Decision 3190/2019 (VII. 16.) AB

on rejecting a constitutional complaint

The plenary session of the Constitutional Court, in the subject-matter of a constitutional complaint – with concurring reasonings by Justices *dr. Ildikó Hörcherné dr. Marosi* and *dr. László Salamon*, and dissenting opinions by Justices *dr. István Stumpf* and *dr. Marcel Szabó* – adopted the following

decision:

The Constitutional Court rejects the constitutional complaint aimed at establishing the lack of conformity with the Fundamental Law and annulling the ruling No. 13.Pf.20.706/2014/6 of the Szekszárd Regional Court.

Reasoning

I

[1] The petitioner, Dr. Bernadett Széll, through her legal representative (Dr. Miklós Pálvölgyi, attorney-at-law, Schiffer & Partners Law Office, H-1027 Budapest, Margit körút 50-52.), filed a constitutional complaint pursuant to section 27 of the Act CLI of 2011 on the Constitutional Court (hereinafter: ACC), requesting a declaration that the judgement No. 13.Pf.20.706/2014/6 of the Szekszárd Regional Court was contrary to the Fundamental Law and asked for its annulment. In her constitutional complaint, the petitioner invoked the violation of his right to access to data of public interest guaranteed by Article VI (2) of the Fundamental Law

[2] The background to the case is as follows. On 11 March 2014, the petitioner submitted a request for data of public interest to MVM Paks II Nuclear Power Plant Development Ltd. – the subsequent respondent in the case – on the basis of section 28 (1) of Act CXII of 2011 on the Right to Informational Self-Determination and Freedom of Information (hereinafter: Information Act) to obtain all the impact studies on the economic, environmental and other effects and risks of the decision to construct a new nuclear power plant unit(s) at the site of the Paks nuclear power plant and all other studies carried out during the preparatory phase. On 24 March 2014, the petitioner also requested from the subsequent respondent the release of the schedules

(subsequently clarified by the petitioner as "term sheets") signed in Moscow on 14 January 2014 on the same subject. The subsequent respondent failed to comply with the data request and the petitioner therefore brought an action.

[3] The Szekszárd District Court acting as the court of first instance rejected the petitioner's action in its entirety with its judgement No. 27.P.20.459/2014/7. The District Court first stated that the respondent is considered to be a body performing other public tasks as defined in section 26 (1) of the Information Act, therefore the data processed by it and requested by the petitioner are considered data of public interest. In connection with the first application of the petitioner, the court – referring to the Decision 12/2004 (IV. 7.) AB and the Decision 21/2013 (VII. 19.) AB (hereinafter: CCDec1) – explained that in a democratic society, the publicity of data of public interest is the general rule, and its restriction can only be constitutionally accepted if it is compellingly justified or unavoidably necessary for the enforcement of another fundamental right or the protection of a constitutional interest. In the light of section 27 (1), (3) and (5) to (6), section 30 (5) and section 31 (2) of the Information Act, the release of the data preparatory to a decision is subject to the decision of the head of the data controller, who must give reasons for his decision to refuse.

[4] In this context, the district court pointed out that section 1 of the Act II of 2014 on the Promulgation of the Convention between the Government of Hungary and the Government of the Russian Federation for Cooperation in the Peaceful Uses of Nuclear Energy (hereinafter: "Intergovernmental Convention") only sets out its purpose, the detailed rules, such as the rights and obligations of the parties, are contained in the "Implementation Agreements" to be concluded subsequently by the authorities designated by the governments. The data on which the Implementation Agreements are based are therefore classified as data preparatory to a decision. Since the Implementation Agreements have not yet been concluded, the respondent has duly justified its refusal to provide the information first requested by the petitioner. The district court also accepted the respondent's argument that these data also constituted trade secrets in view of section 81 (1) and (3) of the Act IV of 1959 on the Civil Code (no longer in force) (hereinafter: "old Civil Code"), and that their disclosure – prior to the conclusion of the Implementation Agreements – would therefore disproportionately and significantly reduce the respondent's ability to assert its interests. As regards the data requested by the applicant the second time (the so-called "term sheets"), the district court held that they also contain classified information, in respect of which, however, the respondent is not the party who classified them (the claim can be asserted against the classifier), and therefore the petitioner's request cannot be granted in this respect either. The petitioner appealed against the judgement.

[5] The Szekszárd Regional Court partially altered the judgement of the first instance by its judgement No 13.Pf.20.706/2014/6. It obliged the respondent to provide the petitioner, among the data requested by the petitioner, with the documents – named and identified in the judgement – of the "Lévai Project", and upheld the judgement of the first instance in all other respects. The regional court supplemented the facts of the case, taking into account the data of the proceedings at first instance and the facts which are acknowledged to be public knowledge.

[6] In this context, the regional court evaluated the documents attached by the respondent – pursuant to section 31 (2) of the Information Act –, the table containing the list of documents sent to the National Authority for Data Protection and Freedom of Information (hereinafter: NAIH) in June 2014, the register of documents prepared by the respondent, the minutes of delivery and the list of documents (in which the subject matter, a brief description of the content and the status of the document were indicated) as well as the content of the above. The regional court interpreted the possibility of restricting the publicity of data of public interest, citing Article I (3) of the Fundamental Law and the case-law of the Constitutional Court, referring to section 27 (1) to (6) of the Information Act. The regional court also cited paragraphs [46] and [58] of the reasoning of CCDec1, stressing that it had also examined the content regarding the preparatory nature of the documents submitted by the respondent and the lawfulness of the refusal of the respondent (data controller) to disclose the data. First of all, the regional court – agreeing with the district court – stated that the Intergovernmental Agreement is not a decision in the light of which the request for access to the documents on which it is based can only be lawfully rejected under section 27 (6) of the Information Act. The regional court, upholding the respondent's argument, held that, in the light of the Intergovernmental Convention, decisions had to be taken in several stages, one after the other, and that the Intergovernmental Convention could not therefore be assessed as an independent decision. In substance, the Intergovernmental Convention is not the end of a decision-making process, since it merely sets out an objective, which is incomplete without the Implementation Agreements, and from which no rights and obligations derive. It follows from this that the data requested by the petitioner are preparatory materials for this multi-stage contractual system and are therefore governed by section 27 (5) of the Information Act, even if the Intergovernmental Convention has already been signed.

[7] In the light of this, the respondent classified the analyses and studies of an economic-financial nature, the list of technical-economic documents relating to the justification of the nuclear power plant investment, the analysis and evaluation documents - as preparatory materials for the decision - and the materials of the planning documentation required for the site licence as data for the justification of the decision. In their case, the respondent data controller, considering the weight of the

public interest in disclosure and the public interest in excluding disclosure (disclosure of that data would weaken the negotiating position of the respondent and, indirectly, of the Hungarian State), correctly excluded the disclosure of that data to the plaintiff, since the Implementation Agreements had not yet been concluded at the time of the request for the data. The regional court added that, in addition to being of a decision-preparatory nature, the documents also constituted trade secrets of the respondent, the disclosure of which would cause significant harm to its interests during the negotiations on the Implementation Agreements. For all these reasons, the provisions of paragraph [46] of the reasoning of CCDec1 cannot be applied in the context of trade secrets and, in the absence of knowledge of the issues to be raised in the negotiations, the complexity of the business interests and their precise scope, a more in-depth and detailed examination of the trade secrets nature of the economic and financial data requested to be disclosed is not justified, due to the considerable volume of the documents.

[8] However, in the context of proportionality, from the totality of the data under section 27 (5) of the Information Act, the regional court found the refusal to disclose the environmental impact assessments generated before 14 January 2014 unlawful, in view of the different weight of the public interest, the more indirect impact on market and economic interests, and the lack of a causal link that could influence the negotiation process. Under the Information Act, only information which is part of the decision-making process and the disclosure of which would jeopardise the success of the implementation or give an undue advantage to certain operators may be excluded. Referring to decisions of the Constitutional Court and to EU and Hungarian sources of law, the regional court ruled that environmental information cannot be included in the concept of decision-preparatory data, since the existence of this character is based not only on formal but also on substantive criteria. Indeed, there is a distinction between the data on which a decision is based and the data used to reach that decision, and environmental information falls into the latter category.

[9] The court, also referring to section 30 (5) of the Information Act, concluded that in the case of the documents of the "Lévai Project" mentioned in the judgement, access to data on the state of the environment also takes precedence over the protection of trade secrets due to the social interest in the preservation of the environment and the fundamental right to a healthy environment, and therefore ordered the respondent to publish these impact studies. However, it found that the documents annexed by the respondent contained a number of environmental impact assessments which were produced after the signing of the Intergovernmental Convention or after the data request made by the petitioner, but which could not be covered by the data request.

[10] The regional court also examined the merits of the respondent's arguments concerning national classified information. Taking into consideration the provisions of

the Act CLV of 2009 on the Protection of Classified Data (hereinafter: "Classified Data Act"), the regional court held that the thirteen documents attached by the respondent did not comply with the provisions of the Classified Data Act and their classification cannot be considered valid, however, according to their content (human resources assessment, assessment of the investment and operational labour needs related to the construction of new nuclear power plant units, involvement of Hungarian enterprises as broadly as possible), they qualify as data to support decision-making as defined in section 27 (5) of the Information Act and as trade secrets in accordance with section 81 (2) of the old Civil Code. Due to the preparation of the Implementation Agreements and the ongoing negotiations, the public interest in excluding access to these documents was considered to outweigh the right to information. The regional court fully shared the findings of the district court in relation to the "term sheets" requested by the petitioner.

[11] In its constitutional complaint, the petitioner explained that the final judgement violated its right to access to data of public interest guaranteed by Article VI (2) of the Fundamental Law in three respects: (i) according to the petitioner, with the exception of the environmental impact assessments ordered by the court to be released, all other documents were held by the court to be serving the purpose to provide the grounds of a decision in accordance with section 27 (5) of the Information Act; (ii) it did not examine by which decision and to what extent the restriction of public access exists; (iii) it did not have the opportunity to review the content of the classification of the requested data. Citing paragraph [46] of the reasoning of CCDec1, the petitioner submitted that the regional court had classified the documents not ordered to be disclosed as decision-preparatory data in their entirety, contrary to what was stated in CCDec1, in breach of Article VI (2) of the Fundamental Law. Also referring to CCDec1, the petitioner explained that the regional court had failed to carry out a substantive analysis of the documents concerned, based on an individual assessment of each category of data. The petitioner acknowledged that in the course of the investment which is the subject of the data request, public authorities take a number of interdependent decisions. However, the petitioner stressed that her request did not concern subsequent agreements and the data on which the decision to be taken at the end of the licensing procedure was based, but the documents preparatory to the Intergovernmental Convention on the construction of the new nuclear power plant unit(s), as a decision.

[12] The petitioner also pointed out that the subsequent decisions – not specified by the respondent – are no longer about the establishment, but about the implementation. In view of this, there is no room for an automatic restriction of public access to the data relating to the decision on the establishment, on the ground that they are of a decision-preparatory nature. The petitioner added that neither the

respondent's pleadings nor any other fact taken into account in the evidentiary procedure demonstrated that the totality of the information requested could be linked to subsequent implementation agreements or decisions on administrative authorisations. In summary, the judgement also infringes Article VI (2) of the Fundamental Law because the petitioner does not consider it possible that the requested data are entirely preparatory material for the expansion of the Paks power plant. Analyses relating to the method of financing or the return on investment will clearly not be included in the building permit procedure, and decisions on the basic elements of the financing scheme have been taken in full by the time of delivering the final judgement. Finally, the petitioner argued that the regional court had also failed to carry out a substantive review of the results of the qualification procedures, which violated the requirement laid down in the Constitutional Court's Decision 4/2015. (II. 13.) AB and Article VI (2) of the Fundamental Law.

[13] During the proceedings, the Constitutional Court, in accordance with section 57 (2) of the ACC, called upon MVM Paks II Nuclear Power Plant Development Ltd. as the respondent in the court proceedings (data controller), the Minister of the Prime Minister's Office, the President of NAIH and the Minister of Justice to submit their statements and opinions.

[14] In the course of the examination of the merits of the case, the Fourth Amendment to the Fundamental Law supplemented Article VI of the Fundamental Law with effect from 29 June 2018, and the right to access the data of public interest relied upon by the petitioner is now guaranteed – with the same content as before – by Article VI (3).

II

[15] 1 The affected provision of the Fundamental Law:

"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."

[16] 2 The relevant provisions of the Information Act:

"Section 26 (1) Any person or body attending to statutory State or municipal government functions or performing other public duties provided for by the relevant legislation (hereinafter jointly "body with public service functions") shall allow free access to the data of public interest and data public on grounds of public interest under its control to any person, save where otherwise provided for in this Act."

"Section 27 (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."

"Section 31 (2) The burden of proof for the lawfulness and the reasons for refusal, as well as the reasons based on which the amount of the fee is payable for making a copy, shall lie with the controller."

III

[17] 1 On the basis of section 56 (2) of the ACC, the Constitutional Court primarily examined whether the petitioner's constitutional complaint had complied with the formal and substantial requirements laid down in the ACC.

[18] 1.1 Pursuant to section 30 (1) and section 53 (2) of the ACC, a constitutional complaint under section 27 of the ACC shall be submitted to the Constitutional Court within sixty days of the notification of the challenged court decision, addressed to the court of first instance. According to the information of the Szekszárd District Court, which was the court of first instance in the case, the petitioner received the contested judgement on 2 April 2015, while her constitutional complaint was posted on 1 June 2015, which is considered to be within the time limit.

[19] The constitutional complaint must contain a definite request in accordance with section 52 (1b) of the ACC. The petitioner has indicated the statutory provision establishing the competence of the Constitutional Court [section 27 (1) of the ACC]; indicated the challenged court decision; indicated the provision of the Fundamental Law alleged to be violated [Article VI (2), the right to access to data of public interest]; explained the essence of the infringement of the right guaranteed by the Fundamental Law and stated why and to what extent the judicial decision challenged in the constitutional complaint infringes it; and expressly requested the annulment of the challenged judicial decision. In view of all the above, the petitioner's application also complies with the formal requirements laid down in section 52 (1b) of the ACC.

[20] 1.2 In connection with the compliance with the statutory substantive requirements for the admissibility of a constitutional complaint (section 27 and sections 29 to 31 of the ACC), the following should be established.

[21] The petitioner can be considered as a person concerned under section 27 of the ACC, as she was a plaintiff in court proceedings preceding the judgement challenged by the constitutional complaint. The petitioner has exhausted the legal remedies available, she has not initiated any review proceedings and no such proceeding is pending.

[22] According to section 29 of the ACC, the Constitutional Court shall admit the constitutional complaint if a conflict with the Fundamental Law significantly affects the judicial decision, or the case raises constitutional law issues of fundamental importance. In admitting the constitutional complaint, the Constitutional Court found that the petition alleging a violation of the right to access data of public interest under Article VI (3) of the Fundamental Law raises questions of fundamental constitutional importance and that these questions affect the merits of the final judgement of the court refusing the request for data.

[23] According to the petition, an examination of the violation of the right to access data of public interest is required in the context of whether the court can deliver a well-founded decision on a restriction of public access to the whole of the requested data if it does not specifically examine the requested documents (and instead of this decides on the basis of a list of the requested documents prepared by the respondent, containing a brief description of their subject-matter, content and designation as "classified material"). Furthermore, it is also necessary to examine the violation of the right of access to data of public interest in order to determine whether the court may decide that the documents requested, or the data contained in them as a whole, constitute decision-preparatory data, in the absence of a precise indication of the decision in connection with which the restriction of public access is imposed and of the extent to which the ground for the restriction of public access to the specific content of each document requested is invoked. In addition, it must be examined whether, if the respondent refuses to disclose part of the data processed by it (and which the applicant requests) on the ground of data classification, the applicant was also entitled to judicial review of the content of the justification for the data classification (in the context of the judicial review of the justification for the restriction of public access). On the basis of the constitutional complaint, the Constitutional Court should in particular assess with regard to the above questions if the challenged judicial decision violates the petitioner's fundamental right enshrined in the Fundamental Law.

[24] The constitutional complaint is unfounded.

[25] In the substantive examination of the constitutional complaint, the question of constitutionality was the restrictability of the right to access data of public interest guaranteed by Article VI (3) of the Fundamental Law, including the interpretation of the law by the court, which found the refusal to disclose the data requested in the specific case to be justified due to their decision-preparatory nature.

[26] 1.1 According to the Constitutional Court's consistent case-law, in proceedings brought under Article 24 (2) (d) of the Fundamental Law and section 27 of the ACC, it reviews the challenged court decision solely from the point of view of constitutionality, i.e. it has no competence to decide on the merits of the case or on the questions of interpretation of the law and the facts of the case. A court judgement is unconstitutional if the interpretation of the law goes beyond the scope of interpretation under the Fundamental Law {Decision 3070/2019. (IV. 10.) AB (hereinafter: CCDec2), Reasoning [18]; Decision 3098/2019. (V. 17.) AB, Reasoning [19]}. In addition, "the Constitutional Court may not distract the power of the adjudicating courts to comprehensively assess the elements of the facts of the cases before them, it may only review whether the interpretation of the law underlying the weighing was in compliance with the Fundamental Law, and whether the constitutional criteria of weighing were complied with" {Decision 14/2019. (IV. 17.) AB, Reasoning [20]}.

[27] 1.2 With regard to the subject-matter of the case, it is also necessary to note that the examination of the judgement of the court in relation to the disclosure of or refusal to disclose data of public interest is limited in that „in a case affecting the restriction of the right to access data of public interest, the Constitutional Court shall only review the challenged judicial decision in terms of its constitutionality Therefore, in the course of the review of the constitutionality of the judicial decision, it shall not take a stand on whether or not the concrete data requested to be disclosed do qualify as data of public interest or data accessible on public interest grounds. Indeed, this is judicial task that requires the application of section 3 points 5 and 6 of the Information Act, i.e. the statutory definition of data of public interest and data accessible on public interest grounds, and in case of legal dispute, the court is entitled to perform this task" (CCDec2., Reasoning [27]).

[28] 1.3 The Constitutional Court formulated as a constitutional requirement in the holdings of CCDec1 that the court hearing a case for the disclosure of data of public interest must examine both the legal grounds and the substantive justification for the refusal to disclose the data. The examination shall include whether the refusal to disclose information of public interest was made only to the extent strictly necessary. In this context, the proceeding court shall also examine whether the data controller has not unduly restricted access to data of public interest on the ground that the data

requested are processed together with data not allowed to be accessed by the applicant, whereas there would have been no obstacle to the latter being rendered unrecognisable.

[29] Taking this into account, the CCDec2. summarised in paragraphs [40] to [43] of its reasoning the previous case-law of the Constitutional Court concerning the refusal of granting the right to access to data of public interest due to the preparatory nature of the requested data. This interpretation formulates a four-step test for judicial interpretation of the law: (1) 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; (2) without regard to the content of the document – i.e. without any examination or because of a single data – the whole document should not be classified as data that serve the purpose of providing the basis for a decision, i.e. the document principle cannot override the data principle set out in section 30 (1) of the Information Act. Thus, an interpretation of the law that considers the totality of the requested documents – irrespectively to their content and in general – as data that serve the purpose of supporting the decision-making is unacceptable; (3) the controller cannot invoke "considerations of convenience", i.e. the additional burden resulting from the greater volume of the requested data; (4) finally, the decision dismissing the request for data – in the interest of securing effective legal remedy – should be reasoned on the merits by the controller. 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 being free of any undue external influence. In this context, the court hearing the appeal must examine the justification for the refusal to disclose the data in terms of its legal basis and content, i.e. only by examining the content of the data requested can it be established whether the refusal to disclose the data of public interest was lawful.

[30] 2.1 In the challenged judgement, the Szekszárd Regional Court considered the following elements of the facts of the case to be relevant. The data controller respondent - in line with the burden of proof binding it under section 31 (2) of the Information Act - attached the "term sheets" requested by the petitioner with the

classified information masked. He also provided a statement of technical and economic documents relating to the justification of the nuclear power plant investment, marked as trade secret. It also attached thirteen documents which it designated as national classified information (judgement of the regional court, p. 11). The regional court further stated on page 14 of the judgement that "as regards the other analyses and study materials provided by the respondent to the court, it can be established that they are preparatory materials for decisions with economic content which may be used in the negotiations on the Implementation Agreements, some of which also contain trade secrets. On the basis of a comparison of the materials actually handed over and classified as trade secrets listed in the handover report [...] with the attached list of documents – in which list the subject of the document, a brief description of the content of the document and the status of the document (issued, decision-preparatory material, internal classified document) were indicated –, the court found that the documents on the list, which were classified as other preparatory material for the decision but not attached, essentially contained the studies and planning documents necessary to justify the application for a site licence. Given their typically technical content and the absence of an application for launching a site licence procedure, both their preparatory character and their trade secret character can be established."

[31] 2.2 In the case, the regional court considered it a preliminary question whether the requested impact studies could be considered as decision-preparatory data, i.e. whether the limitation of publicity under the general rule of section 27 (5) of the Information Act or the principle of publicity under section 27 (6) of the Information Act was applicable. According to the judgement, under the Intergovernmental Convention, decisions are to be taken in successive stages and the Intergovernmental Convention cannot be separated from this as it is not the conclusion of a decision-making procedure but, together with the Implementation Agreements to be concluded later, it is part of a contractual system. The data requested by the petitioner are therefore preparatory data for this contractual system, therefore their preparatory character for a decision within the meaning of section 27 (5) of the Information Act continues to exist also after the conclusion of the Intergovernmental Convention. In the context of Article I (3) of the Fundamental Law, the regional court concluded that the respondent data controller had correctly assessed the weight of the public interest in the disclosure of the data in the public interest against the refusal to disclose the data in the public interest when it opted for the latter. At the time of the data request, the negotiations for the conclusion of the Implementation Agreements were ongoing and the disclosure of the requested data would have significantly weakened the position of the respondent data controller – and indirectly the Hungarian State (pages 18 to 19 of the judgement of the regional court).

[32] In connection with the national classified data, the regional court also concluded that although their classification does not comply with the provisions of the Classified Data Act, their content is indeed of a decision-preparatory or trade secret nature. In the context of the classified data masked the “term sheets”, the respondent data controller was not the classifier and the petitioner could have asserted her claim against the Ministry of National Development. The refusal to issue the environmental impact assessments, in the context of proportionality, was found unlawful by the regional court, because of their different legal regulation, the different weight of the public interest and their more indirect impact on market and economic interests, and the impact assessments referred to in the operative part of the judgement were ordered to be disclosed.

[33] 2.3 The Constitutional Court first examined the judgement in question in relation to the first three points of the constitutionality test summarised in paragraphs [40] to [43] of the reasoning of CCDec2.

[34] A question of interpretation of the law concerning section 3, points 5 and 6 of the Information Act adopted to implement the Fundamental Law is whether the requested information can be considered data of public interest in the case of a relevant request. This is a matter for the court to decide about. At the same time, the court has to determine the legal grounds and the content of the refusal, which requires a substantive examination of the nature of the data indicated by the requesting party. Just as the public interest nature of a specific piece of data, the trade secret and decision-preparatory nature of such data can be decided through judicial interpretation of the statutory provisions cited, about which the Constitutional Court cannot form an opinion.

[35] It is to be noted in this context that it is within the competence of the court to decide in what form and in what depth it examines a document or a set of data that contains data subject to the legal debate. However, it can only make that assessment on a case-by-case basis, taking into account the particularities of the case and the quantity of data, and without any reference to considerations of convenience. An infringement of the Fundamental Law is the result if the judge is absolutely unaware of the content of the information contained in the documents requested and decides about their nature “at a distance”, on the basis of assumptions. This was also pointed out in paragraphs [44] to [45] of the reasoning of CCDec2, when the Constitutional Court found the judgements of a regional court of appeal and a regional court in which the judge did not examine the requested data in any form, but decided on them on the basis of assumptions, to be contrary to the Fundamental Law. However, in addition to the prohibition of an absolutely formalistic decision based on assumptions, the judge acting in the case has a margin of discretion as to the form in which they examine the totality of the data, even on the basis of a statement detailing the content of the

documents. In this respect, it is necessary to emphasise that, under section 31 (2) of the Information Act, the burden of proof in support of the lawfulness of the refusal to disclose lies with the controller, that is to say, it is primarily the controller's responsibility to provide the court with the documents requested to the extent that the court can carry out an examination of their content.

[36] At the same time, the court has the possibility to request that the documents submitted by the data controller be supplemented, or, if necessary, that the full set of data be made available, if it cannot carry out a sufficiently thorough examination of the content on the basis of the documents. It must be apparent from the judgement thus delivered that the court has identified the essential elements of the data contained in the documents in question and has determined the extent of the substantive examination in the light of the circumstances of the case, bearing in mind the principle of public access to data of public interest and data public on grounds of public interest.

[37] It is also important to note that in the course of the examination of the content of a document, the court may also come to the conclusion that an entire document is a trade secret or is decision-preparatory in nature, if its interpretation shows that it did not formally apply the document principle, but considered the content of all the data contained in the document to be the same. However, in the course of that procedure, the judge hearing the case must, pursuant to Article 28 of the Fundamental Law, have regard to the provisions and values of the Fundamental Law, in particular the paramount importance of the right to access to data of public interest. In summary, this means that the judge must examine the substance of the content of all the information contained in the documents requested to be disclosed, but where appropriate, the judge may decide on the manner of examination at their discretion. Ultimately, the Constitutional Court, in the context of the constitutional complaint procedure, is entitled to determine whether the court has paid respect to the constitutional framework in its examination.

[38] 2.4 In view of the above, the Constitutional Court held that it is clear from the judgement challenged by the complaint (in particular: pages 11, 14, 18 to 19, 24, 26 to 27 of the regional court's judgement) that the constitutionality of the case is not in dispute. pages 26 and 27) that the court, with due regard to the specific circumstances of the individual case, had carried out an examination of the content of the documents in question to such an extent that it was able to assess the quality of the information requested by the petitioner in accordance with the standard laid down by the Fundamental Law and developed in detail by the Constitutional Court, also taking into account the question of the substantive justification for the restriction of public disclosure.

[39] 2.5 It is also evident from the interpretation that the court essentially took a position on the decision-preparatory nature of the data, which status exists until the decision in question is made pursuant to section 27 (5) of the Information Act. After making the specific decision, the data are now, as a general rule, subject to the principle of publicity in accordance with section 27 (6) of the Information Act. However, the trade secret character of the requested data may be separated from this after the decision has been taken, but until that time – *argumentum a minore ad maius* – it shares the position of decision-preparatory data that are not a trade secrets. The Constitutional Court therefore had to examine whether the regional court had established the decision-preparatory character of the requested data in accordance with the constitutional framework.

[40] In the present case, both the district court and the regional court concluded that the Intergovernmental Convention and the Implementation Agreements together constitute a contractual regime, and therefore the data requested by the petitioner remain decision-preparatory ones until the end of the process. It is through the interpretation of the Intergovernmental Convention (i.e. the law promulgating it) that the courts proceeding in the case have reached the same conclusion. The specificity of the case is therefore that it was not a question of examining a future decision which might be linked to the action of a particular entity, but of interpreting a law which promulgates an international treaty. Article 1 of the Intergovernmental Convention defines the subject-matter of cooperation between the Government of Hungary and the Government of the Russian Federation (maintenance and development of the capacity of the Paks Nuclear Power Plant, design, construction and commissioning of two new units), and Article 2 states that the parties shall designate their respective competent authorities for the purpose of implementing the Intergovernmental Convention (for Hungary, this is the Ministry of National Development). According to Article 3.2, the Hungarian competent authority shall establish or designate a Hungarian state entity or a state-controlled organisation which is financially and technically capable of carrying out the obligations arising from the cooperation activities set out in the Intergovernmental Convention. Finally, Article 3.5 provides that the Hungarian competent authority and/or the designated entity and the equivalent institution of the Russian party shall conclude Implementation Agreements in accordance with Article 8 of the Intergovernmental Convention. Pursuant to the said Article 8, the provisions of Articles 3, 4, 5, 6 and 7 of the Intergovernmental Convention are detailed in separate Implementation Agreements (contracts) to be concluded for the purpose of implementation.

[41] The regional court interpreted the Intergovernmental Convention as part of a contractual regime, complete only with the Implementation Agreements. However, the determination of this is a matter for the discretion of the court: "when the normative

content of the law can be interpreted in more than one way, in the course of applying and interpreting the norm, the court may and – according to the Article 28 of the Fundamental Law – must select the interpretation, which is in line with the Fundamental Law. An interpretation in conformity with the Fundamental Law, where a law has several possible meanings, does not mean a *contra legem* interpretation or a disregard of the content of the norm" {Decision 9/2016. (IV. 6.) AB, Reasoning [37]; reinforced in: Decision 3031/2019. (II. 13.) AB, Reasoning [43]}. The Constitutional Court has held that Articles 1 and 8 of the Intergovernmental Convention make it clear that the details of the relevant questions are determined by the Implementation Agreements and are therefore closely linked to the Intergovernmental Convention. In the light of this, the courts were able to conclude, by examining the substance of the information requested by the applicant, that their use could arise in the conclusion of the Implementation Agreements.

[42] The judgement of the regional court also found, within the scope of its competence to interpret the law, that the Implementation Agreements constitute the specific decisions in the course of which the data requested by the petitioner are used. This interpretation of the law meets the requirements of constitutionality since, in the light of Articles 1 and 3 to 7 of the Intergovernmental Convention, the subject-matter of the Implementation Agreements can be defined in concrete terms. The regional court further acknowledged, on page 14 of the judgement, as a matter of public knowledge that the respondent data controller is the organisation designated by the Hungarian party which, following the submission of the data request, concluded Implementation Agreements with the Russian counterpart. The respondent data controller thus considered it necessary to reject the disclosure of the data requested by the petitioner in order to prepare decisions within its remit and competence.

[43] Taking all this into account, it can be concluded that the regional court, in accordance with the first three points of the constitutionality test derived from the Fundamental Law, as summarised in paragraphs [40] to [43] of the reasoning of CCDec2, found that the data requested by the petitioner were used for the preparation of concrete decisions within the competence of the respondent data controller, and that the regional court reached these conclusions by examining the content of the data in sufficient depth.

[44] 3 The Constitutional Court, bearing in mind Article I (3) of the Fundamental Law, then examined whether the interpretation of the law by the court sufficiently revealed the justification for the refusal by the respondent to disclose the data, i.e. whether the restriction of the right to access data of public interest was necessary (also the last element of the test under paragraphs [40] to [43] of the reasoning of CCDec2). The clarification of this also follows from the constitutional requirement set out in the holdings of CCDec1 and from paragraphs [37], [39] to [40] and [43] to [45] of the

reasoning providing the details of the constitutional requirement. Paragraph [45] of the reasoning of CCdec1 stated that "the disclosure of information on which a decision is based [...] may be restricted in the light of strict requirements. The fact that the information sought serves as a basis for a decision does not in itself necessarily imply that the public interest data are excluded from public access". In its proceedings, the regional court has taken into account both Article I (3) of the Fundamental Law and the requirement cited above stemming from the Fundamental Law. The court examined the arguments of the respondent data controller and pointed out that the disclosure of the data requested by the petitioner would significantly harm the position of the Hungarian party and indirectly the Hungarian State during the negotiations for the conclusion of the Implementation Agreements. The weight of the public interest is therefore assessed more heavily in favour of refusing to disclose this information. Taking the all above into account, the Constitutional Court concluded that the interpretation of the law by the regional court complies with the provisions of the Fundamental Law, as in a series negotiations affecting an important investment project in terms of national security and national strategy, like the conclusion of Implementation Agreements aimed at the extension of the Paks Nuclear Power Plant, the protection of the positions of the Hungarian negotiating party and the State of Hungary may render it necessary to restrict the right to access data of public interests. This does not mean, however, that the data are completely closed to the public, since their preparatory character only lasts until the decision (in this case, the Implementation Agreements) is taken. Thereafter, they are subject to the general principle of publicity under section 27 (6) of the Information Act, subject to the special rules on trade secrets.

[45] 4 Within the scope of the proportionality under Article I (3) of the Fundamental Law, the Constitutional Court found that the court took into account the fact that the grounds for the restriction of fundamental rights do not exist with regard to all elements of the requested data. The judgement (pp. 20 to 24) revealed in detail that the social interest in the publication of the impact assessments for the "Lévai Project", which analysed the impact of the nuclear power plant units on the state of the environmental elements, was significantly greater than the commercial considerations put forward by the respondent data controller. The Court added that the social interest in protecting the environment and the fundamental right to a healthy environment also prevail over the protection of commercial data. In addition, these data have no or only an indirect impact on market and economic interests. The regional court also stated that the data request submitted by the petitioner could not, by definition, relate to environmental impact assessments produced after the signing of the Intergovernmental Convention (14 January 2014) and after the submission of the request. In this context, the Constitutional Court held that the regional court had carried out a proportionality assessment under Article I (3) of the Fundamental Law,

had taken into account the paramount importance in a democratic society of the fundamental right to access to information of public interest guaranteed by Article VI (3) of the Fundamental Law and, in accordance with this, had weighed the social interest in protecting the environment and in acquiring knowledge of the effects of the investment on it.

[46] 5 With regard to the interpretation of the law by the courts in relation to the refusal to disclose classified information, the Constitutional Court has stated the following. The judgement under appeal does not indicate – and nor did the petitioner claim in her constitutional complaint – that her adjudicated statement of claim covered the review of the classification of the data requested; the judgement under appeal does not in fact reject any statement of claim of such content. Without an explicit motion for the judicial review of the data classification, a constitutional complaint referring to the absence of a judicial review on the merits of the justification for the data classification can therefore clearly not be considered to be a breach of the Fundamental Law with regard to the contested judicial decision, which could have a material effect on the judicial decision in this respect, and therefore the petitioner's constitutional complaint could not be examined on the merits in this respect. The Constitutional Court refers to the information provided by the President of the NAIH, according to which section 31 (6a) of the Information Act introduced in 2015 – regulating that the court may initiate the NAIH's secrecy supervisory procedure for the review of the classification of classified data, while suspending the proceedings before it – settles this issue. This provision was not in force at the time the court proceedings were initiated and, again, the petitioner's application did not contain any request of this kind. The regional court only examined the respondent data controller's justification as to whether it had legitimately invoked the sensitive nature of the data as a ground for refusing to disclose it (the regional court's judgement, pp. 26 to 27).

[47] 6 In light of the above, the Constitutional Court found that the judgement of the Szekszárd Regional Court challenged by the constitutional complaint, taking into account the provisions of the Fundamental Law, necessarily and proportionately restricted the petitioner's right to access to data of public interest guaranteed by Article VI (3) of the Fundamental Law, and therefore rejected the constitutional complaint.

Budapest, 09 July 2019.

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

Dr. István Balsai, Justice of the Constitutional Court

Dr. Ágnes Czine, Justice of the Constitutional Court

Dr. Egon Dienes-Oehm, Justice of the Constitutional Court

Dr. Attila Horváth, Justice of the Constitutional Court

Dr. Ildikó Hörcherné dr. Marosi, Justice of the Constitutional Court

Dr. Imre Juhász, Justice of the Constitutional Court

Dr. Mária Szívós, Justice of the Constitutional Court

Dr. Béla Pokol, Justice of the Constitutional Court

Dr. László Salamon, Justice of the Constitutional Court

Dr. Balázs Schanda, Justice of the Constitutional Court

Dr. István Stumpf, Justice of the Constitutional Court

Dr. Marcel Szabó, Justice of the Constitutional Court

Dr. Péter Szalay, Justice of the Constitutional Court

Dr. András Varga Zs., Justice of the Constitutional Court