise the conformity of the amount of issue to the number of securities registered in the depository for securities which are subject to trading;

– guarantee the processing of liabilities the issuers have towards the entitled persons due to the securities registered in the depository; by carrying out that task, the institution, *inter alia*, acts as an intermediary between issuers and those entitled to receive dividend and carries out assimilation, change, conversion and division of shares, exercises the right to receive or change bonds exchangeable for shares;

– clear and settle transactions made on the regulated stock-exchange and OTC market, as well as transactions made in the alternative system of trading within the scope of dematerialised securities; within the meaning of the provisions of the Act, settlement

entails setting the amount of pecuniary and non-pecuniary considerations which arise from the transactions made; the obligation to provide consideration rests on the participants of the National Depository who are the parties to the transactions or other participants who declared to fulfil the obligations related to such settlements; clearing entails charging or recognising a deposit account or security account run by the National Depository respectively in relation to the transaction of sale or purchase of financial instruments as well as, adequately to the amounts of consideration, recognising or charging a bank account indicated by a participant being a party to the settlement;

– undertake activities related to withdrawing securities from the depository for securities;

– run a system of securing the liquidity of settlement, including the system for guaranteeing the transactions on the regulated stock-exchange market and OTC market; the participants are obliged to pay contributions to the National Depository, which create a Settlement Guarantee Fund which is aimed at securing proper settling of concluded transactions; the Settlement Guarantee Fund guarantees settling of the transactions made on the regulated market, within the scope specified in the rules of procedure of the Settlement Guarantee Fund; the National Depository may manage the resources of the Settlement Guarantee Fund;

– create and run an obligatory system of compensation, in order to amass the means for paying out compensation to investors; the compensation comes from contributions made by brokerage houses and custodians; the purpose of the system is to guarantee payment in cash, up to the amount specified by statute, made to investors, the compensation of the value of lost brokerage financial instruments stored by the investors in brokerage houses in case of impossibility to cover them by the indebted.

6.3. The activity of the National Depository for Securities (KDPW) in many areas is linked with carrying out its constitutional tasks by the National Bank of Poland. As the Management Board of the NBP pointed out in its resolution addressed to the Constitutional Tribunal, there is a triple connection:

Firstly, when implementing monetary policy, the National Bank of Poland carries out operations on the open market, the objects of which are Treasury bonds or other securities registered in the National Depository for Securities. The National Bank of Poland also carries out deposit and credit operations as well as other operations which are secured by Treasury bonds or other securities registered in the National Depository. The application of these instruments requires appropriate technical infrastructure which is ensured by the National Depository for Securities. As the Management Board of the NBP points out, carrying out some of the operations as part of monetary policy became possible only after creating appropriate conditions by the National Depository for Securities, after the introduction of multi-session system and the system for real time gross settlement (the RTGS system).

Secondly, the National Depository for Securities constitutes a vital element of the payment system in Poland, by clearing and settling securities transactions, including, *inter alia*, transactions between banks. Malfunctioning of the system of the National Depository for Securities may, within that scope, cause malfunction in the operating activity of banks, which in turn may affect the functioning of the whole payment system in Poland, which the NBP is to safeguard.

Thirdly, as the state's central bank, the National Bank of Poland fulfils the role of an agent of Treasury bonds issue, by organising tenders for sale, redemption and exchange of those bonds. The National Depository for Securities registers Treasury bonds and settles transactions related to the emission of Treasury bonds.

The National Depository for Securities (KDPW) also fulfils ancillary functions in relation to the National Bank of Poland, creating technical conditions for the operations carried out by the NBP within the scope of its constitutional functions. It ensures the efficient and proper functioning of the market for dematerialised financial instruments. The institution belongs to the legal and institutional framework of the capital market in Poland. Its tasks and powers have primarily a technical and ancillary character with regard to the participants in the trade.

The activity of the KDPW is also related to the NBP's implementation of monetary policy developed by the Monetary Policy Council. This follows from the fact that the KDPW, by running a depository for securities, and in particular for Treasury bonds, makes it possible and at times determines the application of all those instruments of monetary policy, the objects of or collaterals for which are, or should be, securities registered in the KDPW. The KDPW ensures the efficient and proper functioning of the market for dematerialised financial instruments. The institution belongs to the legal and institutional framework of the capital market in Poland. Its tasks and powers have primarily a technical and ancillary character with regard to the participants in the trade. It also fulfils the ancillary functions towards the National Bank of Poland, creating technical conditions for the operations carried out by the NBP within the scope of its constitutional functions. The role of the KDPW amounts to the above-mentioned technical and ancillary functions. In the light of the Constitution, and in the context of the KDPW fulfilling certain ancillary functions related to the fulfilment of constitutional tasks by the National Bank of Poland, the shares held by the NBP constitute an additional guarantee for the fulfilment of constitutional obligation to implement monetary policy, imposed on the central bank, by means of the ownership rights towards the National Depository which arise from the shareholder's rights. As the Monetary Policy Council states, the lack thereof may have impact on the fluctuations in the value of the Polish currency which the NBP is responsible for.

6.4. So far the shares of the National Depository for Securities (KDPW) have not given the shareholders the right to dividend. Such a solution corresponded to a special character of the join-stock company as a financial institution established to provide certain services to the public institutions of the financial sector and the State Treasury, rather than merely conducting business activity and providing services which fall within the scope of interests of the shareholders. So far the rights attached to shares held in the KDPW have not only served the financial interests of the shareholders, which would primarily secure the efficient infrastructure of the financial markets to ensure the provision of financial services to the participants in the market and the efficient implementation of monetary policy by the NBP. The shares of the National Bank of Poland held in the National Depository for Securities (KDPW) were perceived not only as an element of its capital, as one of the means to carry out the tasks of the NBP, within the scope of integrated supervision over the payment and securities clearing systems, with the use of the National Depository for Securities. The rights constitute a vital instrument of participation in the decision-making process, by the participation in the corporate bodies of that company, as well as the influence on the policy of the company and the functioning of the National Depository for Securities, in accordance with the public interest. In other words: holding the KDPW's shares by the NBP is vital, not only because the shares have a measurable asset value. Due to the corporate powers of shareholders, the possession of shares entails participating in the KDPW's decision-making bodies. Each participant (a shareholder) may have a direct impact on the shaping of the financial market, mostly because of having real-time access to the information on the policy of the company and the financial flows registered in the KDPW. If it is assumed that the said information is indispensable for the NBP to carry out its

constitutional functions within the scope of monetary policy, then - as the ECB stresses – it is necessary to create instruments (channels) for the NBP's direct impact on the functioning of institutions of the securities market and for access to information arising therefrom. Despite the stance presented in the course of work on the Act, the information which is accessible to a member of the company's Management Board and that which is available to an external authority which is competent to request information, by taking administrative measures, is not equivalent. The difference here is primarily the fact that the shareholder receives current information. The information which the KDPW receives thanks to holding shares in the KDPW enables the NBP to carry out its activities effectively within the scope of its constitutional functions related to formulating and implementing monetary policy.

7. The ostensible argument about a statutory prohibition against holding shares in the KDPW by the NBP.

When presenting its own amendment on changing the composition of the KDPW's shareholders, introduced as amended point 37(1) of the government's bill, which specified the new wording of Article 46 of the Act on trading in financial instruments, the result of which was to be the exclusion of the NBP from the shareholders of the KDPW and the NBP's obligation (pursuant to Article 19 of the amending Act) to dispose of all the shares held in the KDPW – the government justified that change by the necessity to eliminate the inter-systemic contradiction within the system between Article 5(2) of the Act on the NBP and amended Article 46(3). This is an ostensible argument.

The Constitutional Tribunal states that the regulation concerning the shares held by the KDPW already existed in 1994 and was maintained by the provisions of the Act on the public trade in securities and the Act on trading in financial instruments. Article 46(3) in its original wording constitutes a particular norm in relation to a general norm contained in Article 5(2) of the Act on the NBP, which stipulates that "the NBP shall not hold shares in other legal persons, except those providing services solely to the financial institutions and the State Treasury". The KDPW is a legal entity which conducts the activity referred to in Article 5(2) *in fine* of the Act on the NBP. The acquisition of the KDPW's shares by the NBP took place under the former Act on the NBP and was aimed at increasing the efficiency of settlements as well as at carrying out shareholders' governance over the KDPW by the NBP, the prerequisite for which is the exercise of the right to vote attached to the shares. Not only was the provision of Article 46(3) of the Act on trading in financial instruments not inconsistent with Article 5(2) of the Act on the NBP, but on the contrary – it specified the exception to the general rule contained therein. There is no room here for "inter-systemic contradiction".

8. The problem of proportionality of legal regulations which were challenged in the President's application (Article 2 of the Constitution).

8.1. Pursuant to Article 122(3) of the Constitution, in his application to the Tribunal, the President of the Republic of Poland alleged that Article 19 in conjunction with Article 1(37)(a) of the Act of 4 September 2008 amending the Act on trading in financial instruments and certain other acts was inconsistent with Article 2, Article 7, Article 21(1), Article 9 in conjunction with Article 91(1) and (2), as well as with Article 227(1) of the Constitution. The President stressed therein that excluding the NBP, by means of the said Act, from holding shares in the KDPW, and depriving the NBP of its right to exercise the rights attached to the KDPW's shares, limits the possibility of carrying out the constitutional functions assigned to the NBP, for which it is indispensable to "exercise effective supervision over the KDPW by the NBP. This is justified by (...) the

vital role played by clearing service provided by the National Depository with regard to the activities aimed at implementing monetary policy of the NBP as well as operational relations between the KDPW and the NBP payment systems" (p. 3 of the application).

8.2. The Tribunal points out the fact that one of the assumptions of the passed bill is to rule out the possibility of the NBP's impact on the KDPW, by means of the NBP's direct exercise of the rights attached to the shares, and to maintain supervision over the KDPW, and an impact on it, by the Polish Financial Supervision Authority. As a result of the entry into force of the passed bill, after the obligatory disposal of shares held in the KDPW, the NBP will lose its rights in relation to the said institution, which are attached to the shares, and these rights will be replaced by the rights falling within the scope of oversight, which means supervision as defined in public law. The rights of a shareholder which are attached to shares are not tantamount to direct management of a given company. However, in the light of the new provisions, the NBP loses its previous possibilities of effective corporate influence on the directions of the KDPW's activity, by means of participation in the statutory bodies of the company.

Excluding the possibility that the NBP can exert direct and indirect influence on the KDPW, by exercising the right to vote attached to the shares held in the KDPW by the NBP, in the relevant organisational forms; the new wording of Article 64a provided for the power of the President of the NBP to request information, in certain situations, from the KDPW, as regards the matters concerning the KDPW's activity within the scope of clearing and settling transactions involving securities, as well as in the case where, in the view of the President of the NBP, the KDPW's activity does not guarantee the secure and efficient functioning of settlement systems – the right to notify the President of the Polish Financial Supervision Authority about the problem. The changes also result in a shift from the shareholders' governance, previously exercised by the NBP by virtue of the shares held in the KDPW, to the model of oversight; in fact, oversight has a consultative and instructive character, with the shift of powers to the Polish Financial Supervision Authority, without the right of independent, direct and active influence on the course of the KDPW's work on the part of the NBP, as well as without the possibility to directly acquire information on the functioning of financial markets by the NBP, on the basis of information registered in the National Depository.

The Constitutional Tribunal shares the view of the Management Board of the NBP, which has been supported with the ECB opinion, that the new powers limit the possibilities of exerting the NBP's influence on the National Depository to a larger extent than the previous powers ensuing from the exercise of the rights attached to the shares.

8.3. The Constitutional Tribunal draws attention to the fact that Article 227(1) of the Constitution imposes the obligation to implement monetary policy on the National Bank of Poland. The NBP's ownership rights which are exercised by means of the block of shares held in the KDPW currently determine - apart from other instruments which the NBP is entitled to - the possibility of acquiring information which constitutes one of vital elements for carrying out the tasks and functions specified in Article 227(1) of the Constitution, also by applying methods which have no legal effects. As it has been explained in the previous jurisprudence of the Constitutional Tribunal, the interpretation of the Polish law in accordance with the EU law, which has been referred to in the NBP's statements, is aimed at preventing contradictions between the Polish law and EU law. The principle of interpretation in accordance with the EU law also applies to constitutional provisions. They should be interpreted in such a way that situations will be avoided where the provisions of primary or secondary EU law would remain contradictory to the Polish

law. The solutions concerning the independence of national central banks adopted in the EU law entirely fall within the boundaries of regulatory freedom delineated in Article 227(1) of the Constitution. Making reference to the EU law, there is no need to narrow down – by way of interpretation – the scope of regulatory freedom specified for the legislator by the Constitution, which has previously been defined by the doctrine and jurisprudence.

8.4. The issue of the boundaries of the legislator's regulatory freedom, considered in the case under examination, does not amount to the question whether the legislator at all has the right to change regulations of the Act on trading in financial instruments, including particular provisions concerning the legal structure of the KDPW and the forms of the NBP's activity. The Tribunal states that, within that scope, the legislator's freedom is restricted by Article 2 of the Constitution. Exercising its legislative powers, the legislator may not make such changes with reference to the systemic tasks of the NBP as a constitutional organ and the particular tasks and powers of that organ which would limit the possibilities of carrying out the constitutional tasks assigned thereto or would restrict the range of legal instruments which are at its disposal and which are indispensable for its effective functioning, in accordance with the purpose specified in the Constitution.

The Constitutional Tribunal indicates that, in order to assess the correctness of the legal solution adopted by the legislator, there is a need for carrying out an assessment of indispensability, effectiveness and proportionality of the effects of the provisions included in the application, from the point of view of the principle of a democratic state ruled by law.

Derived from Article 2 of the Constitution, the principle of proportionality places a special emphasis on the adequacy of a legislative goal and the means used for its attainment. This entails that, out of possible (and legal) means of exerting influence, one should choose those which will be effective for the achievement of set goals and, at the same time, the least burdensome for the entities they will be applied to, or troublesome only to the extent it is indispensable for the attainment of a set goal. Examining the conformity of the challenged regulation to the principle of proportionality (Article 2 of the Constitution), the following three crucial issues should be examined: 1) is this regulation indispensable for the protection and implementation of the public interest, to which it is related, 2) is it effective, allowing for achieving set goals, 3) do its effects remain in appropriate proportion to the burdens imposed on the citizen or a different subject of rights.

8.5. In this context, Article 2 of the Constitution constitutes a basis for distinguishing the admissible reforms of the legal status of the central bank and the general rules for its functioning and, on the other hand, the inadmissible forms of interference with the protected sphere of its independence (Article 227(1) of the Constitution). In the view of the Constitutional Tribunal, the solutions adopted by the legislator in the challenged provisions change the principles of functioning of the National Depository for Securities.

The Tribunal states that the regulations questioned by the President, established in the challenged provisions, may not be regarded as an admissible form of interference, restraining and changing the constitutionally protected sphere of the NBP's independence as a constitutional organ which has been granted the constitutional right to implement monetary policy. The NBP's loss of rights attached to the shares held in the KDPW - pursuant to the challenged provisions which deprive the NBP of necessary instruments for carrying out its constitutional functions and tasks - is not indispensable for the implementation of the strategic goals which were the reason for the legislative initiative in the Sejm Papers No. 64 and 64-A. This goal was the implementation of the directives of

the European Parliament, the Council and the Commission. The change limiting the legal status of the NBP as a constitutional organ was also not necessary for achieving the goal set in the government's own amendment – i.e. the privatisation of the Warsaw Stock Exchange - since the composition of shareholders, according to the new wording of Article 46(3) of the Act, encompasses all other entities, except for the NBP, including also those which receive public funds. The change of the legal status of the NBP, in relation to the KDPW, means the legislator's disproportionate interference with the NBP's realm of independence, specified in Article 227 of the Constitution (as regards monetary policy). In that context, the NBP's shares held in the KDPW make it possible to quickly react to the developments in monetary policy and the implementation thereof, on the basis of indispensable information which ensues from registering the financial processes made by the KDPW. Such possibilities are not guaranteed by the NBP's supervisory power, granted as a substitution by the amendment, on the basis of public law. Also, the legislator's wording of the obligation to dispose of the shares held in the KDPW infringes on the NBP's independence. The circumstance that the NBP may refrain from disposing of shares, and instead remain the shareholder, but lose its right to vote, does not eliminate the allegation of the infringement of the NBP's independence, whereas the deprivation of the right to vote actually means the limitation of access to information by the NBP's participation in the decision-making bodies of the KDPW which exercise the right to vote.

8.6. Addressing the problem of the implementation of monetary policy by the NBP, the Constitutional Tribunal points out that, as a result of the ratification of the Treaty concerning the accession of the Republic of Poland to the European Union, done at Athens on 16 April 2003 (Journal of Laws - Dz. U. of 2004 No. 90, item 864), the constitutionality of which was confirmed by the Tribunal's judgment of 11 May 2005, Ref. No. K 18/04 (OTK ZU No. 5/A/2005, item 49), Poland is obliged to respect the EU law, also as regards the status of the central bank.

With reference to the raised allegation that the provisions of the Treaty of Accession were inconsistent with Article 227 of the Constitution, the Constitutional Tribunal stated then as follows: "the provision of Article 105 of the EC Treaty does not have a self-executing character, and thus one may not actually speak of a clash between that regulation and Article 227(1) of the Constitution, which establishes the NBP as the state's central bank, entrusts it with the exclusive right to issue money as well as to formulate and implement monetary policy, and also makes the NBP responsible for the value of Polish currency. The challenged Community provisions concern the establishment of the ESCB and the European Central Bank (Article 8 of the EC Treaty) and the monetary policy of the European Community (Article 105 of the EC Treaty), conducted within the framework of the ESCB which is composed of the European Central Bank and the central banks of the EU Member States.

In order to carry out the tasks of the ESCB, the European Central Bank adopts regulations which shall have general application. They shall be binding in their entirety and directly applicable in all Member States (Article 110(2), first and second sentences, of the EC Treaty). Only by comparing the content of those regulations with the content of Article 227(1) of the Constitution may lead to a possible declaration of conformity (or non-conformity) between them and the Constitution.

For that reason, it should be concluded that Article 105 of the EC Treaty is not subject to review of conformity to Article 227(1) of the Constitution".

As a consequence of the accession of the Republic of Poland to the European Union, the EU legislation has been implemented, within a certain scope, to the Polish legal system; what arises from the EU legislation is also a set of certain rights and obligations of

the public authorities in relations with the European Central Bank. From the point of view of their conformity to Article 227(1) of the Constitution, they have not been undermined in any way.

8.7. Delivering opinions on draft legal acts by the ECB is, *inter alia*, aimed at drawing the attention of a given Member State to a possible infringement of the EU law, or to the negative impact of a proposed legal act on the implementation of the goals of the European Community. This facilitates the observance of the EU law and the formulation and conduct of domestic policy by the governments of the Member States, taking into consideration the requirements of European integration. As it has already been mentioned, the views expressed in the ECB opinion are not binding for the organs of the Members States. The said organs which request the ECB to provide an opinion should, however, consider the views presented in that opinion, as they may considerably affect the content of national draft legal acts, encouraging the said organs to amend those drafts, in accordance with the "pro-EU" interpretation of the provisions of the Constitution of the Republic of Poland. They should carefully analyse the ECB opinions concerning proposed bills; and if the opinions are consistent with the aforementioned direction of the interpretation of the regulations consulted upon, they should make relevant amendments to the bill.

Taking the above into consideration, the Constitutional Tribunal states that Article 19 in conjunction with Article 1(37)(a) of the Act of 4 September 2008 amending the Act on trading in financial instruments and certain other acts is inconsistent with Article 227(1) in conjunction with Article 2 of the Constitution.

9. Article 9 and Article 91(1) and (2) of the Constitution as higher-level norms for constitutional review.

9.1. In the opinion of the President, the challenged provisions are inconsistent with Article 9 and Article 91(1) and (2) of the Constitution. It follows from the substantiation of the application that, according to the President, the infringement of the indicated constitutional provisions results from assuming their non-conformity to the content of Article 108 of the EC Treaty. The Constitutional Tribunal draws attention to the fact that, as part of *a priori* review, the Tribunal is not competent to examine the conformity of statutes to international agreements, but, at the same time, it states that the challenged provisions in the present case do not contain regulations which would undermine the obligation to obey international law as such, or which would contain provisions that would regulate the place of international agreements in the Polish legal order differently than this is done in the Constitution. Therefore, there are no grounds for declaring the non-conformity of the challenged provisions to Article 9 and Article 91(1) and (2) of the Constitution.

10. The applicant indicated Article 7 of the Constitution among the higher-level norms for constitutional review. However, he has not proved his allegation within that scope. Hence, there are no grounds to consider Article 7 to be an adequate higher-level norm for review in the present case.

11. Article 21(1) of the Constitution as a higher-level norm for review.

The Tribunal states that, in Article 19 of the Act, when introducing the NBP's obligation to sell its shares held in the KDPW to the entities indicated by the legislator (new wording of Article 46(3)), the legislator considerably interfered with the ownership rights of the central bank, stipulating that, after the lapse of 18 months from the date of

entry into force of the Act, the NBP shall lose its right to vote attached to the shares, maintaining only the right to sell the shares after that period. As it follows from the analysis carried out in the above points of this judgment, the object of the provisions of the amending Act, challenged by the applicant, and the object of the allegation of non-conformity of those provisions to the Constitution, was the fact of depriving the NBP of legal instruments – by means of excluding the NBP from holding shares in the KDPW and, by statute, depriving it of its right to vote attached to the shares held in the KDPW – which was inconsistent with Article 227(1) of the Constitution; the instruments ensured that the NBP would effectively carry out its constitutional tasks related to the implementation of monetary policy.

In the full bench judgment of 12 April 2000, Ref. No. K. 8/98, the Constitutional Tribunal expressed the view that "Article 21(1) of the Constitution, as a provision which concerns a basic systemic value, protects ownership right regardless of the subject thereof" (OTK ZU No. 3/2000, item 87, p. 399). The challenged Act, in Article 19, provides for the obligation to sell shares and the restriction of the rights arising therefrom. Such interference means an infringement on the guarantee of the NBP's ownership right and other ownership entitlements ensuing therefrom. From the point of view of the beneficiary of these rights (the NBP), if the essence of the right to own shares in the KDPW primarily consists in the possibility of participating in the bodies of the company, granted to shareholders, so that the NBP could carry out its tasks related to the implementation of monetary policy, then the prohibition on possession of shares (or the loss of corporate rights attached to shares) violates Article 21 of the Constitution. Therefore, it should be stated that challenged Article 19 in conjunction with Article 1(37)(a) of the Act of 4 September 2008 amending the Act on trading in financial instruments and certain other acts is also inconsistent with Article 21(1) of the Constitution.

12. In conclusion, the Constitutional Tribunal states that Article 19 in conjunction with Article 1(37)(a) of the Act of 4 September 2008 amending the Act on trading in financial instruments and certain other acts is inconsistent with Article 227(1) in conjunction with Article 2 of the Constitution and with Article 21(1) of the Constitution; in addition, it is not inconsistent with Article 7, Article 9 as well as Article 91(1) and (2) of the Constitution. The Constitutional Tribunal states that the provision regarded as unconstitutional is not inextricably linked to the remainder of the Act, and deeming it unconstitutional does not result in the unconstitutionality of the remainder of the normative text.

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

Dissenting Opinion
of Judge Janusz Niemcewicz
to the Judgment of the Constitutional Tribunal
of 16 July 2009, Ref. No. Kp 4/08

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, to the part concerning the adjudication of unconstitutionality of Article 19 in conjunction with Article 1(37)(a) of the Act of 4 September 2008 amending the Act on trading in financial instruments and certain other acts.

I hold the view that the arguments adopted by the Tribunal as justifying the unconstitutionality of the challenged provisions are not sufficient for ruling out the presumption of their constitutionality.

I

In the opinion of the Tribunal, the key argument for the non-conformity of the challenged provisions to Article 227 in conjunction with Article 2 of the Constitution is that the NBP's ownership rights, exercised by owning a package of the KDPW's shares, make it possible to gain information regarding the policy of the company and the financial flows registered by the company, such information is indispensable for carrying out the NBP's constitutional functions.

Therefore, the Tribunal draws attention to the restrictions on access to information on the National Depository which result from the loss of the ownership rights; however, in my view, the Tribunal does not prove in what way these restrictions are to limit the possibility of conducting monetary policy. At the same time, the Tribunal overlooks the fact that the shareholder's right to the information is limited and the scope thereof is set out, *inter alia*, by the provisions of Article 6(4) and Article 428 of the Polish Commercial Companies Code. The restrictions concern both the information provided at the General Assembly, as well as outside the Assembly.

By losing the ownership rights, the National Bank of Poland gained new powers which allow for obtaining new information. In particular, on request of the President of the NBP, the members of the Management Board or the employees of the Depository will be obliged to provide information on matters pertaining to the activity of the Depository, within the scope of clearing or settling transactions (new Article 64a(1)).

The Polish Financial Supervision Authority continues its supervision over the National Depository for Securities (KDPW). The Act on trading in financial instruments provides for detailed powers of the Polish Financial Supervision Authority in relation to the Depository in Articles 47, 48, 50 or 64. The Authority has, *inter alia*, the right to receive – upon request – copies of documents as well as written and oral explanations, and the Chairperson of the Supervision Authority or his representative may take part in the sessions of the Management Board of the Depository and general assemblies.

In accordance with Article 5(2) of the Act on supervision of the financial market, the member of the Polish Financial Supervision Authority is the President of the NBP, or the Vice-President delegated by him/her. For that reason, he has access to the information received by the Supervision Authority and impact on the actions taken by the said Authority. Moreover, pursuant to Article 17 of that Act, the Chairperson of the Supervision Authority and the President of the NBP exchange information, including confidential information, within the scope which is indispensable for carrying out statutory tasks. They may also enter into an agreement on the exchange of information.

Stating that restricted access to information, resulting from the loss of ownership rights, makes it difficult to carry out the constitutional tasks of the NBP, insofar as it causes non-conformity to Article 227(1) of the Constitution, the Constitutional Tribunal has not, at the same time, indicated what information to which the NBP would have access as a shareholder – pursuant to the Polish Commercial Companies Code – the NBP could not have receive, due to the powers granted to it or due to the membership of the President of the NBP in the Polish Financial Supervision Authority.

Moreover, the Constitutional Tribunal pointed out that the participation of the NBP in the share ownership of the National Depository for Securities constitutes an additional guarantee of fulfilling the constitutional obligation to implement monetary policy. Together with the entry into force of the provisions under examination, the NBP would lose the possibilities it has had so far to have corporate impact on the directions of the KDPW's activity.

However, it has not been proved in the course of proceedings that these possibilities constitute a prerequisite for the NBP to be carry out its constitutional tasks. Monetary policy involves choosing macroeconomic objectives by regulating the supply of and demand for money. The KDPW does not have any instruments at its disposal which would allow it to have an impact on the supply of money. In my view, the scope of powers which the NBP, its President and its governing bodies will have, in the light of the new provisions, will not impede the carrying out of constitutional tasks by the Polish central bank. By enacting the challenged provisions, the legislator did not go beyond the boundaries of regulatory freedom set out by the Constitution.

II

As to the non-conformity of Article 21 to the Constitution declared by the Tribunal, I hold the view that this Article does not constitute an adequate higher-level norm for review of the challenged provisions.

Firstly, the Tribunal emphasises that it perceives the shares of the National Bank of Poland held in the KDPW's capital not as a capital asset, but as a means to carry out the tasks of the NBP, and particularly as a means to obtain information available to shareholders.

Secondly, in the light of the previous jurisprudence of the Tribunal and the views of the doctrine, it is highly dubious whether the constitutional guarantees of ownership from Article 21 of the Constitution refer to the persons of public law, such as the NBP.

The constitutional principle of the independence of the National Polish Bank also encompasses the protection of the independence of its assets. However, it has a different character from the protection of private property, and does not entirely rule out the interference with that ownership, provided such interference is justified by other constitutional values.

The challenged provisions constitute an element of a wider reform of the market for financial instruments. In my view, the reform of the institutions of the financial market may justify the legislator's interference with particular assets of the NBP, insofar as this is necessary for adjusting that area to the new scope of tasks and powers, provided for by the legislator.