DECISION 4/2021 (IV. 22.) AB OF THE CONSTITUTIONAL COURT

on establishing a constitutional requirement and rejecting a motion related to Section 5 of the Act VII of 2015 on the investment project in relation to the capacity conservation of the Nuclear Energy Plant of Paks and modifying certain related Acts

In the posterior examination of a statutory regulation's compatibility with the Fundamental Law and the examination of a conflict with an international treaty, the plenary session of the Constitutional Court – with concurring reasoning by Justices *dr. Ágnes Czine* and *dr. László Salamon,* and with dissenting opinions by Justices *dr. Ildikó Hörcherné dr. Marosi* and *dr. Balázs Schanda* – adopted the following

d e c i s i o n:

1. The Constitutional Court establishes as a constitutional requirement resulting from Article VI (3) and Article 39 (2) of the Fundamental Law that Section 5 of the Act VII of 2015 on the investment project in relation to the capacity conservation of the Nuclear Energy Plant of Paks and modifying certain related Acts is applicable to the subcontractors of the Russian Designated Organisation and the subcontractors of the Hungarian Designated Organisation only if they are considered to be organisations performing a public duty.

2. The Constitutional Court rejects the posterior norm control initiative aimed at establishing the lack of conformity with the Fundamental Law and annulling Section 5 of the Act VII of 2015 on the investment project in relation to the capacity conservation of the Nuclear Energy Plant of Paks and modifying certain related Acts.

3. The Constitutional Court rejects the posterior norm control initiative aimed at establishing a conflict with an international treaty and annulling Section 5 of the Act VII of 2015 on the investment project in relation to the capacity conservation of the Nuclear Energy Plant of Paks and modifying certain related Acts.

According to the second sentence of Section 44 (1) of the ACC, the Constitutional Court orders the publication of this decision in the Hungarian Official Gazette.

R e a s o n i n g

I.

[1] 1 On the basis of Article 24 (2) (e) of the Fundamental Law, the petitioning Members of Parliament requested a declaration that Section 5 of Act VII of 2015 on the investment project in relation to the capacity conservation of the Nuclear Energy Plant of Paks and modifying certain related Acts (hereinafter: Project Act) is in conflict with the Fundamental Law and its retroactive annulment upon its promulgation. The petitioners invoked a breach of the right to access and disseminate information of public interest under Article VI (2) of the Fundamental Law, in force at the time of the submission of the petition, and Article 39 (2) of the Fundamental Law. As a secondary motion, the petitioners also requested a declaration – based on Article 24 (2) (f) of the Fundamental Law and Article 32 (2) of the Act CLI of 2011 on the Constitutional Court (hereinafter:

ACC) – that the challenged provision of the Project Act is contrary to Article 4 paragraphs 1, 4 and 6 of the Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters signed in Aarhus on 25 June, 1998 (hereinafter: Aarhus Convention) promulgated by Act LXXXI of 2001.

[2] The challenged provision of the Project Act (in force at the time of the submission of the motion), which refers back to Act II of 2014 on the Proclamation of the Convention between the Government of Hungary and the Government of the Russian Federation on Cooperation in the Peaceful Uses of Nuclear Energy (hereinafter: Convention), states the following: "The business and technical data contained in the Implementation Agreements and in the contracts concluded, in connection with the Project, by the Russian Designated Organisation within the meaning of Article 3.1 of the Convention and its subcontractors, and the Hungarian Designated Organisation within the meaning of Article 3.2 of the Convention and its subcontractors, as well as the business and technical data relating to the preparation and conclusion of these Implementation Agreements, contracts and the Convention, together with the data serving as a basis for the decisions relating thereto, shall not be accessible as data of public interest for a period of 30 years from the date of their creation, with due account to Section 27 (2) (b) and (h) of the Act CXII of 2011 on the Right to Informational Self-Determination and Freedom of Information."

[3] 2 The petitioners argue that the challenged provision – in the interests of national security and the protection of intellectual property rights – actually completely precludes, without any discretion, the disclosure of – specifically not defined – “business data", "technical data" and "data serving as a basis for a decision" generated in connection with the expansion of the Paks Nuclear Power Plant (hereinafter: Project), as data of public interest for a period of thirty years from the date of their generation. Article VI (2) of the Fundamental Law guarantees the right of access to data of public interest, and Article 39 (2) thereof specifically states that data relating to public funds qualify as data of public interest. According to the petitioners, the Project affects both provisions of the Fundamental Law. They point out that, with regard to Article I (3) of the Fundamental Law, the protection of national security interests and intellectual property rights may constitute a legitimate restriction of the right to access data of public interest, but the contested provision of the Project Act does not meet either the necessity or the proportionality criteria. The provisions of Act CXII of 2011 on the Right to Informational Self-Determination and Freedom of Information (hereinafter: FOIA) and Act CLV of 2009 on the Protection of Classified Data (hereinafter: APCD) adequately ensure the protection of the interests referred to in the Project Act. Since the law-maker failed to identify any circumstances that would necessitate further restrictions on the accessibility of data of public interest, and since the Project Act makes an uncertain set of data completely inaccessible in its entirety – irrespective of whether the specific information otherwise concerns one of the categories to be protected – the contested provision unnecessarily and disproportionately infringes Article VI (2) of the Fundamental Law. The mandatory provision also eliminates the possibility of a judicial remedy against the refusal of a data request. This is the case, because the data controller has no discretion: if the data request falls within the scope of the Project Act, it must automatically refuse it. For this reason, the court can also only formally examine the lawfulness of the controller's procedure. The Project Act therefore removes the discretion under Article 30 (5) of the FOIA with regard to both the data controller and the court.

[4] The petitioners refer to the practice of the Constitutional Court, in the light of which a substantive and effective judicial remedy must be ensured over the restriction of

publicity. In addition to examining the formal criteria, this must also include an examination of the content of the justification for the restriction of public access. Since Section 5 of the Project Act does not provide for the possibility of a substantive review of the refusal of a data request by a court, it violates Article VI (2) of the Fundamental Law. The Project Act limits the accessibility of the data for a period of thirty years, which is the same as the maximum period of protection for the data at "Top Secret!" and "Secret!" classification levels as laid down in Section 5 (6) a) of the APCD.

[5] At the same time, the APCD contains a number of formal and substantive guarantees to ensure that the right to access data of public interest is restricted only to the extent and for the duration that is necessary. The petitioners refer to Section 8 (1) of the APCD, which stipulates that the classification must be reviewed at most every five years. In contrast, the Project Act uniformly restricts all data – business, technical and decision supporting data – from public access for thirty years, without requiring a review of the justification for the restriction at specified intervals. This is a disproportionate restriction of Article VI (2) of the Fundamental Law.

[6] The petitioners also point out that the Project Act entered into force on the eighth day after its promulgation, which means that the prohibition of access contained in it may also have an effect on pending proceedings. Finally, the petitioners argue that the prohibition of access also covers data that constitute environmental information, but that the restriction of their disclosure is only possible, according to the final provision of Article 4 (4) of the Aarhus Convention, if interpreted in a restrictive way and only if the data controller takes into account "the public interest served by disclosure and taking into account whether the information requested relates to emissions into the environment" before restricting disclosure" In view of this, the petitioners claim, as explained above, that the Project Act does not provide for the restriction of the data concerned only in the case of actual harm, does not provide for the possibility of the discretion invoked, and thus violates Article 4 (1) and (4) (a) to (b) and (e), the final provision of Article 4 (4) and Article 6 (6) of the Aarhus Convention.

[7] 3 The Constitutional Court – in accordance with the Section 57 (2) of the ACC and Section 36 (3) to (5) of the Constitutional Court's Rules of Procedure – has contacted the Minister of Justice, the Minister of National Development, the Government Commissioner of the Prime Minister's Office, the President of the National Authority for Data Protection and Freedom of Information (hereinafter: NAIH), the Director of the Methodological Centre of the Energiaklub Policy Institute (hereinafter: Policy Institute) and the Commissioner for Fundamental Rights in order to present their views.

[8] 3.1 Representing the united government position, the Minister of Justice put forward the following argument. The legal basis for the challenged provision of the Project Act is Article 13 (3) of the Convention, entitled "Confidentiality", which thus fulfils Hungary's international legal obligation. According to the Convention, "the information exchanged under this Convention or resulting from its implementation which is considered confidential by both Parties shall be clearly defined and identified. [...] The Parties shall minimise the number of persons who have access to such information and shall ensure that it is used only for the purposes set out in this Convention. Such information will not be disclosed to the public or transferred to third parties. Such information shall be protected in accordance with the laws of both Parties." In the opinion of the Minister of Justice, the Project Act is in line with the Fundamental Law, the FOIA and Hungary's obligations under international law and the European Union. The purpose of the

provision is firstly to fulfil the obligation undertaken in Article 13 of the Convention, in accordance with Article 27 (2) of the FOIA.

[9] With reference to the case law of the Constitutional Court, the Minister of Justice pointed out that in the Hungarian legal system the general rule is publicity, which can only be restricted by law, for reasons determined by the content, to the narrowest possible extent. Due to the nature of the Project, the external and internal security of the State and the guarantee of its energy supply are very much affected, which justifies the restriction of public access to certain data. In the area of necessity, the Minister of Justice pointed out that the APCD does not provide adequate protection, as its system – in particular the five-yearly review obligation – is not in line with the period of the expansion and operation of the nuclear power plant, and most of the data cannot be separated: "non-" classified data could also be used to infer classified data. With respect to proportionality, the Minister of Justice explained that the scope of the data protected is sufficiently narrow (typically business and technical data contained in the contracts of contractors; business and technical data relating to the preparation and conclusion of the Convention; and data relating to the conclusion, preparation and basis of the contracts concerned). In particular, only specific data, the disclosure of which would harm national security interests or intellectual property rights, should not be disclosed. He added that the provision does not apply to data that may be disclosed under other sectoral laws – i.e. data accessible on public interest grounds – or to data that are subject to the APCD.

[10] According to the Minister of Justice, contrary to the petitioners' claim, data requests under the Project Act are subject to the discretion of the data controller, and judicial review is available against its decision. The data controller must first assess whether the requested data falls within the scope of Section 5 of the Project Act. If this is not the case – for example, because it is subject to a sectoral law, such as Act LIII of 1995 on the General Rules for the Protection of the Environment (hereinafter: APE) – i.e. data accessible on public interest grounds –, then it will comply with the data request. If this is the case, and if there are any restrictions based on the interests set out in Section 27 (2) (b) or (h) of the FOIA, the data request will be refused. If this not the case, the data request will be served. In addition to this, under the FOIA, the party requesting the data can challenge the controller's decision in court, and the court can examine whether the controller's classification was appropriate and whether the legal basis for the refusal – the interest of national security or intellectual property rights – existed. Finally, the Minister of Justice pointed out that the scope of exceptions under Article 27 (2) (b) and (h) of the FOIA are in line with the provisions under Article 4 (4) (a), (b), (d) and (e) of the Aarhus Convention and Article 4 (2) (b) and (e) of Directive 2003/4/EC of the European Parliament and of the Council of 28 January 2003 on public access to environmental information and repealing Directive 90/313/EEC (hereinafter the Directive).

In other words, the Project Act does not violate any obligation under international law or EU law, as environmental information is not covered by it, subject to the exceptions set out in the cited sources of law.

[11] The Minister of Justice also reiterated that the restriction under the Project Act does not apply to environmental information and to the disclosure of data that must be disclosed independently of the FOIA under other Acts, such as the APE.

[12] 3.2 The President of the NAIH first explained that access to data of public interest related to the Project may be restricted by a specific Act pursuant to Article 27 (2) of the FOIA, due to the strategic importance of the project and the security of energy production.

Section 5 of the Project Act is in line with this with regard to only applying to data of public interest falling within certain categories of data and protects the purposes permitted by the FOIA.

[13] However, the President of the NAIH also raised the following substantive concerns: i) the restriction applies to a wide range of data (business and technical data), where individual data may require different treatment instead of a uniform restriction; ii) instead of an *ex lege* restriction, the controller should consider the necessity of data processing, but this is not possible under the Project Act, which, in this respect, differs from the laws restricting publicity. If the request falls within the scope of the Project Act, the data controller must refuse the request, regardless of whether the restriction is necessary in relation to the requested data.

[14] Finally, the President of the NAIH pointed out that the Project Act may also concern data that may fall under Section 17 (9) to (11) of the Act CXVI of 1996 on Nuclear Energy (hereinafter: ANE). At the same time, the President of the NAIH concluded in his resolution No. NAIH-2782-2/2014/J that in the case of a publicity restriction permitted by the ANE, the necessity of such a restriction must be considered with special care, also on the basis of Article VI (2) and Article 39 (2) of the Fundamental Law. According to the President of the NAIH, this places a special responsibility on the data controller to ensure that the restriction of the right to access data of public interest does not go beyond what is necessary. The Project Act should therefore be interpreted restrictively: it does not apply to data the disclosure of which is expressly ordered by a specific Act, such as the Act CXCV of 2011 on Public Finances (hereinafter: APF) or the APE. The thirty-year limitation period does not preclude the controller's discretion to disclose data whose disclosure does not harm national security interests or intellectual property rights.

[15] 3.3. The commissioner for fundamental rights and the deputy commissioner for the protection of the interests of future generations made the following comments. The challenged provision of the Project Act locks up for thirty years the decision-preparatory data related to the Project, even though the decision in question (the Project) fundamentally determines – beyond the present generation – Hungary's energy strategy. This restriction excludes the possibility of the social participation of the present generation and makes it impossible to channel the interests of future generations in the decision-making process, thereby causing a disproportionate harm that raises the question of a violation of Article P of the Fundamental Law. According to the commissioner and the deputy commissioner, the state cannot take a long-term decision falling under Article P of the Fundamental Law to the complete exclusion of the public, as this would deprive individuals of their obligations to protect environmental values. In the context of Article P) of the Fundamental Law, they also argue that neither the State nor any social body is able or entitled to determine the interests of future generations on its own. This can only be done through the broadest possible social debate. In the context of Article VI (2) of the Fundamental Law, they point out that Section 5 of the Project Act actually excludes the disclosure of documents – and not of the information to be protected – and does not differentiate: it prohibits the disclosure of all technical and business data, which constitutes a disproportionate restriction of fundamental rights. Finally, the Project Act deprives the controller of the possibility of a substantive review, and the judge is also deprived of discretion as to the necessity and proportionality of the restriction.

[16] 3.4. According to the Director of the Policy Institute, the challenged Section 5 of the Project Act seriously violates the fundamental right to access and disseminate data of

public interest and the principle of the publicity of public funds, by going beyond the necessary extent and ignoring the essential content of the foregoing. The Director also considers the contested provision to be contrary to European Union law and the Aarhus Convention. The Project Act does not identify specific interests that would justify a general and undifferentiated exclusion of the public, and therefore constitutes an unnecessary and disproportionate restriction of fundamental rights. In addition, the contested provision, because of the lack of discretion, also eliminates the possibility of judicial review. Article 39(2) of the Fundamental Law is violated because the society is essentially unable to control the progress of one of the largest domestic projects, even though it is in a top public interest, precisely because of its scale. Finally, the Director explained that the provision is contrary to Article 4 (6) of the Aarhus Convention, which states that the public shall not be excluded from environmental information in general and without differentiation.

[17] 3.5. In addition to those contacted by the Constitutional Court, five NGOs submitted a unified comment on the conflict of Article 5 of the Project Act with the Fundamental Law. According to the observation, first of all, the Convention and the Implementation Agreements are concluded by a public authority – the Ministry of National Development (hereinafter: MND) pursuant to Article 2.1 (2), and Article 2.5 of the Convention – and the contracts concluded by the bodies designated under the Convention and their subcontractors are for the use of public funds, i.e. the data relating to them are data of public interest pursuant to Section 3.5 and Section 26 of the FOIA and Article 39 (2) of the Fundamental Law. They argue that restrictions on the freedom of information are acceptable in the interests of national security or the protection of intellectual property rights, but that the Project Act also covers data that are not necessarily related to the values to be protected, which means that the restriction is unnecessary. The term "business and technical data" is not defined in the Project Law or in any other legislation, which makes the scope of the restriction uncertain, which in itself violates the proportionality requirement. They explained that the provisions of the FOIA and the APCD, and the possibility of individual classification of specific data already sufficiently ensure the protection of the interests indicated in the Project Act. The project involves a significant use of public funds – its risks related to energy, geopolitics, the environment and the society are considerable and its impact will last for generations – and therefore, with respect to the project, the provisions of Article 39 (2) of the Fundamental Law are enhanced. Overall, they argued that while the public interest in relation to the Project is very strong, the Project Act imposes a restriction on public access that no other public interest information in the legal system is subject to. The severity of the restriction is therefore disproportionate to the objective it seeks to achieve, and therefore Section 5 of the Project Act violates Article VI (2) of the Fundamental Law.

[18] 4 The contested provision of the Project Act was amended – with effect from 12 May 2016 – by Section 1 of Act XIX of 2016 amending Act VII of 2015 on the investment related to the maintenance of the capacity of the Paks Nuclear Power Plant and amending certain related acts (hereinafter: "Amending Act"). In view of this, the petitioning Members of Parliament supplemented their request. In their opinion, the amended – and effective – text still does not provide any possibility for discretion. The regulation provides *ex lege* for the restriction of publicity, and therefore, as far as the group of seekers of public interest data is concerned, it deprives the data seekers of the rights guaranteed by Article XXVIII (1) and (7) of the Fundamental Law, by violating Article XV (2) of the Fundamental Law. However, in view of the change brought about by the

Amending Act, the petitioners propose for the Constitutional Court to lay down constitutional requirement – while saving the legal system – by declaring the need to exercise discretion during the application of the contested provision, with due account to the competing interests.

[19] 5. Following this, the Constitutional Court also contacted the CEO of MVM Paks II Nuclear Power Plant Development Private Limited Company (hereinafter: "Paks II") to explain his position. In his response, the director argued that the application of the Project Act clearly requires a substantive assessment. First, on must decide whether the requested data are business, technical or pre-decision data under the Project Act. Then one should consider on a case-by-case basis whether there is an overriding interest in the disclosure or in refusing to disclose the requested data, for reasons of national security or the protection of intellectual property rights. The director pointed out that according to Article 31 (2) of the FOIA, the burden of proof that the restriction of public access is in the public interest lies with the data controller. In addition, the person requesting the data may – according to the rules of the FOIA – go to court.

[20] The director then explained that, with regard to Article 4 (4) of the Aarhus Convention, freedom of information is not unlimited even with regard to environmental information. However, the contested provision of the Project Act also guarantees – and obliges the data controller to exercise – discretion in this respect. Overall, the director considers that Article 5 of the Project Act is not mandatory and it provides for judicial review of the controller's discretion, therefore it is in line with Article I (3), Article VI (2), Article XXVIII (1) and (7) and Article 39 (2) of the Fundamental Law.

II.

[21] 1. The provision of the Fundamental Law in force at the time the petition was filed and subsequently amended:

"Article VI (2) Everyone shall have the right to the protection of his or her personal data, as well as to access and disseminate data of public interest."

[22] 2. The provisions of the Fundamental Law in force at the time of examining the petition:

"Article VI (3) Everyone shall have the right to the protection of his or her personal data, as well as to access and disseminate data of public interest."

“Article XV (2) Hungary shall guarantee fundamental rights to everyone without discrimination and in particular without discrimination on the grounds of race, colour, sex, disability, language, religion, political or other opinion, national or social origin, property, birth or any other status.”

“Article 39 (2) Every organisation managing public funds shall be obliged to publicly account for its management of public funds. Public funds and national assets shall be managed according to the principles of transparency and the purity of public life. Data relating to public funds and national assets shall be data of public interest.”

[23] 3. The provisions of the Aarhus Convention affected by the petition:

“Article 4. Access to environmental information

1. Each Party shall ensure that, subject to the following paragraphs of this article, public authorities, in response to a request for environmental information, make such information available to the public, within the framework of national legislation, including, where requested and subject to subparagraph (b) below, copies of the actual documentation containing or comprising such information:
(a) Without an interest having to be stated;
(b) In the form requested unless:
(i) It is reasonable for the public authority to make it available in another form, in which case reasons shall be given for making it available in that form; or
(ii) The information is already publicly available in another form.
[...]
4. A request for environmental information may be refused if the disclosure would adversely affect:
(a) The confidentiality of the proceedings of public authorities, where such confidentiality is provided for under national law;
(b) International relations, national defence or public security;
(c) The course of justice, the ability of a person to receive a fair trial or the ability of a public authority to conduct an enquiry of a criminal or disciplinary nature;
(d) The confidentiality of commercial and industrial information, where such confidentiality is protected by law in order to protect a legitimate economic interest. Within this framework, information on emissions which is relevant for the protection of the environment shall be disclosed;
(e) Intellectual property rights;
(f) The confidentiality of personal data and/or files relating to a natural person where that person has not consented to the disclosure of the information to the public, where such confidentiality is provided for in national law;
(g) The interests of a third party which has supplied the information requested without that party being under or capable of being put under a legal obligation to do so, and where that party does not consent to the release of the material; or
(h) The environment to which the information relates, such as the breeding sites of rare species.
The aforementioned grounds for refusal shall be interpreted in a restrictive way, taking into account the public interest served by disclosure and taking into account whether the information requested relates to emissions into the environment.
[...]
6. Each Party shall ensure that, if information exempted from disclosure under paragraphs 3 (c) and 4 above can be separated out without prejudice to the confidentiality of the information exempted, public authorities make available the remainder of the environmental information that has been requested.

[24] 4. The challenged provision of the Project Act in force at the time of submitting the petition:

"Section 5 The business and technical data contained in the Implementation Agreements and in the contracts concluded, in connection with the Project, by the Russian Designated Organisation within the meaning of Article 3.1 of the Convention and its subcontractors, and the Hungarian Designated Organisation within the meaning of Article 3.2 of the Convention and its subcontractors, as well as the business and technical data relating to the preparation and conclusion of these Implementation Agreements, contracts and the Convention, together with the data serving as a basis for the decisions relating thereto,

shall not be accessible as data of public interest for a period of 30 years from the date of their creation, with due account to Section 27 (2) (b) and (h) of the Act CXII of 2011 on the Right to Informational Self-Determination and Freedom of Information."

[25] 5. The challenged provision of the Project Act in force at the time of examining the petition:

"Section 5 The business and technical data contained in the Implementation Agreements and in the contracts concluded, in connection with the Project, by the Russian Designated Organisation within the meaning of Article 3.1 of the Convention and its subcontractors, and the Hungarian Designated Organisation within the meaning of Article 3.2 of the Convention and its subcontractors, as well as the business and technical data relating to the preparation and conclusion of these Implementation Agreements, contracts and the Convention, together with the data serving as a basis for the decisions relating thereto, the disclosure of which in the course of request for data of public interest according to Chapter III of the Act CXII of 2011 on the Right to Informational Self-Determination and Freedom of Information (hereinafter: FOIA) would harm national security interests or intellectual property rights under Section 27 (2) (b) and (h) of the FOIA, shall not be accessible as data of public interest for a period of 30 years from the date of their creation."

[26] 6. The relevant provisions of the FOIA:

"Section 3 For the purposes of this Act:
5. data of public interest shall mean information or data other than personal data, registered in any mode or form, controlled by the body or individual performing state or local government responsibilities, as well as other public tasks defined by legislation, concerning their activities or generated in the course of performing their public tasks, irrespective of the method or format in which it is recorded, its single or collective nature; in particular data concerning the scope of authority, competence, organisational structure, professional activities and the evaluation of such activities covering various aspects thereof, the type of data held and the regulations governing operations, as well as data concerning financial management and concluded contracts;
6. data accessible on public interest grounds means any data, other than data of public interest, the disclosure, availability or accessibility of which is prescribed by an Act for the benefit of the general public;"

"Section 27 (1) Access to data of public interest or data public on grounds of public interest shall be restricted if it has been classified under the Act on the Protection of Classified Information.
(2) The right to access data of public interest or data accessible on public interest grounds may be restricted by an Act, with the specific type of data indicated, if considered necessary for the purposes of
[...]
(b) national security;
[...]
(h) intellectual property rights.

(3) Any data that is related to the central budget, the budget of a local government, the appropriation of European Union financial assistance, any subsidies and allowances in

which the budget is involved, the management, control, use and appropriation and encumbrance of central and local government assets, and the acquisition of any rights in connection with such assets shall qualify as data public on grounds of public interest, and as such shall not qualify as business secrets, nor shall any data specified by a separate Act – in the public interest – as information to have access to or to be disclosed. Such disclosure, however, shall not result in access to any data, in particular to protected know-how, that, if made public, would be unreasonably detrimental for the business operation, provided that withholding such information shall not interfere with the availability of, and access to, information of public interest.

(3a) Any natural or legal person, or unincorporated business association entering into a financial or business relationship with a person belonging to the sub-system of state finances shall, upon request, provide any member of the general public with information on the data public on grounds of public interest under paragraph (3) and related to this legal relationship. The obligation referred to above may be fulfilled by the public disclosure of data public on grounds of public interest, or, if the information requested had previously been disclosed electronically, by way of reference to the public source where the data is available.

[...]

(5) Any data compiled or recorded by an organ performing public duties as part and in support of its decision-making process within the limits of its powers and duties shall not be disclosed for ten years from the date it was compiled or recorded. After considering the weight of public interest with respect to granting or denying access, the head of the organ that processes the data in question may permit access.

(6) A request to access data underlying a decision may be dismissed after the decision is adopted but within the time limit referred to in paragraph (5), if the data underlies future decisions, or access to it would jeopardise the lawful functioning of the organ performing public duties, or would jeopardise the performance of its duties without any undue external influence, such as, in particular, the free expression of the standpoint of the organ which generated the data during the preliminary stages of its decision-making process."

III

[27] 1. The petitioning Members of Parliament have clearly indicated the legal basis of the petition for posterior norm control and the establishment of the violation of an international treaty, with reference to Article 24 (2) (e) and (f) of the Fundamental Law and Section 32 (2) of the ACC [Section 52 (1b) (a) of the ACC]. In their application, they set out the grounds for initiating the procedure [Section 52 (1b) (b) of the ACC], and they also clearly identified Section 5 of the Project Act as the legal provision they sought to have annulled [Article 52 (1b) (c) of the Fundamental Law] on the grounds of the infringement of Article VI (2), Article XV (2) and Article 39 (2) of the Fundamental Law and Article 4 (1), (4) and (6) of the Aarhus Convention [Section 52 (1b) (d) of the ACC]. Both in their original motion and in its supplement, the petitioning Members of Parliament explained why they consider the challenged provision of the Project Act to be contrary to the Fundamental Law and the international treaty [Section 52 (1b) (e) of the ACC]. Finally, the Members of Parliament clearly requested the annulment – with retroactive effect – of Section 5 of the Project Act [Section 52 (1b) (f) of the ACC]. On the whole, therefore, the motion complies with the requirements of the ACC.

[28] 2. The legal provision challenged by the petitioners was clarified by the Amending Act, which entered into force on 12 May 2016. The petitioners, however, subsequently supplemented the petition, maintained their application also with regard to the amended text of the provision, and also supplemented their arguments for its annulment. In addition, Article 4 of the Seventh Amendment to the Fundamental Law amended Article VI of the Fundamental Law with effect from 29 June 2018. As a consequence, the right of access to and dissemination of data of public interest invoked by the petitioners has been moved from the original paragraph (2) to Article VI (3), with the same wording. In view of all the above, the Constitutional Court conducted its substantive proceedings in relation to Section 5 of the Project Act, currently in force, in the light of the provisions of the Fundamental Law – and the Aarhus Convention – in force.

IV

[29] The petition is unfounded.

[30] 1. First, the Constitutional Court examined the petitioners' arguments that the challenged provision of the Project Act was contrary to the Fundamental Law. According to the content of the petition, the challenged provision of the law violates the essence of freedom of information, as it implements – *ex lege* – the publicity restriction affecting an extremely wide range of data of public interest in such a way that neither the data controller nor the court reviewing the controller's action has the opportunity to exercise discretion regarding the content. Thus, the petitioners alleged that the Project Act mandatorily provides for automatic and total data blocking. These concern all the dimensions of the interpretation of the freedom of information (its content and function; its subject-matter and its obligated parties, as well as the possibility to restrict it). In this light, the Constitutional Court first of all considered it necessary to review its case law in relation to Article VI (3) and Article 39 (2) of the Fundamental Law.

[31] 2. The right to access and disseminate information of public interest guaranteed by Article VI (3) of the Fundamental Law is summarised in the case law of the Constitutional Court as freedom of information. {Decision 7/2020. (V. 13.) AB, Reasoning [14]}. Freedom of information is "of fundamental importance in the area of access to information and the free flow of information, in particular in the area of transparency of the activities of public authorities and bodies of the State" {Decision 13/2019. (IV. 8.) AB, Reasoning [27]}

[32] 2.1 Freedom of information is multifunctional: it is both a fundamental right in its own right and a precondition for many other rights. In both cases, it is inextricably linked to a democratic constitutional system, i.e. one that seeks to settle public issues through the broadest possible social debate. According to the Constitutional Court, the purpose of freedom of information "is essentially based on two interrelated reasons: on the one hand, to create the conditions for the informed expression of opinion on the functioning of public power, and on the other hand, to provide external control and incentives for democratic and efficient functioning. Forming an informed opinion on the functioning of the State is essential for judging and holding to account the actions of those in power, for exercising citizen control and influence over public decision-making and the conduct of public affairs, and more broadly for the development of an open, fact-based discourse on public affairs." {Decision 13/2019. (IV. 8.) AB, Reasoning [29] to [30], Decision 7/2020. (V. 13.) AB, Reasoning [14]}. In its Decision 21/2013 (VII. 19.) AB, the

Constitutional Court, confirming its previous case law, also stated in principle that freedom of information "enables the control of the legality and efficiency of elected representative bodies, the executive and the public administration, and stimulates their democratic functioning. Due to the complexity of public affairs, the citizens' control and influence over the decision-making by the public authorities and the management of the cases shall only be effective if the competent organs reveal the necessary information." {Decision 21/2013. (VII. 19.) AB, Reasoning [30]} As a summary, on may conclude that: "Guaranteeing the democratic operation of the State is a constitutional function of the freedom of information. The openness of exercising public authority, and in a wider context, the transparency of public affairs are undoubtedly preconditions of exercising other fundamental rights (expression of opinion, participation in community decision-making) and they can be regarded as guarantees of the effective operation of the State." {Decision 8/2016. (IV. 6.) AB, Reasoning [43]} In other words: "Access to data of public interest is a prerequisite for the democratic functioning of the State." {Decision 4/2015. (II. 13.) AB, Reasoning [27]}

[33] It should be stressed, however, that guaranteeing the transparency of public authority is only one of the objectives of freedom of information. With the entry into force of Article 39 (2) of the Fundamental Law, this has been supplemented, as it now also requires "the principles of public accountability, transparency and fairness in public life" {Decision 8/2016 (IV. 6.) AB, Reasoning [17]}. According to the Constitutional Court, "the Fundamental Law [...] lays down in its chapter on 'Public Funds' the requirement of transparent management of national property and public funds [Article 38 (4), Article 39]. It also explicitly provides that "data relating to public funds and national property are data of public interest", irrespective of who or which organisation holds them [Article 39 (2)]. Article 39 (1) of the Fundamental Law stipulates that the central budget may only grant aid or make payments under a contract to an organisation whose activities for the use of the aid are – among others – transparent. Paragraph (2) provides that every organisation managing public funds shall be obliged to publicly account for its management of public funds. As the Minister of Justice pointed out in his reply, the rules of the FOIA on the accessibility of data of public interest and data accessible on public interest grounds are intended to ensure transparency in the management of public funds. To this end, the legislator lays down obligations both for persons performing public functions and for persons/organisations having a financial or business relationship with a person/entity belonging to a sub-system of public finances." {Decision 7/2020. (V. 13.) AB, Reasoning [15]}. In other words: the Fundamental Law now requires transparency not only with regard to public power, but also concerning the use of public funds.

[34] 2.2. Constitutional doctrine has always treated freedom of information together with freedom of expression, or more precisely as part of freedom of expression. According to this, "freedom of expression can be considered the 'mother right' of the so-called communication rights, and freedom of information is one of the fundamental communication rights. The relationship between the two rights is self-evident: informed expression presupposes access to information in the public interest, freedom of information is 'often a precondition and condition for the exercise of the right to freedom of expression' [...], since being well informed and knowing the facts is a condition of freedom of expression." {Decision 13/2019. (IV. 8.) AB, Reasoning [31]} In this framework of interpretation, "these two fundamental rights ensure freedom to discuss public affairs and together they enable the individual to participate in social and political processes." {Decision 4/2015. (II. 13.) AB, Reasoning [27]} Overall, therefore, freedom

of information "belongs to the group of rights of communication and, as such, is closely related to the freedom of expression guaranteed by Article IX (1) of the Fundamental Law, the freedom of scientific research, learning and teaching guaranteed by Article X (1), and the constitutional value of democracy protected by Article B (1).” {Decision 29/2014. (IX. 30.) AB, Reasoning [43]}.

[35] 2.3. The defining and characterising principle of freedom of information is the publicity of the data of public interest. Accordingly, "all data of public interest are public” {Decision 2/2014. (I. 21.) AB, Reasoning [41]} i.e. "in a democratic society [...] public access to data of public interest is the general rule; in comparison, restrictions on public access to data of public interest should be considered an exception" {Decision 21/2013. (VII. 19.) AB, Reasoning [39]; Decision 5/2014. (II. 14.) AB, Reasoning [33]; Decision 29/2014. (IX. 30.) AB, Reasoning [13]; Decision 4/2015. (II. 13.) AB, Reasoning [28]; Decision 6/2016. (III. 11.) AB, Reasoning [44]; Decision 8/2016. (IV. 6.) AB, Reasoning [42]; Decision 13/2019. (IV. 8.) AB, Reasoning [34]}.

[36] The principle of publicity must be enforced in three dimensions. On the one hand, there is the question of what exactly it concerns (what is the subject of the freedom of information); who is bound by it and how (who is obliged by the freedom of information); and thirdly it needs to be clarified how and to what extent freedom of information can be restricted, bearing in mind the principle of publicity.

[37] 2.4. First, the subject of the freedom of information is primarily "data of public interest. This concept is not thoroughly defined in the Fundamental Law. Article 39 (2) of the Fundamental Law explicitly states only with regard to data on public funds and national property that they are data of public interest. However, in view of the purpose of the fundamental right as explained above, it is clear that the scope of data of public interest is not limited to data mentioned in Article 39 (2) of the Fundamental Law. In principle, information and knowledge in the possession of bodies and persons performing state or local government functions and other public functions, and relating to their activities or being in connection with the performance of their public functions, shall be considered data of public interest.” {Decision 21/2013. (VII. 19.) AB, Reasoning [34]; Decision 5/2014. (II. 14.) AB, Reasoning [31]; Decision 3077/2017. (IV. 28.) AB, Reasoning [29]} In the Decision 8/2016. (IV. 6.) AB, the Constitutional Court found that “the scope of data of public interest is defined in general terms in Section 3 point 5 of the Act CXII of 2011 on the Right of Informational Self-Determination and on Freedom of Information […], developed – according to the preamble of the Act – »for the purpose of implementing the Fundamental Law, on the basis of Article VI of the Fundamental Law«. {Decision 8/2016. (IV. 6.) AB, Reasoning [17]; see also: Decision 3077/2017. (IV. 28.) AB, Reasoning [28]; Decision 3/2018. (IV. 20.) AB, Reasoning [33] and [36]; Decision 13/2019. (IV. 8.) AB, Reasoning [40]}. In light of this, the concept of data of public interest is contained in the FOIA {Decision 7/2020. (V. 13.) AB, Reasoning [17]}. In addition to Section 3 (5) of the FOIA, Article 39 (2) of the Fundamental Law applies to data on public funds, which can be regarded as a concretisation of the freedom of information within the Fundamental Law {see: Decision 3026/2015. (II. 9.) AB, Reasoning [28]}.

[38] However, the freedom of information does not only cover the scope of data of public interest as defined in Article 39 (2) of the Fundamental Law and Section 3 (5) of the FOIA, i.e. data that are typically closely related to the activities of public authorities or

the management of public property. {see: Decision 7/2020. (VI. 13.) AB, Reasoning [21]}. Indeed, Section 3 point 6 of the FOIA states that data public on grounds of public interest shall mean any data, other than public information, that are prescribed by law to be published, made available or otherwise disclosed for the benefit of the general public. In addition to other Acts, the FOIA itself also defines a broader scope of data public on grounds of public interest [see: Section 26 (2) and (3); Section 27 (3) to (3a) of the FOIA]. Data public on grounds of public interest share the legal status of data of public interest with regard to their disclosure or the blocking of it [see Section 1 and Section 2; Section 26 (1); Section 27 (1) and (2) and Section 28 (1) of the FOIA]. Finally, it is important to underline that the assessment of whether data is of public interest or it is data public on grounds of public interest is a question of applying the law – ultimately a matter for the ordinary courts – which is subject to the review of constitutionality in a narrow scope {Decision 3077/2017. (IV. 28.) AB, Reasoning [27]}; in summary and pointing to the interpretation of Article 39 (2) of the Fundamental Law, which is the task of the Constitutional Court, see Decision 3/2018 (IV. 20.) AB, Reasoning [33] to [36]; Decision 13/2019 (IV. 8.) AB, Reasoning [41]}.

[39] 2.5. As regards the scope of the right to freedom of information, the general rule is that everyone is entitled to it, i.e. anyone can access data of public interest and data public on grounds of public interest without having to justify or prove an interest {Decision 21/2013. (VII. 19.) AB, Reasoning [40]; Decision 29/2014. (IX. 30.) AB, Reasoning [37] and [46]}.

[40] The scope of the obliged parties is determined, on the one hand, by the legal status or activity of the data provider [body or person performing a public task pursuant to Section 28 (1) of the FOIA], and on the other hand, by the nature of the data itself {see Decision No 3026/2015 (II. 9.) AB, Reasoning [19]}. According to the latter finding, the scope of obliged parties is therefore broader than the scope of bodies or persons performing public tasks. In these cases, the legal basis for the obligation to provide data is Article 39 (2) of the Fundamental Law, Section 26 (3), Section 27 (3) and (3a) of the FOIA, and other statutory provisions based on Section 3 (6) and Section 27 (3) of the FOIA. As interpreted by the Constitutional Court, "with account to the aim of the fundamental right, the obliged parties are in general the organs and persons performing the tasks of the state and the local government or any other public duty. Taking into account, however, that according to Article 39 (2) of the Fundamental Law, »every organisation managing public funds« shall be obliged to publicly account for its management of public funds, also the organisations other than the ones with a public-service mission shall guarantee access to the data of public interest that they control – in particular, upon a relevant request." {Decision 21/2013. (VII. 19.) AB, Reasoning [35]; see also in: Decision 29/2014. (IX. 30.) AB, Reasoning [38]; Decision 25/2014. (VII. 22.) AB, Reasoning [30]; irrespectively to type of body it belongs to: Decision 8/2016. (IV. 6.) AB, Reasoning [16] to [17] and [28]; Decision 3/2018. (IV. 20.) AB, Reasoning [44] to [47]; Decision 7/2020. (V. 13.) AB, Reasoning [23], [29] and [33]}

[41] The obligated party must guarantee the freedom of information proactively or at the request of the right holder. {See: Decision 23/2013. (VII. 19.) AB, Reasoning [35]; Decision 5/2014. (II. 14.) AB, Reasoning [32]; Decision 29/2014. (IX. 30.) AB, Reasoning [38]; Decision 8/2016. (IV. 6.) AB, Reasoning [42]; Decision 3/2018. (IV. 20.) AB, Reasoning [32]; Decision 7/2020. (V. 13.) AB, Reasoning [25]}. The details of how information is to be provided are set out in the FOIA [Section 26 (1) and (2), Section

27 (3a); and Sections 28 to 31]. In other words, request for data – in the absence of proactive disclosure – and its ultimate enforceability through the courts is a guarantee of freedom of information, without which it would be rendered void {See: Decision 4/2015. (II. 13.) AB, Reasoning [29]; Decision 3077/2017. (IV. 28.) AB, Reasoning [23] to [24]; Decision 7/2020. (V. 13.) AB, Reasoning [34]}.

[42] 2.6. Although freedom of information is of paramount importance for the maintenance of a democratic, pluralistic State under the rule of law, guaranteeing a wide range of fundamental rights, it is not an absolute, i.e. unlimited, fundamental right. As pointed out by the Constitutional Court in the Decision 21/2013. (II. 19.) AB, "the right of access to and dissemination of data of public interest […] may only be restricted for the purpose of the enforcement of another fundamental right or the protection of a constitutional value, to the extent absolutely necessary, in proportion with the desired objective, with paying respect to the essence of the fundamental right [Article I (3)]" {Decision 21/2013. (VII. 19.) AB, Reasoning [37]}; Freedom of information, as a fundamental right of communication in concrete terms, shares the constitutional standard for the restriction of freedom of expression. In this respect, the Constitutional Court has confirmed its previous case law according to which "the less the objective to be achieved by the restriction is linked to the protection of a specific fundamental right, the more stringent the justification for the restriction must be. In the context of the freedom of expression the Constitutional Court argued that »the restrictive laws to be assessed are to be assigned a greater weight if they directly serve the realisation or protection of another subjective fundamental right, a lesser weight if they protect such rights only indirectly through the mediation of an 'institution', and the least weight if they merely serve some abstract value as an end in itself (public peace, for instance)«" {Decision 21/2013. (VII. 19.) AB, Reasoning [44]}. In other words, freedom of information enjoys at least the same level of constitutional protection as its mother right, the freedom of expression {see: Decision 29/2014. (IX. 30.) AB, Reasoning [45]}.

[43] Compared to the principle of publicity, the blocking of data of public interest is an exception, it can only be accepted in compelling cases, or the law imposing the restriction must be interpreted restrictively. {see: Decision 21/2013. (VII. 19.) AB, Reasoning [39]}. The restriction can only be considered legitimate when incorporated in the form of an Act, and in substance only in the narrowest possible scope, proportionate to the objective pursued {see: Decision 2/2014. (I. 21.) AB, Reasoning [30]}. The latter, substantive requirement is enforced by the rules of the FOIA, which require the data controller – if authorised – to weigh the importance of the public interest in the disclosure or refusal to disclose the requested data [Section 27 (5), Section 30 (5) of the FOIA]. The case law of the Constitutional Court refers to this assessment as the "public interest test" {Decision 29/2014 (IX. 30.) AB, Reasoning [16]}, which is of particular importance in the context of restrictions on freedom of information. That is why the limitation that "if access to the data of public interest can be prevented by formal invocation of a ground for restriction of public access, without the actual existence of a substantive justification for the restriction being proved beyond reasonable doubt, this constitutes an unjustified and therefore unnecessary restriction on the right of access to and dissemination of data of public interest" is important. {Decision 21/2013. (VII. 19.) AB, Reasoning [56]; Decision 29/2014. (IX. 30.) AB, Reasoning [51]; Decision 4/2015. (II. 13.) AB, Reasoning [37]} In light of this, the restriction of publicity is only legitimate if the disclosure of the data concerned could realistically harm a constitutionally recognisable

objective {*mutatis mutandis* see the Decision 3069/2019 (IV. 10.) AB, Reasoning [49] – the endangerment must be ascertainable}.

[44] The case law of the Constitutional Court considers the rules of the data request procedure as a guarantee of the fundamental right, without which it would be meaningless. In other words, a publicity restriction that is acceptable – temporarily – with sufficient rigour is only possible with an appropriate data controller procedure, the enforcement of the burden of proof on the data controller and by guaranteeing substantive judicial review against the decision of the data controller refusing the data request, including the legal basis and the justification as well. {See: Decision 21/2013. (VII. 19.) AB, Reasoning [39] to [41]; Decision 2/2014. (I. 21.) AB, Reasoning [26] to [30]; Decision 29/2014. (IX. 30.) AB, Reasoning [44] to [46]; [51]; Decision 4/2015. (II. 13.) AB, Reasoning [29] to [30]; Decision 8/2016. (IV. 6.) AB, Reasoning [44] to [45]; Decision 7/2020. (V. 13.) AB, Reasoning [34]}.

[45] Finally, another aspect of the guarantee: the justification of the content of the restriction must be in relation to the specific data and not to the medium (document) that stores it. An entire document should not be blocked simply because it contains information for which there is a need to restrict public access. The formal and automatic application of the so-called documentary principle is therefore prohibited {Decision 21/2013. (VII. 19.) AB, Reasoning [60]; Decision 29/2014. (IX. 30.) AB, Reasoning [49], [68], [71]; Decision 3069/2019. (IV. 10.) AB, Reasoning [44]; Decision 3070/2019. (IV. 10.) AB, Reasoning [41]; Decision 3190/2019. (VII. 16.) AB, Reasoning [37]}. The data principle must be applied primarily in the application of the law, but at the same time – with account to Section 27 (2) of the FOIA – an Act authorising the legitimate restriction of freedom of information may only authorise the blocking of data, not of entire documents.

[46] 2.7. In the light of Article I (3) of the Fundamental Law, the FOIA specifies the framework within which the freedom of information may be restricted. The FOIA distinguishes three categories. First of all, data that is considered classified data under the APCD cannot be accessed as data of public interest and data accessible on public interest grounds [Section 27 (1) of the FOIA] {see: Decision 2/2014. (II. 21.) AB, Reasoning [28]; Decision 29/2014. (IX. 30.) AB, Reasoning [55]}. Secondly, in the case of bodies performing public functions, the data used as the basis for a decision falling within their remit and competence is not public for ten years from the date of its creation [Section 27 (5) of the FOIA]. This rule is, however, loosened by the FOIA itself, when, on the one hand, it authorises the data controller to disclose the data concerned after a discretionary procedure, and on the other hand, by enforcing the principle of publicity as a general rule after the decision has been taken: the data controller may refuse to disclose the requested data only if the data would also serve as a basis for a future decision or if disclosure of the data would jeopardise the lawful functioning of the body exercising public authority or the exercise of its functions and powers free from undue external influence, in particular the free expression of its standpoint on which the data is based, in the course of the preparation of decisions [Section 27 (5) and (6) of FOIA]. In other words, it is rather the case that "the citizen does not have an unconditional subjective right to access, but it is up to the decision of the head of the body that holds the data. As a rule, these data are not public, but the head of the body may authorise access to them upon request." {Decision 2/2014. (I. 21.) AB, Reasoning [28]} In the third case, the right of access to data of public interest and data public on grounds of public interest may be restricted by an Act – with specific indication of the types of data

– for reasons of national defence; national security; the prosecution or prevention of criminal offences; environmental or nature conservation interest; central financial or foreign exchange policy; with a view to foreign relations, relations with international organisations; with regard to judicial or administrative proceedings or intellectual property rights [Section 27 (2) of the FOIA].

[47] On the basis of the regulation, it would seem that in the first two cases, the data are blocked *ex lege* on the basis of the FOIA. In reality, however, the decision to restrict freedom of information, even for the most extreme reasons, is taken by the controller, the only difference being the date of the decision. In the case of the APCD, this is done at the time of classification {see the first paragraph of the holdings of the Decision 29/2014 (IX. 30.) AB and paragraphs [54] to [61] of the Reasoning}. The rationale for restricting data used for decision-making is different, and in these cases the focus should be on the necessity of the restriction (see below).

[48] Explaining the above was necessary to present that the Hungarian constitutional doctrine focuses on data and the application of law. This is the reason for emphasizing that in principle the discretionary restriction of public access left to the free consideration of the data controller is, as such, against the Fundamental Law. {see: Decision 21/2013. (VII. 19.) AB, Reasoning [41]; Decision 2/2014. (I. 21.) AB, Reasoning [42] and [44]; Decision 29/2014. (IX. 30.) AB, Reasoning [48]} This follows from the above-mentioned principle that restrictions on freedom of information cannot be based on formal grounds, i.e. it must be proven that the publicity of the requested data would – in fact – violate the constitutionally recognised categories of restrictions. This can only be established by applying the law in individual cases. To sum up: a restriction on the freedom of information is never automatic by virtue of an Act: it always requires the intervention of the controller's decision. This clause can be seen as the essence and main guarantee of freedom of information, which covers all three types of restrictions (classified data, data justifying a decision and blocking under a specific law). It is therefore not constitutionally possible to block data directly by way of an Act.

[49] 3. In addition to the constitutional framework, it is also necessary to describe the legislative context in which the Project Act applies.

[50] 3.1. According to Article 1 of the Project Act, its scope covers "all investment activities related to the maintenance of the capacity of the Paks Nuclear Power Plant, which are directly related to all buildings and equipment, their design, procurement, construction, commissioning and preparation for operation, with two new nuclear power plant blocks No. 5 and 6 specified in Article 1.1 [...] of the Agreement between the Government of Hungary and the Government of the Russian Federation for cooperation in the field of the peaceful uses of nuclear energy". It means that, as the preamble to the Project Act indicates, and as the Minister of Justice has pointed out, the Project Act aims to achieve the objectives set out in Article 1.1 of the Convention. The same is laid down in the justification attached to Section 1 of the Project Act.

[51] 3.2 The Convention was concluded as an international treaty by the Government of Hungary and the Government of the Russian Federation (hereinafter referred to as the Parties, see the Preamble to the Convention). The subject-matter of the Convention is defined in Article 1, which states, inter alia, in Article 1.1, that "the Parties shall cooperate in maintaining and developing the capacity of the Paks Nuclear Power Plant

located in the territory of Hungary, including by planning, constructing, commissioning and decommissioning two new blocks No. 5 and 6, with a VVER (water-cooled water-moderator) type reactor, with an installed capacity of at least 1000 MW for both blocks, as provided for in this Agreement, to replace the capacity of blocks No.1 to 4 to be closed down in the future".

[52] For the purposes of the Project Act, these activities can be considered to be the "Project" referred to by the petitioners. At the same time, Article 1 of the Convention gives a broader scope to the Convention (see Article 1.2 to 1.6 of the Convention), which is, however, not covered by the Project Act, with account to its Section 1.

[53] According to Article 2 of the Convention, the Parties designate their "Competent Authorities" to coordinate and monitor the implementation of the intergovernmental cooperation set out throughout the Convention. At the time of signing the Convention, the Parties designated the State Atomic Energy Agency "Rosatom" as the Russian Competent Authority and the NFM as the Hungarian Competent Authority [Article 2.1 (1) and (2) of the Convention]. In Article 3 of the Convention, the Parties have agreed that the Russian Competent Authority shall designate from among its group of companies an entity under the control of the Russian State (hereinafter referred to as the Russian Designated Organisation) to carry out as an undertaking the obligations arising from the Convention (Article 3.1 of the Convention). The Hungarian Competent Authority shall also establish or designate a Hungarian state entity or a state-controlled organisation (hereinafter referred to as the Hungarian Designated Entity) for this purpose. For the purposes of the Convention, state control means at least 95% direct or indirect state ownership (or equivalent) and voting rights (or equivalent). Articles 3.6 to 3.7 of the Convention allow the Russian Designated Organisation to involve subcontractors in cooperation under the Convention, with which it may also enter into direct contracts, if the Russian Designated Authority owns at least 95% of their shares or ownership interests (or equivalent rights) and if the Russian Designated Authority directly or indirectly holds the votes that they are entitled to.

[54] Article 3.5 (and Article 8) of the Convention are of particular relevance for the Project Act, as according to these provisions the Hungarian Competent Authority and/or the Hungarian Designated Organisation and the Russian Competent Authority and/or the Russian Designated Organisation shall conclude Implementation Agreements. The obligations of the Parties are detailed in Articles 4 to 7 of the Convention. Among other things, the Russian Party shall guarantee that the Russian Competent Authority and/or the Russian Designated Organisation shall carry out civil engineering works on the power plant's facilities in connection with the subject-matter of the Convention [Article 5 (4) of the Convention]; to provide technical maintenance services for the equipment delivered, including consultations, supply of spare parts [Article 5 (8) of the Convention]; and to carry out trial operation, organise and carry out commissioning works and commissioning of new power plant blocks [Article 5 (10) of the Convention]. The Hungarian party shall ensure that the Hungarian Competent Authority and/or the Hungarian Designated Organisation shall, for example, transfer to the Russian partner the construction site for the new blocks of the Paks Nuclear Power Plant [Article 6 (2) of the Convention], provide for obtaining the expert opinions and special licences for the development of the Paks Nuclear Power Plant [Article 6 (3) and (4) of the Convention] and, in particular: finance on a continuous basis all works, supplies and services necessary for the implementation of the projects covered by the Convention [Article 6 (22) of the Convention].

[55] Article 8 (1) of the Convention stipulates that the obligations contained in Articles 3 to 7 of the Convention are to be set out in separate agreements (treaties) for their implementation (Implementation Agreements). In the event of a conflict between the Implementation Agreements and the Convention, the provisions of the Convention prevail, and in the event of a dispute arising out of the Implementation Agreements, the court of arbitration in the third country designated therein, and agreed by the Parties, shall decide (Items 1 to 3 of the Convention). It should be emphasised that the Russian Party shall provide the Hungarian Party with a State loan for the implementation of the Project covered by Article 1.1 of the Convention, i.e. the scope of the Project Act, in accordance with a separate international treaty to be concluded between the Parties (Article 9 of the Convention). The Parties to the Convention – i.e. the Russian and Hungarian States Parties – have also assumed responsibility for ensuring that the Convention is implemented in accordance with their laws and international obligations (Article 11.1 of the Convention); they will take all reasonable steps, in accordance with their legal systems, to protect intellectual property and know-how acquired or used in the implementation of the Convention (Article 12 of the Convention); and they have also assumed confidentiality obligations in Article 13 of the Convention. According to the latter, (i) no Russian state secrets or classified data within the meaning of the ACDP shall be transferred in the framework of the Convention; (ii) no information, the disclosure of which is prohibited by the legal system of a Party or by an international obligation entered into by that Party shall be transferred, and (iii) no information exchanged between the Parties within the framework of the Convention or resulting from the implementation of the Convention shall be disclosed to the public or transferred to third parties without the prior written consent of the Parties; (iv) the information disclosed by the Parties to each other in the framework of the Convention or arising from its implementation, and is considered by the Parties to be confidential, shall be exactly specified and indicated. With respect to such information, the Parties shall limit to a minimum the scope of those who have access to it and shall ensure that it is used only for the purposes set out in the Convention. Such information will not be disclosed to the public or transferred to third parties and will be protected in accordance with the laws of the Parties. In addition, however, Article 13.3 of the Convention provides that no Party, Competent Authority or Designated Organisation may refuse to provide information required by law or ordered by a court of competent jurisdiction to be provided to that Party, Competent Authority or Designated Organisation on the basis of the Convention. The disclosing Party, Competent Authority or Designated Organisation shall in such cases cooperate in good faith with the other Party, Competent Authority or Designated Organisation to ensure that the disclosure is made in a form that will result in the transfer of information in the minimum amount required by applicable law or the decision of the competent court and in a form acceptable to the other Party, Competent Authority or Designated Organisation.

[56] 3.3. The details of the Russian state loan provided for in Article 9 of the Convention are set out in the Agreement between the Government of the Russian Federation and the Government of Hungary on the disbursement of the State loan to the government of Hungary for the financing of the construction of the nuclear power plant in Hungary (hereinafter referred to as the “Loan Agreement”), promulgated by the Act XXIV of 2014. According to Article 1.1 of the Agreement, the Russian Party (i.e. the Russian State) shall provide the Hungarian Party with a State loan of up to EUR 10 billion to finance the works, services and equipment necessary for the design, construction and

commissioning of blocks No. 5 and 6 of the Paks Nuclear Power Plant (i.e. the implementation of Article 1.1 of the Convention). This loan will be used by the Hungarian party (i.e. the Hungarian State) to finance 80% of the value of the contract, according to Article 1 of the Loan Agreement, which will be concluded and accepted by the Russian and Hungarian entities specified in the contract in question, in accordance with the procedure set out in Article 8 of the Loan Agreement. Article 1.2 of the Loan Agreement clarifies the structure of the financial construction, as it stipulates that 20% of the amount specified in the relevant contract will be paid in euro by the Hungarian contracting party to the Russian contracting party. The conditions for the use of the loan available from 2014 to 2025 are set out in Article 2 of the Loan Agreement, while the repayment, interest and other obligations of the Hungarian party (i.e. the Hungarian State) are set out in Articles 3 to 6 of the Loan Agreement.

[57] 3.4. Section 2 (b) of the Project Act clarifies that the Russian Designated Organisation is the main contractor of the Project, while a subcontractor under (a) is any natural or legal person who or which enters into a contract under Section 3 (1) of the Project Act with the main contractor (i.e. the Russian Designated Organisation under the Convention) or any of its subcontractors. Section 3 (1) of the Project Act stipulates that the main contractor of the Project, the subcontractor of the main contractor or the client of the main contractor under Article 3.2 of the Convention – the Hungarian Designated Organisation – may conclude contracts and subcontracts related to the Project for the implementation of the Implementation Agreements under Article 8 of the Convention only with an entity holding a site security certificate pursuant to the Act on the Protection of Classified Data.

[58] 3.5. In summary, the Project – i.e. all investment activities directly related to the maintenance of the capacity of the Paks Nuclear Power Plant, which are directly related to all buildings and equipment, their design, procurement, construction, commissioning and preparation for operation, with two new nuclear power plant blocks No. 5 and 6 specified in Article 1.1 of the Convention – is carried out within the framework of a specific legal arrangement based on international conventions. According to its essence, the Parties have set out in the Convention the framework for their cooperation and the main obligations incumbent on the Parties. In addition, the Parties have designated in the Convention their competent authorities responsible for coordination and monitoring, which will subsequently designate or establish their designated organisations for the effective implementation of the Convention. From a combined reading of the Project Act and the Convention, it is clear that the Hungarian Designated Organisation is the client of the Project, while the Russian Designated Organisation is the Project's main contractor. The Designated Organisations shall enter into Implementation Agreements or contracts for the implementation of the Convention, or, according to the Convention, the Russian Designated Organisation may invite its subcontractors into the implementation. The Project will be financed in accordance with the terms of the Loan Agreement. The Russian State provides a loan to the Hungarian State, which (or the body implementing the Project) will use 80% of it to cover the contracts for the implementation of the Project, while 20% will be paid by the State from its own resources.

[59] 4. The contested provision of the Project Act clearly restricts the freedom of information, since it states that business and technical data falling within its scope, as well as data used as a basis for decisions, the disclosure of which would harm national security interests or intellectual property rights, shall not be accessed as data of public

interest for 30 years from the date of their creation. The constitutionality of the provision was examined by the Constitutional Court taking into account the specificities of the construction outlined above, as the Project Act only covers data generated within and in connection with this construction.

[60] 4.1 In their initial application, the petitioners argued that the contested provision imposes a disproportionately long data restriction without any possibility for discretion with respect to an extremely broad range of data. In their opinion, national security interests and intellectual property rights are already sufficiently protected by the provisions of the FOIA and the APCD, therefore the restriction is unnecessary. The petitioners maintained, even after the amendment of the Project Act, that the provision constitutes an *ex lege*, non-discretionary data restriction.

[61] 4.2 First of all, the Constitutional Court has to find out exactly which data, generated by which bodies are covered by the specific legislation. The Project Act provides for the blocking of publicity of certain business and technical data included in contracts concluded by (i) the Russian Designated Organisation and its subcontractors; (ii) the Hungarian Designated Organisation and its subcontractors; (iii) certain business and technical data related to the preparation and conclusion of the Implementation Agreements, contracts and the Convention; (iv) and certain data used as a basis for making decisions related to the above.

[62] According to Section 3.5 of the FOIA, data of public interest shall mean information or data other than personal data, registered in any mode or form, controlled by the body or individual performing state or local government responsibilities, as well as other public tasks defined by legislation, concerning their activities or generated in the course of performing their public tasks, irrespective of the method or format in which it is recorded, its single or collective nature; in particular data concerning the scope of authority, competence, organisational structure, professional activities and the evaluation of such activities covering various aspects thereof, the type of data held and the regulations governing operations, as well as data concerning financial management and concluded contracts. In addition, Article 39 (2) of the Fundamental Law states, as emphasised in the quoted Constitutional Court case law, that data relating to public funds and national assets shall be data of public interest.

[63] The latter is supplemented and concretized by Section 7 (1) of Act CXCVI of 2011 on National Assets (hereinafter: ANA), according to which the basic purpose of national assets is to ensure the performance of public functions, Section 5 (1) of the Act CVI of of 2007 on State Property (hereinafter: ASP), which states that a body or person managing or disposing over State property shall qualify as a body or person performing a public function within the meaning of the FOIA. The scope of national and state property is defined in Section 1 (2) and Section 4 of the ANA and Section 1 (2) of the ASP, and the two laws designate the scope of those property elements which are not or only partially covered by them [see Section 1 (3) and (4) of the ASP]. In addition, Section 3/A (1) of the APF provides that a public task is a state or municipal task specified by the law. Based on the above, a body that performs a task expressly defined by law, or a body that manages public property, i.e. public funds, shall qualify as a body performing a public task, and thus managing data of public interest. This scope is supplemented – with due regard to Article 39(2) of the Fundamental Law – by Section 26 (3) as well as Section 27 (3) and (3a) of the FOIA, which prescribe – irrespective of the type of the

organisation – the accountability obligation of natural and legal persons managing or receiving public funds, as well as of such organisations without legal personality.

[64] The wording of the contested provision of the Project Act names the Russian Designated Organisation and its subcontractors and the Hungarian Designated Organisation and its subcontractors as the parties whose business and technical data contained in the contracts concluded by them are not accessible as data of public interest. The Convention also contains statements on these, however, they are not explicitly mentioned. It is in the nature of the legal construction determining the Project that these organisations are responsible for the elaboration of the details and the implementation of a task defined by the Convention: the extension of the plant. According to the Convention, the designated organisations must be State- or State-controlled entities. This means that the Parties, and more specifically the designated authorities, may designate either public legal entities or private legal entities – ones that are directly or indirectly owned by the State at the rate of least 95% – as the designated organisation for the purposes of the Convention. The Convention also expressly provides for this in relation to the subcontractors of the Russian Designated Organisation (see Article 3.3 of the Convention).

[65] What is relevant for the Project Act is that the designated organisations and their subcontractors are responsible for the implementation of the Project as a public task. The Parties, i.e. the governments of the States Parties, have delegated their commitments through the Convention to the designated organisations. However, this also means that the designated organisations are directly responsible for the performance of public tasks and have the possibility to delegate the development of certain issues to their subcontractors, according to their agreements. Subcontractors are therefore to be regarded as organisations with a public-service mission in the light of the public task entrusted to them in connection with the Project (Article 3.3 of the Convention refers only to organisations). For the purposes of the Project Act, it is irrelevant that the Russian Designated Organisation is owned directly or indirectly by the Russian State at a rate of at least 95%, or that the subcontractors are owned by the Russian Competent Authority at a rate of at least 95%. According to the case law of the Constitutional Court, on the one hand, the scope of bodies performing public functions must be interpreted broadly from the perspective of the FOIA {see: Decision 7/2020 (13.V.) AB, Reasoning [29]}, on the other hand, the "FOIA, [...] in defining a public task, does not stipulate that it can only be a public task of the Hungarian State, Hungarian local government or another public tasks defined in Hungarian law" {Decision 3254/2018. (VII. 17.) AB, Reasoning [34]}. It follows that organisations owned by the Russian Government or the Russian Competent Authority qualify to perform a public task in relation to the Project for the purposes of processing data of public interest. This is reinforced by Section 2 of the FOIA, which defines the scope of the Act, read in conjunction with Section 6 of Act CXXX of 2010 on Legislation (hereinafter: AL), which states that it covers data processing on the territory of Hungary. If this was not the case, i.e. if the Russian Designated Organisation and its subcontractors were not organisations performing a public task, the Project Act would impose an unnecessary and impossible restriction on them – assuming data processing –, which would make the relevant parts of the text be contrary to the Fundamental Law. The Hungarian Designated Organisation may also qualify as an organisation performing public functions – with due account to Article 39 (2) of the Fundamental Law, the Section 5 (1) of the ASP and Article 3.2 and 3.3. of the Convention – because, if it is not a State entity, then, according to the Convention, it must be an organisation (company) which is at least 95% directly or indirectly owned by

the State, i.e. it manages public assets, which, in itself, justifies its character of performing a public task. {see in this context: Decision 25/2014. (VII. 22.) AB, Reasoning [46]}.

[66] However, the contested provision of the Project Act affects a scope wider than the named designated organisations and their subcontractors. It also imposes restrictions on publicity in connection with the preparation of the Implementation Agreements and the Convention. According to Article 3.5 of the Convention, which has already been quoted, the Implementation Agreement, which sets out the details of the investment, may be concluded not only by the designated organisations but also by the competent authorities. These, on the one hand – as well as the designated organisation – are involved in the implementation of the public task under the Convention, therefore, from this point of view they perform a public task, and on the other hand, at least on the Hungarian side, it is the NFM, i.e. a public authority. However, the NFM is no longer included in Section 1 of Act V of 2018 on the List of Ministries of Hungary and on the Amendment of Certain Related Acts. Its legal succession is regulated by the Government Decree No. 94/2018 (V. 22.) Korm. on the Duties and Powers of the Members of the Government, therefore, in this respect, too, it can be established that the organisation concerned performs a public authority activity or public function, although the text of the Convention has not been amended after the termination of the NFM. The same applies to the Parties to the Convention, namely the Governments of the Russian Federation and Hungary.

[67] Therefore, as explained in the foregoing, the listed bodies and organisations qualify as organisations performing public functions for the purposes of the Project Act, they process data of public interest, and therefore Section 5 of the Project Act applies to them in relation to the Project. On the basis of the foregoing, contrary to the petitioners' arguments, the scope of the parties obliged to provide data – in relation to which the restriction on the freedom of information applies – is not inherently unidentifiable. Under the contested wording of the Act, the documents – contracts, Implementation Agreements or the Convention – which may contain data of public interest may also be indicated. Indeed, the Project Act clearly states that the restriction laid down in it only applies to certain business and technical data or data used to support a decision.

[68] 4.3 At this point, the Constitutional Court considers it necessary to point out – and at the same time to respond to the petitioners' arguments that the restriction concerns an extremely broad scope of data – the following. The Project Act – as pointed out by the Minister of Justice, the statutory regulation and the reasoning of the Amending Act – only requires the restriction of data of public interest. This also means that all data not covered by the concept of data of public interest under Section 3 (6) of the FOIA, the disclosure, knowledge of or access to which is ordered by an Act of Parliament in the public interest, i.e. data public on grounds of public interest, are not affected by the Project Act.

[69] 5. The Project Act mentions three types of data (business, technical and decision supporting data) and two values to be protected (national security interests and the protection of intellectual property rights). The Constitutional Court first had to consider whether there was a constitutionally acceptable purpose that would justify the restriction. Secondly, it had to investigate the relationship between the Project Act and the FOIA, and whether the existing legal options provided – as claimed by the petitioners –

sufficient protection for the interests identified by the Project Act (national security, protection of intellectual property).

[70] 5.1 The Constitutional Court has also recognised in its earlier case law that freedom of information may be restricted under Article I (3) of the Fundamental Law. The case law is also consistent by respecting that a restriction may only be formally imposed in an Act of Parliament, and in substance only if there is a compelling justification for it due to the protection of another fundamental right or constitutional value. Restrictive laws should be interpreted restrictively.

[71] In response to the Constitutional Court's request, the Minister of Justice explained that the Project Act was adopted in order to fulfil the obligations undertaken in the Convention. This is also mentioned in the law-maker's reasoning attached to the contested provision. The specificity of the international commitment is that it is for the expansion and operation of a nuclear power plant in Hungary. In the light of the above, it can be concluded that the Project concerns issues of national security and national strategic importance – the operation, expansion and maintenance of the safety of a nuclear power plant cannot be considered otherwise – and that the disclosure of certain data generated in connection with the Project may result in a violation of national security and intellectual property rights to an extent that would duly justify the restriction of the freedom of information. {this has already been acknowledged by the Constitutional Court, see the Decision 3190/2019 (VII. 16.) AB, Reasoning [43], and its importance was also highlighted by the Budapest-Capital Regional Court of Appeal in its judgement No.Pf.20.352/2019/9}.

[72] In other words, the publicity restriction sought by the Project Act serves a legitimate purpose that is justifiable in light of the international obligation and the interests that are to be protected, which are of an overriding nature due to the nature of the Project. Section 27 (2) (b) and (h) of the FOIA expressly allows for a Act of Parliament to restrict the freedom of information in the interest of national security and with regard to intellectual property rights. Thus, the provisions of the challenged Section 5 of the Project Act may constitute legitimate restrictions on the publicity of data of public interest guaranteed by Article VI (3) of the Fundamental Law and the disclosure of data related to public funds, enshrined in Article 39 (2) of the Fundamental Law. However, the objective pursued does not fully justify the need for the contested regulation, as the legislative context must also be examined in order to determine it.

[73] 5.2 In relation to the Project Act and the FOIA, the following can be stated. The territorial scope of the FOIA – based on Section 2 (1) of the Act and with due account to Section 6 of the AL – covers all data processing carried out in Hungary, i.e. in the absence of an amendment to this provision, the scope of the FOIA cannot be challenged by any other Act of Parliament. The Hungarian government was bound by both the Fundamental Law and Hungarian legislation when the Convention was concluded. The Act L of 2005 on the Procedure relating to International Treaties contains detailed regulations on concluding international treaties and on recognizing their mandatory force. According to its Section 4 (3), from the moment of starting to prepare the international treaty the conformity of the treaty with the Fundamental Law, the laws and with the legal obligations under Union law and under other international law shall be subject to continuous scrutiny. Conformity shall be ensured by achieving the appropriate content of the treaty, by the amendment or annulment of the laws, or by the amendment or

termination, as applicable, the obligations under Union law or other international law. As by recognising the binding effect of the Convention the scope of the FOIA has neither been amended nor the Act repealed, therefore it continues to cover all data processing carried out in Hungary.

[74] The Minister of Justice has also pointed out that the Project Act is to be considered as a permissible law under Section 27 (2) of the FOIA, and that the provisions of the FOIA, such as the possibility of judicial review, shall apply during its application. In addition, the reasoning of the Amending Act amending the contested provision of the Project Act – which is of primary importance for determining the purpose of the law pursuant to Article 28 of the Fundamental Law – states that the purpose of the amendment was precisely to clarify that Section 5 of the Project Act must be interpreted in conjunction with both the FOIA [the provisions contained therein are considered permissible categories under Section 27 (2) (b) and (h) of the FOIA, and their application is governed by the provisions of Chapter III of the FOIA] and with the sectoral Acts of Parliament. In addition, Article 11.1 of the Convention states that the Convention shall be implemented in accordance with the laws of the Parties, including Hungary. The fact that the Project Law cannot be regarded as *lex specialis* compared to the FOIA as *lex generalis* is also confirmed by the established case law of the courts. According to the partial judgement No.Pf.20.807/2018/9 of the Budapest-Capital Regional Court of Appeal, first of all, the Convention "does not overrule the provisions of the FOIA, as no such conclusion can be drawn from its provisions. In the event that it would contain a provision on the restriction of publicity, which would apply to data controllers and the parties requesting data, it could constitute a statutory restriction on the disclosure of data of public interest under Section 27 (2) of the FOIA." Secondly, the contracting parties had to take into account publicity under the Hungarian constitutional environment, guaranteed by the FOIA and other laws. Thirdly, the court stated that Section 5 of the Project Act, by which the Hungarian party intended to meet its obligation under the Convention, should be considered a restrictive provision under Section 27 (2) of the FOIA. The findings of the court were confirmed by the judgement No.Pf.20.352/2019/9 of the Budapest-Capital Regional Court of Appeal and the judgement No.Pf.20.775/2019/7 of the Budapest-Capital Regional Court of Appeal. Overall, one may conclude that Section 5 of the Project Act can be interpreted on the basis of Section 27 (2) of the FOIA, and therefore the violation of the Fundamental Law alleged by the petitioners must also be examined in this context.

[75] 5.3 On the one hand, the Project Act allows for the temporary blocking of data that are covered by other laws or due to interests that other laws also seek to protect. These, however, do not mean that the Project Act is, in itself, an unnecessary restriction on the freedom of information. The assessment of the restrictability of the three types of data identified by the Project Act is slightly different, depending on their character.

[76] 5.4. First, the starting point for the restriction of access to business and technical data in the interest of national security or for the protection of intellectual property rights is the definition under Section 3 (5) of the FOIA.

[77] The definition is illustrative; in fact, data of public interest covers all data units processed by a person or organisation performing a public task. In other words, when the Project Act allows – and does not order –, by definition, the blocking of data of public interest, it necessarily covers all the activities of the data controllers concerned and the data they

are processing pursuant to Section 3 (5) of the FOIA. As a general rule, therefore – based on the cited case law of the Constitutional Court related to the principle of publicity – all data processed by any organisation performing a public duty are public along the lines specified in the FOIA. The organisation or person performing a public task is usually, but not by a long always, performs an activity of public authority (of the State or a municipality) or a public task defined by the law, as its main activity. There may be entities that carry out activities on the market by using state assets, either as a statutory public task or as a main or secondary activity. At the same time, the fact that they manage state assets justifies – as it has been demonstrated and as confirmed by the case law of the Constitutional Court – that they are considered bodies or persons performing public functions as far as the FOIA is concerned. In general, the protection of the data listed above is already guaranteed by other laws, in particular for private entities. These are in particular, the FOIA; the Act LIV of 2018 on the Protection of Trade Secrets (hereinafter: Act on Secrets); the Act XXXIII of 1995 on the Patent Protection of Inventions (hereinafter: Patent Act); the Act XI of 1997 on the Protection of Trademarks and Geographical Indications (hereinafter: Trademark Act); or the Act LXXVI of 1999 on Copyright (hereinafter: Copyright Act). The interests to be protected may also be governed by the provisions of the Trademark Act, the Copyright Act and the APCD.

[78] 5.5. As presented above, the Project Act includes a number of bodies – not directly named – which are clearly considered to be public authorities. Examples include, in relation to the Convention, the Hungarian Government or, as the Hungarian Competent Authority, the successors to the NFM under the Government Statute. With regard to them, the applicability of the above laws – which provide for the protection of certain data, works, activities, etc. in private law relationships – is at most possible. The foregoing applies to the Government of the Russian Federation as a body designated as a party to the Convention, which is a public authority and not a market actor in the light of the Russian constitutional system. These findings are, however, not necessarily applicable to the Russian Competent Authority, the Russian Designated Organisation and its subcontractors or the Hungarian Designated Organisation and its subcontractors. As defined in the Convention, these bodies are companies under the direct or indirect influence of the State that may carry out market activities in addition to their public service tasks. It requires the application of the law, based on the consideration of all the circumstances of the case, to assess whether a given body or person may rely, for example, on the protection – in accordance with Section 27 (3) of the FOIA – of trade secrets and proprietary information under the Act on Secrets in relation to a specific piece of data. This is reinforced by the NAIH's Recommendation 2016/1911/V on the disclosure of business information by companies managing or holding national assets and operating in the market (hereinafter the Recommendation). According to the Recommendation, if a company, which is at least in majority State/municipal ownership, is assigned a public task by law, it cannot rely on the protection of business secrets in relation to its activities, as it is more related to the sphere of public authority due to performing a public task. Nor can a company that carries out monopoly tasks for the State rely on the protection of business secrets. In addition, companies in public ownership engaged in profit-making activities may refuse to disclose certain information if this would cause disproportionate harm to their business. It should be noted that the NAIH points out in the Recommendation that this option does not apply to environmental and other mandatory data disclosures. The foregoing clearly show that the business and technical data referred to in the contested provision of the Project Act are not protected at all or only in restrictive cases under the laws referred to.

[79] 5.6. On the side of protected values, first of all, with regard to intellectual property rights, the former shall apply. The Patent Act; the Trademark Act or the Copyright Act, which provide for the protection of intellectual property rights, are also not or only partially applicable in the context of the legal construction of the Project Act, since their primary purpose is to regulate private law relationships. This is reinforced by the fact that Article 27 (2) (h) of the FOIA also allows for Acts of Parliament to impose freedom of information in order to protect an intellectual property right. In other words, the FOIA does not take the protection of the freedom of information originally granted by other Acts of Parliament.

[80] 5.7. As regards the interest of national security, the provisions of the APCD may be relevant. The APCD is one of the extreme cases of the restriction of information. The APCD may be applied only in a specific scope and by specific persons in a specific procedure, provided that it is justified by a forcing necessity for the purpose of protecting the sovereignty and territorial integrity; the constitutional order; defence, national security, law enforcement and crime prevention activities; justice affairs; central finance and economic activities; foreign and international relations of Hungary, and securing that the operations of State bodies are undisturbed and free from unauthorised external influence [Section 5 (1) of APCD]. The possibility of classification, or the absence of classification, does not mean, however, that a refusal to disclose business and technical data designated by the Project Act on the grounds of the protection of national security interests cannot be justified in a given case. On the one hand, Section 74 of the Act CXXV of 1995 on National Security Services may provide a reference point for the definition of national security interest, even if the relevant provision of the law offers an interpretation in relation to the given Act of Parliament. According to the list provided here – which is not completely the same as provided in Section 5 (1) of the APCD –, national security interest is: the ensuring of the independence and the safeguarding of the lawful order of the Republic of Hungary, including the detection of any endeavours with offensive intentions against the independence and territorial integrity of the country; detection and warding off of any concealed endeavours interfering with or threatening the political, economic, and defence interests of the country; acquisition of information on foreign countries or of foreign origin required for government decisions; detection and warding off of any concealed endeavours aimed at the alteration or disturbance of the lawful order of the country ensuring the exercising of fundamental human rights, representative democracy based on a multi-party system, and the operation of lawful institutions; detection and preventing of acts of terrorism, illegal arms and drug trafficking, as well as the illegal circulation of internationally controlled products and technologies. In other words, the APCD guarantees the option of classification in the cases that endanger the interests of Hungary the most. However, the protection of national security interests can also make sense in a broader context: in cases where classification is not necessary. Furthermore, the APCD precisely defines the scope of those entitled to perform classification [Section 4 (1)], which does not necessarily overlap with the scope of the bodies or persons who are data controllers for the purposes of the Project Act. Finally, it should be noted that in relation to the data/values to be protected, the provisions of Section 17 (9) to (11) of the ANE are not applicable, as they only apply to the authorisation procedure and grant powers to the competent authority.

[81] Overall, the following can be concluded. The restrictions on the freedom of information imposed by the Project Act to protect national security interests and intellectual property

rights are justified and therefore necessary to protect business and technical data, with due account to the importance of the Project.

[82] 5.8. It has been mentioned that the nature of the restriction on the disclosure of business and technical data is somewhat different from that of the data on which a decision is based. The difference results from the function of the latter.

[83] According to the case law of the Constitutional Court, data that serve the purpose of providing the basis for a decision "»is a guaranteeing institution of high quality and efficient public administration work, that the decisions of public servants are prepared freely, informally and free from public pressure. Thus the requirement of publicity applies only to the final outcome rather than the intermediary working materials«. [...] In addition, the subsequent implementation of important political and economic decisions »would often be made impossible if the planned actions to be discussed at a government meeting were made public before the decision is taken. There may also be a justifiable reason for the government to postpone the publication of a decision taken at an earlier meeting to a later date, in order to avoid the implementation of government policy being frustrated before the planned measures are introduced« [...]" {Decision 21/2013. (VII. 19.) AB, Reasoning [43]; Decision 5/2014. (II. 14.) AB, Reasoning [37]; Decision 3069/2019. (VII. 16.) AB, Reasoning [41]}. In other words: blocking access to the data on which a decision is based is essentially intended to ensure the smooth operation of public bodies under very strict conditions.

[84] The details are provided in paragraphs (5) and (6) of Section 27 of the FOIA. According to it, any data compiled or recorded by an organ performing public duties as part and in support of its decision-making process within the limits of its powers and duties shall not be disclosed for ten years from the date it was compiled or recorded. After considering the weight of public interest with respect to granting or denying access, the head of the organ that processes the data in question may permit access. In addition to that, a request to access such data may be dismissed after the decision is adopted but within the time limit of ten years, if the data underlies future decisions, or access to it would jeopardise the lawful functioning of the organ performing public duties, or would jeopardise the performance of its duties without any undue external influence, such as, in particular, the free expression of the standpoint of the organ which generated the data during the preliminary stages of its decision-making process.

[85] According to the regulation under the FOIA, "the limited availability of these data constitutes a restriction of the fundamental right to public access to data of public interest, and thus it must comply with the constitutional requirements set against the restriction of fundamental rights under Article I (3) of the Fundamental Law" {Decision 5/2014. (II. 14.) AB, Reasoning [38]} Therefore, the Constitutional Court emphasized that due to the nature of creating such data, they automatically fall under the restriction of publicity, this is why, "however, in the interest of preventing the rules […] on accessing the data that serve the purpose of providing the basis for a decision becoming a formal and arbitrary ground of restriction that may be referred to at any time, a narrow interpretation shall be followed and an examination of substance and of the merits shall be carried out" {Decision 3069/2019. (VII. 16.) AB, Reasoning [41]}. Confirming this, it further stated that "the mere fact that the requested data is of a nature of preparing a decision does not in itself entail a binding decision to bloc public access to the data of public interest, nor does the adoption of the decision in question necessarily mean that

the preparatory nature of the data ceases to exist and that the requested data of public interest must be disclosed. At the time of the data request, as well as under the current legislation, it is up to the discretionary decision of the head of the data controller to refuse or reject the request for access to the data on which the decision is based, within the ten-year period set by law. Where the head of the data controller body decides not to disclose the data of public interest, he or she shall justify his or her decision in accordance with the criteria deriving from the Fundamental Law and specified in the Act of Parliament." {Decision 5/2014. (II. 14.) AB, Reasoning [39]}

[86] In the light of the foregoing, the Constitutional Court has set out important safeguards for the procedure of data controllers. The Decision 3069/2019 (16.VII.) AB formulated a four-step test in the context of the reference to the data on which a decision is based. According to it, (i) the data that serve the purpose of providing the basis for a decision may only be a data compiled or recorded by the relevant organ during its decision-making process (within the limits of its powers and duties). Furthermore, this quality of the data that serve the purpose of providing the basis for a decision should exist exclusively by virtue of its connection to the actual decision-making process" therefore, "it is unacceptable on a constitutional basis to make a general reference in a procedure to the decisions to be adopted in the future; the data that serve the purpose of providing the basis for a decision should be connected to an actual decision-making process"; (ii) without regard to the content, the whole document should not be classified as data that serve the purpose of providing the basis for a decision; (iii) the controller may not refer to aspects of convenience with respect to sorting the data, and (iv) "the decision dismissing the request for data should be reasoned on the merits – in the interest of securing effective legal remedy – and the reasoning should specify the exact pending procedure in which the data of public interest to be disclosed serves the purpose of providing the foundations for a decision, as well as how the disclosure of the data of public interest influences the adoption of the relevant decision, i.e. whether it would impede the effective implementation of the decision or if it would jeopardise independent and effective work of public servants being free of any undue external influence. In the context of the above, judicial control on the merits is of special importance. It is insufficient to formally refer to the character of the data serving the purpose of providing the foundations for a decision, as it needs to be justified, verified – in a manner that can be reviewed by the court – and the proceeding court »should examine both the title of dismissing the disclosure of data and its justification based on the content of the data« […]." {Decision 3069/2019. (VII. 16.) AB, Reasoning [43] to [46]} Thus, a data controller performing a public task may refuse to disclose a requested data, because of its decision-making function, if it applies the test set out above.

[87] Taking into account Article 27 (5) and (6) of the FOIA, it can be stated, with regard to data that serve the purpose of providing foundation for a decision, that the restriction of publicity does not concern only one or a specific type of data, but it rather provides a general authorisation for a very broad range of data in a specific factual context. As acknowledged by the Constitutional Court, the function (purpose) of this authorisation is to ensure the continuous operation of bodies performing public functions, i.e. in these cases the FOIA itself is a law restricting freedom of information, the applicability of which is only permitted under the conditions presented above.

[88] It is particularly important that the relevant classification of the data that serves the purpose of providing foundations for a decision is always contingent and it can only be

interpreted in relation to a specific decision. It has also been mentioned earlier that, in the case of data that serves the purpose of providing foundations for a decision, the "public interest test" can in fact only be carried out on the side of necessity. As a general rule, in the case of a restriction on the freedom of information – i.e. following the recognition of necessity in a narrow scope – the proportionality test must be carried out to examine whether there is a greater public interest in the disclosure of the requested data or in blocking the data in order to protect the indicated value. The latter cannot prevail in the case of data on which a decision is based, due to the nature of the regulation, which is why necessity must be put in the focus of the constitutionality test. In these cases, the cited findings of the Constitutional Court, which prohibit the data controller's procedure becoming a formalised and discretionary one, must be given exceptional weight. These principles govern both before and after the decision concerned, as long as Section 27 (6) of the FOIA applies.

[89] It has already been acknowledged that the FOIA itself limits the scope of cases in which the restriction it allows can be applied. On the one hand, by carrying out a "public interest test", the head of the data controller body may – at any time within the ten-year period – authorise the disclosure of the requested data {i.e. the principle of blocking cannot be considered to be an absolute one, see: Decision 3069/2019 (IV. 10.) AB, Reasoning [40]}. On the other hand, after the decision in question has been adopted, the request to access the data may only be dismissed, if the data also serves the purpose of forming the basis for any further future decision, or access to the data would jeopardise the lawful functioning of the organ performing public duties, or would jeopardise the performance of its duties without any undue external influence, such as, in particular, the free expression of the standpoint of the party that generated the data during the preliminary stages of its decision-making process. In this case, however, the data controller's burden of proof is increased [Section 31 (2) of the FOIA]. In its case law, the Constitutional Court has highlighted – almost exclusively through the examination of the constitutionality of the action of the bodies that apply the law – in the context of the refusal based on Article 27 (6) of the FOIA: "the law-maker only requires that the »jeopardising« should be verified, which means that it is not required to establish beyond doubt that disturbing the lawful functioning order or the undue external influencing of the powers and competences would take place for sure" {Decision 3069/2019. (IV. 10.) AB, Reasoning [49]}.

[90] In other words: a body performing a public function is entitled to processes certain data in a closed manner for a period of ten years – on the basis of the FOIA – before, and in certain cases after, making a decision falling within its remit and competence, subject to the burden of proof binding it and in the light of judicial review applicable to the legal basis and the justification as well.

[91] Section 5 of the Project Act also provides for the possibility of refusing to disclose data on which decisions are based, if their disclosure would violate national security interests or intellectual property rights. In the light of the foregoing, the question is whether the Act may impose additional restrictions – as compared to the FOIA – on the freedom of information with regard to the data on which a decision is based.

[92] Paragraphs (5) and (6) of Section 27 of the FOIA actually provide the controller with a possibility broader than the protection of national security interests or intellectual property rights as defined in the Project Act. The object of protection is the public task

activity itself, which may also include the protection of these values mentioned above. This does not, however, mean that an Act of Parliament imposing – for other reasons – restrictions on the disclosure of information on which a decision is based is against the Fundamental Law. This is because these data are ambiguous in character: as a general rule, they may correspond to the regime under Section 27 (5) and (6) of the FOIA, but they can also be considered a type of data under Section 27 (2) of the FOIA. In other words, their disclosure may also cause harm in cases other than those covered by paragraphs (5) and (6) of Section 27 of the FOIA, the avoidance of which justifies in a constitutional manner the restriction of their disclosure. If the information used to justify a decision within the scope of the duties and powers of a public body does not necessarily cause the decision to fail or does not jeopardise the functioning of the body, still its disclosure may result in the infringement of other constitutionally recognised values. In these cases, the data used as a basis for a decision – still depending on a specific decision – is considered a type of data, the disclosure of which may be restricted by an Act of Parliament pursuant to Section 27 (2) of the FOIA. Where such a legal restriction does exist, the data controller is under an increased obligation to enforce the requirements stemming from the Fundamental Law and elaborated by the Constitutional Court. If it treats the data on which a decision is based as a data-type, it must not act in accordance with the regime set out in Section 27 (5) and (6) of the FOIA, but must apply the "public interest test" as the general rule when considering the disclosure. The burden is on the data controller to specifically identify the data as a data-type – depending on the decision taken in the scope of its functions and powers – and to prove that publicity would harm the interests to be protected. It could refuse to disclose the requested data only if there is a greater public interest in keeping it blocked than in disclosing it. Of course, judicial review under the FOIA must also apply in these cases, covering both the legal basis and the justification of the controller's decision. Therefore, if the data controller's action is deemed to be in conflict with the Fundamental Law, if it is unable to identify the decision falling within its remit, linking it to the requested data, or to justify the larger social interest in refusing to disclose it.

[93] In summary, it can be concluded that the disclosure of data serving as the basis for a decision may be restricted under Section 27 (5) and (6) of the FOIA on the one hand, and on the other hand as a data-type pursuant to Section 27 (2) of the FOIA, by virtue of a specific Act of Parliament. The two categories of restriction have different functions. The case law of the Constitutional Court also recognises that the character of being the basis for making a decision does not necessarily justify the application of paragraphs (5) and (6) of Section 27(5) of the FOIA, but at the same time, as a data-type, a separate Act of Parliament may still authorise its closed processing under Section 27 (2) of the FOIA.

[94] In the context of the Project Act, this means that the possible closed treatment of the data – as a data-type – serving the purpose to provide the grounds of a decision indicated in the Project Act is also considered necessary by way of analogy with the arguments applied to business and technical data. In other words: the protection of national security interest and intellectual property rights indicated by the Project Act may justify, with account to the Project, a restriction, under Section 27 (2) of the FOIA, on the disclosure of the data serving the purpose of substantiating a decision, even though the provisions under Section 27 (5) and (6) are not applicable.

[95] 6. The petitioners consider the publicity restriction in the Project Act to be disproportionate in several respects. Both in their original motion and in their supplement

to the motion, they miss the possibility to consider content and they hold that the thirty-year ban on disclosure under the Project Act is disproportionately long. The petitioners maintained their arguments despite the fact that the wording of the Project Act had – in terms of its content – changed significantly as a result of the Amending Act.

[96] 6.1. First of all, it is clear that the Project Act is to be interpreted in concordance with the FOIA, and it is an Act of Parliament within the meaning of Section 27 (2) of the FOIA. During the application of the Act its guarantees shall, therefore, be enforced: (i) the controller shall carry out the "public interest test", i.e. it shall restrictively interpret the ground of refusal, and it may reject the demand to have access to the data of public interest only if the public interest that serves as the basis of the rejection is of greater weight than the public interest attached to entertaining the request to have access to the data of public interest [Section 30 (5) of the FOIA]. In addition, (ii) the data controller must prove the lawfulness of the refusal and the reasons for the refusal [Section 31 (2) of the FOIA]. The party requesting the data (iii) may, pursuant to Section 31 (1) of the FOIA, go to a court which, in accordance with the practice of the Constitutional Court, shall examine both the legality of the refusal and its substantive justification. Thus, contrary to the petitioners' claim, the scope of discretion both for the data controller and the court is guaranteed under the FOIA with respect to Section 5 of the Project Act, consequently the law does not provide for any disproportionate restriction. This also follows from the amended wording of the Act, which only allows for the blocking of business and technical data the disclosure of which would harm national security interests or intellectual property rights. The petitioners have raised the issue of – because they are not entitled to submit it as a motion – the Constitutional Court laying down as a constitutional requirement that the Project Act should be interpreted in concordance with the FOIA. However, in the light of the foregoing, this is not necessary, as it is clear from the explored content of the legislation.

[97] 6.2. Contrary to the petitioners' assertion, the wording of the Act that provides for thirty years for the confidentiality of the data concerned cannot be considered a disproportionate restriction either. This cannot be considered an *ex lege* restriction, in particular after the Amending Act, but only a legal presumption that the disclosure of the data within this period may harm the values to be protected. However, as the Project Act itself requires a "public interest test" to be performed, the restriction can only be applied if there is a greater public interest in it than in the disclosure of the data concerned. If this was not the case – i.e. if the Project Act was to impose *ex lege* the thirty-year data blocking – it would be contrary to the Hungarian constitutional doctrine on freedom of information, and would also mean that the text and the justification of the Project Act would be self-contradictory and therefore inapplicable.

[98] 6.3. In view of all the above, the Constitutional Court found that the challenged Section 5 of the Project Act does not cause an unnecessary or disproportionate restriction of Article VI (3) or Article 39 (2) of the Fundamental Law, and therefore rejected the petitioners' application for posterior norm control with regard to these provisions.

[99] However, Section 5 of the Project Act also mentions the subcontractor of the Hungarian Designated Organisation, but the Convention does not contain any provision on it, unlike the subcontractor of the Russian Designated Organisation. It is also possible that the Russian main contractor and its subcontractors may use additional subcontractors. However, the Project Act only applies to them – as it only contains a provision on data

of public interest – if they qualify as a person or body performing a public task. If not, their obligation to provide information – taking into account the fact that under the Loan Agreement 80% the Project shall be implemented from an interstate loan to be repaid by the Hungarian party, i.e. the Hungarian State, while 20% of it will be financed from the own resources of the Hungarian party, i.e. the Hungarian State, thus entirely from public funds – is governed by Section 27 (3) and (3a) of the FOIA, with account to Article 39 (2) of the Fundamental Law. However, one should not exclude that the subcontractors – not named in the Convention – used either by the Hungarian Designated Organisation or the Russian Party, may qualify as persons or entities performing a public task. On the one hand, the designated organisations may delegate the further specification of the public task related to the Project, and on the other hand, these subcontractors may be managing national assets or performing other public tasks defined by the law. In view of this, in order to assist the application of the law, the Constitutional Court considered it necessary to state, as a constitutional requirement arising from Article VI (3) and Article 39 (2) of the Fundamental Law, that Section 5 of the Project Act can only be applied to subcontractors of the Russian Designated Organisation and subcontractors of the Hungarian Designated Organisation if they are considered to be organisations performing a public task.

[100] 7. The petitioners also argued that the Project Act, which does not allow for discretion and eliminates the possibility of judicial remedy, puts data requesting parties at a disadvantage compared to other data requesting parties, in violation of Article XV (2) of the Fundamental Law, as they are unable to exercise their right to a fair trial guaranteed by Article XXVIII (1) of the Fundamental Law and their right to judicial remedy under Article XXVIII (7) of it.

[101] According to the relevant provision of the Fundamental Law, Hungary shall guarantee fundamental rights to everyone without discrimination and in particular without discrimination on the grounds of race, colour, sex, disability, language, religion, political or other opinion, national or social origin, property, birth or any other status. The provision therefore prohibits discrimination between fundamental rights.

[102] According to the case law of the Constitutional Court, „»Hungary shall guarantee fundamental rights to everyone without discrimination and in particular without discrimination on the grounds of race, colour, sex, disability, language, religion, political or other opinion, national or social origin, property, birth or any other status«. In addition to the itemized list of the characteristics, the wording »discrimination on other grounds« provides a guarantee that the persons who live in unforeseeable situations, which are remarkably similar to the listed characteristics, shall not suffer from a negative discrimination. This phrase offers a possibility for the Constitutional Court to react in due time to the current changes in the society and and to always determine itself what are the vulnerable groups of the society, i.e. the members of which group should be held defenceless, excluded or subject to continuous and unjustified discrimination. Accordingly, Article XV (2) of the Fundamental Law contains an open list, but this open list may not be extended without limits. It shall not offer protection for those persons who are currently negatively affected by a certain rule, but who are not subject of a discrimination. Actually, the prohibition of discrimination granted in Article XV (2) of the Fundamental Law only covers the situations of life where people face a prejudice or social exclusion due to their essential characteristics that determine their identity. Consequently, the constitutional clause of the prohibition of discrimination primarily

serves the purpose of protecting the groups of the society differentiated according to their personal characteristics that cannot be changed by one's free discretion. In a previous decision, the Constitutional Court stated that »the qualities mentioned in the provision – race, colour, sex, disability, social origin, etc. – are immutable characteristics of the individual which cannot be influenced. Religion or political and other opinions can rightly be included here, because for the individual they form an integral part of his or her identity (personality) and as such cannot be changed at will. [...] Discrimination is making a distinction based on an individual's immutable characteristics, which are mostly predetermined and not dependent on the individual's own decision, as the most serious form of making a legal distinction. Such discrimination is generally prohibited under Article XV (2), and therefore any such discrimination requires a stricter test than the general equality rule. Such a distinction is deemed to exist if groups with the same characteristics formed on the basis of the law differ from each other according to an immutable characteristic of the individual«[…].” {Decision 3206/2014. (VII. 21.) AB, Reasoning [27]; see also: Decision 30/2017. (XI. 14.) AB, Reasoning [52]; Decision 6/2018. (VI. 27.) AB, Reasoning [38]; Decision 11/2018. (VII. 18.) AB, Reasoning [20]; Decision 33/2019. (XI. 27.) AB, Reasoning [72]}

[103] The petitioners alleged a violation of Article XV (2) of the Fundamental Law in relation to the exercise of the limited fundamental right – resulting from the regulation – between the parties requesting data of public interest. In the light of the cited case law of the Constitutional Court, however, it can be stated that the potential submission of a request for access to data of public interest cannot be considered either as a situation listed in Article XV (2) of the Fundamental Law or as another situation related to the immutable characteristics of the individual. The Constitutional Court therefore dismissed the petitioners' application in this respect for lack of a substantive connection between the petitioners' arguments and the protection guaranteed by Article XV (2) of the Fundamental Law {See: Decision 32/2015. (XI. 19.) AB, Reasoning [51]; Decision 33/2017. (XII. 6.) AB, Reasoning [146]; Decision 3/2020. (I. 3.) AB, Reasoning [74]; Decision 13/2020. (VI. 22.) AB, Reasoning [69]}.

[104] The Constitutional Court notes that contrary to the petitioners' arguments, the challenged provision of the Project Act does not even constitute an adverse regulation, since, as explained above, the guarantees provided by the FOIA, which are also granted to other data requesters, are also ensured in the application of the Act.

[105] 8. The petitioners also alleged that Section 5 of the Project Act violated an international treaty. They argue that the wide range of data covered by the restriction also unduly affects environmental data and excludes them from public access without any discretion, in violation of Articles 4 (1) and 4 (4)(a) to (b) and (e), the final provision of Article 4 (4) and Article 6 of the Aarhus Convention.

[106] Article 4 (1) of the Aarhus Convention requires the states parties to guarantee the disclosure of environmental information, subject to certain permissible exceptions. Such an exception might be if the request concerns, for example, preparatory material [Article 4 (3) (c) of the Aarhus Convention]; or if the disclosure of the environmental information would adversely affect, for example, international relations, national defence or public security, or, for example, intellectual property rights [Article 4 (4) of the Aarhus Convention]. The Aarhus Convention also stipulates in Article 4 that the grounds for refusal are to be interpreted restrictively and that the public interest in disclosure of the

information as well as the extent to which the information requested relates to emissions into the environment must be assessed. As a further guarantee, Article 4 (6) of the Aarhus Convention also requires that if the environmental information to be processed in a closed manner can be separated, the rest of the information must be made public.

[107] The Constitutional Court has already pointed out above that the Project Act – as emphasised by the Minister of Justice and as clarified in the reasoning of the Amending Act – limits only the accessibility of data of public interest. This means, therefore, that the Project Act does not apply to data the disclosure of which is required by another Act of Parliament in the public interest (i.e. data public on grounds of public interest according to Section 3 (6) of the FOIA). Data processed by an organisation performing a public task are data of public interest. Where a restriction on information imposed by an Act of Parliament only applies to data in the public interest, the laws on data public on grounds of public interest are to be considered as a restriction over the restriction. In the present case, this means that the Project Act does not affect the obligation of data controllers to disclose environmental information, which is imposed on them by Section 12 of the APE. In this respect, therefore, the Project Act cannot, as a general rule, be linked to the Aarhus Convention's provisions, since it is not applicable in the context of environmental information as data public on grounds of public interest.

[108] However, there may be cases in which it is disputed or undecided whether, for example, technical data can be considered as environmental data. Nevertheless, this must be resolved by the body applying the law, by considering all the circumstances of the case. If it concludes that, due to its nature, information that is also environmental information is also business, technical or decision supporting information as defined in the Project Act, it must act in accordance with the guarantees – provided in the FOIA – to be followed during the application of the Project Act. Based on the text of the Aarhus Convention, it can be concluded that the Project Act imposes restrictions on the freedom of information in order to protect interests that are permitted by the international treaty itself. The Hungarian legal system provides the guarantees – in paragraphs (1), (2) and (5) of Section 30 of the FOIA as already described above – required by the Aarhus Convention with regard to restricting environmental information to the minimum extent possible.

[109] In light of the above, the Constitutional Court found that Section 5 of the Project Act does not violate the Aarhus Convention, and therefore rejected the petitioners' claim for a declaration of violation of an international treaty.

V.

[110] Based on the second sentence of Section 44 (1) of the ACC, the Constitutional Court orders the publication of this decision in the Hungarian Official Gazette.

Budapest, 12 January 2021

Dr. Tamás Sulyok
President of the Constitutional Court
Justice of the Constitutional Court, Rapporteur

Dr. Tamás Sulyok *Dr. Tamás Sulyok* *Dr. Tamás Sulyok*

President of the Constitutional Court
on behalf of
Dr. Ágnes Czine
Justice of the Constitutional Court
unable to sign

President of the Constitutional Court
on behalf of
Dr. Egon Dienes-Oehm
Justice of the Constitutional Court
unable to sign

President of the Constitutional Court
on behalf of
Dr. Tünde Handó
Justice of the Constitutional Court
unable to sign

Dr. Tamás Sulyok
President of the Constitutional Court
on behalf of
Dr. Ildikó Hörcherné dr. Marosi
Justice of the Constitutional Court
unable to sign

Dr. Tamás Sulyok
President of the Constitutional Court
on behalf of
Dr. Imre Juhász
Justice of the Constitutional Court
unable to sign

Dr. Tamás Sulyok
President of the Constitutional Court
on behalf of
Dr. Miklós Juhász
Justice of the Constitutional Court
unable to sign

Dr. Tamás Sulyok
President of the Constitutional Court
on behalf of
Dr. Béla Pokol
Justice of the Constitutional Court
unable to sign

Dr. Tamás Sulyok
President of the Constitutional Court
on behalf of
Dr. László Salamon
Justice of the Constitutional Court
unable to sign

Dr. Tamás Sulyok
President of the Constitutional Court
on behalf of
Dr. Balázs Schanda
Justice of the Constitutional Court
unable to sign

Dr. Tamás Sulyok
President of the Constitutional Court
on behalf of
Dr. Péter Szalay
Justice of the Constitutional Court unable to sign

Dr. Tamás Sulyok
President of the Constitutional Court
on behalf of
Dr. Mária Szívós
Justice of the Constitutional Court
unable to sign

Concurring reasoning by Justice *Dr. Ágnes Czine*

[111] I agree with the content of the holdings of the decision, but at the same time I also hold it important to point out the following.

[112] 1. In the context of Article VI (3) of the Fundamental Law, the Constitutional Court has emphasised in several decisions that "there is a close link between the principle of publicity, democracy and the protection of fundamental rights. The purpose of providing for the publicity of data of public interest is to ensure transparency in the functioning of the State, and to enable the citizens to monitor it. Public access to data of public interest cannot be restricted arbitrarily, without sufficiently serious and constitutionally justifiable reasons, otherwise the transparency and the monitoring of public authority activities would be compromised, which would pose a threat to the democratic State

under the rule of law. The publicity of data of public interest and data public on grounds of public interest is therefore a prominent public interest that must be weighed against any restriction on the fundamental right to freedom of information." {Decision 29/2014. (IX. 30.) AB, Reasoning [53]}

[113] In the present case, the Constitutional Court – confirming its case law in the context of freedom of information – made it clear for the bodies that apply the law under which constitutional aspects Section 5 of the Project Act may restrict the accessibility of data of public interest.

[114] Above all, it is important to emphasise that the Project Act does not qualify as a *lex specialis* compared to the FOIA as a *lex generalis*, and therefore Section 5 of the Project Act must be interpreted together with the FOIA. This is why the Constitutional Court stressed that the access to data of public interest can be limited, also in the specific case, with regard to the criteria set out in the FOIA. Consequently, the controller must carry out the "public interest test", i.e. it shall restrictively interpret the ground of refusal, and it may reject the demand to have access to the data of public interest only if the public interest that serves as the basis of the rejection is of greater weight than the public interest attached to entertaining the request to have access to the data of public interest [Section 30 (5) of the FOIA]. In addition, another important constitutional aspect is that the controller must prove the lawfulness of the refusal and the reasons for the refusal [Section 31 (2) of the FOIA].

[115] With regard to these constitutional aspects, the Constitutional Court also held that, contrary to the petitioners' claim, the wording of the Act which provides for thirty years for the blocking of the data concerned cannot be considered a disproportionate restriction. This is not an *ex lege* restriction, but merely a statutory presumption. Consequently, the restriction can only be applied if it implies a greater social interest than the disclosure of the data concerned.

[116] The Constitutional Court thus emphasised that the Project Act does not exclude the substantive discretionary assessment of the accessibility of data of public interest, nor renders the possibility of judicial remedy empty. In accordance with the provisions of the FOIA, the controller must assess whether the conditions for the restriction are met, and this procedure cannot be formal or discretionary.

[117] 2. In the present case, the Constitutional Court reinforced its case law based on Article 39 (2) of the Fundamental Law, according to which "every organisation managing public funds" shall be obliged to publicly account for its management of public funds, therefore "also the organisations other than the ones with a public-service mission shall guarantee access to the data of public interest that they control – in particular, upon a relevant request" {Decision 21/2013. (VII. 19.) AB, Reasoning [40]; Decision 25/2014. (VII. 22.) AB, Reasoning [30]}. As far as the obligation is concerned, it is only relevant that the entity in question processes data of public interest and is therefore itself subject to the obligation to comply with the request for data – in order to enforce the right of access to data of public interest. This general obligation cannot be limited by narrowing the scope of the recipients without restricting the right of access to data of public interest {Decision 6/2016. (III. 11.) AB, Reasoning [31]}.

[118] In the present case, the cited practice of the Constitutional Court is of particular relevance in relation to those organisations which are not bodies performing a public task for the purposes of Section 5 of the Project Act, but which manage public funds. The Constitutional Court made it clear through the interpretation of the law contained in the constitutional requirement that Section 5 of the Project Act does not apply to these organisations, and therefore it is necessary to ensure the freedom of information in their case on the basis of Article 39 (2) of the Fundamental Law.

[119] 3. In the context of the substantive scope of the Project Act, the Constitutional Court clearly stated in the present case that the Project Act does not affect the obligation of data controllers to disclose environmental information, which is imposed on them by Section 12 of the APE. Therefore, the Project Act cannot be linked to the provisions of the Aarhus Convention, since it is not applicable in the context of environmental information as data public on grounds of public interest.

[120] 4. On the basis of the above, the Constitutional Court concluded that the provisions of the Project Act challenged by the petition do not preclude a substantive examination of the justification for the restriction of publicity, and therefore do not in themselves result in a disproportionate restriction of the freedom of information. Whether, in the case of specific data requests, the data controllers have weighed the restriction on access to data of public interest in accordance with constitutional considerations can be examined in the context of judicial review.

Budapest, 12 January 2021

Dr. Tamás Sulyok
President of the Constitutional Court
on behalf of
Dr. Ágnes Czine
Justice of the Constitutional Court, unable to sign

Concurring reasoning by Justice *dr. László Salamon*

[121] I agree with the decision. In relation to the constitutional requirement set out in point 1 of the holdings of the decision, I consider it important to emphasise the following.

[122] The reasoning of the decision analyses in detail the cases in which subcontractors of the Russian and Hungarian Designated Organisations may acquire data of public interest and how this affects whether or not they are considered to be organisations performing a public task. According to the constitutional requirement, Section 5 of the Project Act does not apply if the subcontractor cannot be considered as an organisation performing a public task. However, it does not in any way follow from establishing the constitutional requirement that, while the disclosure of specific data of public interest defined in the Project Act may be lawfully refused by organisations classified as public bodies (Designated Organisations and their subcontractors) on the basis of Section 5, the same data would have to be disclosed by organisations subcontracted to them but not classified as organisations performing a public task.

Budapest, 12 January 2021

Dr. Tamás Sulyok
President of the Constitutional Court
on behalf of
Dr. László Salamon
Justice of the Constitutional Court, unable to sign

Dissenting opinion by Justices *dr. Ildikó Hörcherné dr. Marosi* and *dr. Balázs Schanda*

[123] We hold that Section 5 of the Project Act may raise concerns in terms of fundamental rights.

[124] The Project Act has developed an independent set of rules with respect to the disclosure of both the data concerned (identification of the data according to their content as business and technical data) and the data that serve the purpose of forming the basis of a decision. Although the system of the Project Act relies on the FOIA [Section 27 (2)] as well as on certain provisions of the APCD with regard to the closed processing of data (e.g. the 30-year publicity limitation), in the absence of an explicit provision, the application of the guarantee system of either of the above-mentioned Acts is not evident.

[125] The Deputy Commissioner for the Protection of the Interests of Future Generations drew attention to the fact that the Project Act excludes an entire generation from access to crucial data on a project that will determine Hungary's energy strategy in the long term. The scale of the project and the responsibility it entails require the trust of the society, and this can only be achieved by ensuring the highest possible openness without compromising the considerations of safety. Of course, we accept that in connection with the investment related to the maintenance of the capacity of the Paks Nuclear Power Plant, a number of data may be generated in respect of which the restriction of data disclosure may be justified in the interests of national security or intellectual property rights, but the right way to guarantee this without compromising constitutional concerns would be to classify according to the APCD the data worthy of protection, or to exclude them – in some other procedure protected by similar guarantees – from the scope of public interest data accessible to the public. In this case, the formal and substantive guarantees of the APCD would apply, and the NAIH would have the right of review. And if the classification is not justified, it would have to be decided on a case-by-case basis under Section 27 of the FOIA whether there is a constitutional interest that justifies a restriction on access to data of public interest.

[126] In view of the above, we could not support the operative part of the decision.

Budapest, 12 January 2021

Dr. Tamás Sulyok
President of the Constitutional Court
on behalf of
Dr. Ildikó Hörcherné dr. Marosi
Justice of the Constitutional Court unable to sign

Dr. Tamás Sulyok
President of the Constitutional Court
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Dr. Balázs Schanda
Justice of the Constitutional Court unable to sign

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