ANNEX 8

The whole text of the Capitol City Court sentence

RECEIVED
Date: 12 October
Deadline:
Case No.:

IN THE NAME OF THE REPUBLIC OF HUNGARY!

The Metropolitan Court passed the following

J U D G E M E N T

in the lawsuit filed by **Plaintiff Energia Klub Környezetvédelmi Egyesület** (Energy Club Environmental Protection Association, head office: H-1056 Budapest, Szerb u. 17–19., Hungary)

represented by Harsányi and Baltay Law Office, case officer: Attorney-at-law Dr Levente Baltay (working at H-2360 Gyál, Körösi út 104., Hungary) against

Defendant Magyar Villamos Művek Zrt. (Hungarian Electricity Ltd., head office: H-1035 Budapest, Szentendrei út 207–209., Hungary)

represented by Attorney-at-law Dr Krisztina Hajdú (working at H-1031 Budapest, Nánási út 42/B., Hungary) for **the disclosure of information of public interest**.

The Court obliges the Defendant to disclose the following information relating to the what is called Lévai Project within 15 days:
– planned total cost of the project
– time plan of the project
– schedule of the project
– results of the project to date
– data on the share of the companies of the MVM Holding in the project
– as well as to provide a list of other companies and organisations not belonging to the MVM Holding and participating in the project
– to provide a list of contracts concluded under the project, stating the subject-matters and amounts of the contract and the dates of performance set forth in the contracts; authorising the Defendant to block out details relating to technical processes and solutions (if included in the list).

The Court obliges the Defendant to pay the Plaintiff legal costs of HUF 75,000 (seventy-five thousand Hungarian forints) within 15 days. The unpaid procedural duty of HUF 27,000 (twenty-seven thousand Hungarian forints) shall be borne by the state.

An appeal shall lie against the judgment within 15 days of the service thereof, which, addressed to the Metropolitan Court of Appeal, may be submitted to this Court in three copies. In the proceedings before the Court of Appeal, legal representation is mandatory for the party submitting the appeal or adjoining appeal.
Prior to the expiry of the deadline for appeal, the parties may jointly request the assessment of the appeal without a hearing.

If the appeal applies only to the defrayal or the amount of legal costs or the payment of the unpaid duty or costs advanced by the state or is related to the date of payment, or if the appeal is only against the grounds of the judgment, either party may request the appeal to be assessed by the court of second instance at a hearing.

If the parties proceeding with counsels propose in a joint petition attached to the appeal against the judgment, *the appeal based on the violation of a substantive legal rule* will be assessed directly by the Supreme Court. *In property law cases,* the parties may propose proceedings by the Supreme Court if the value disputed in the appeal (or the value thereof established pursuant to Section 24 of the Civil Proceedings Act) exceeds HUF 500,000. No new fact or new evidence may be referred to in the appeal submitted in the way set forth above. The appeal shall be assessed without a hearing, by appropriately applying the rules applicable to judicial review procedures, thus in assessing the appeal, the Supreme Court will decide on the basis of the documents, and no judicial review shall lie against its decision.

Grounds

In its request dated 18 January 2011, received by the Defendant on 24 January, the Plaintiff non-governmental organisation requested the Defendant to provide information on the Lévai Project. In its request, it requested the Defendant to make the following available to the Plaintiff:
– planned total cost of the project
– time plan of the project
– schedule of the project
– results of the project to date
– information on the share of the companies of the MVM Holding in the project (what is the proportion of employees?)
– as well as to provide a list of other companies and organisations not belonging to the MVM Holding and participating in the project
– to provide a list of contracts concluded under the project, stating the subject-matters and amounts of the contracts and the dates of performance set forth in the contract

In its letter of 2 March 2011, the Defendant refused to disclose the information by claiming that the Plaintiff was requesting documents relating to decision preparation and that some of the documents contained trade secrets, and also represented that the data controller may not be obliged to prepare a list or statement by which it generates new information different in quality in order to provide access to the information requested to be disclosed.

After such antecedents, the Plaintiff non-governmental organisation initiated proceedings with the court (received on 4 March 2011), requesting, in the present proceedings, the Defendant to be obliged to disclose information of public interest regarding the disclosure of the above undisclosed documents. It referred to Section 19(1) of the Data Protection Act as the legal basis for its request, pointing out (and also referring to a final and non-appealable decision of the Metropolitan Court of Appeal) that the Defendant was a business association operating with an interest held by the state in the long term, and as such it was an agency performing public service tasks (‘a business association established for the provision of public services even if it managed its operations in the free market, under competitive conditions today,’ referred the Plaintiff to the grounds of a judgment rendered by the Supreme Court), therefore, it was obliged to disclose information of public interest falling within its sphere of responsibilities. Both the Defendant and the companies belonging to its holding and their contracting partners must be aware that the business operations of the Defendant appear as the management of state assets due to the interest held by the state, its contracts entail encumbering and

using state assets, and as such, they must be accessible to the public in order to allow the use of public funds to be monitored. In reference to this argument, it requested the representation made by the Defendant, which refused data disclosure in reference made to the violation of trade secrets to be disregarded. In respect of the objection of the Defendant regarding competence, it represented that the Metropolitan Court of Appeal had declared in several decisions that the role of the Defendant was of national importance in the domestic electricity market, and since it provided public services, it performed public service tasks. In addition, it pointed out, by also referring to the subject-matter of the information requested to be disclosed, that in Hungary, atomic energy is used within a framework controlled by the Government. In this area, the operations of the state are coordinated, also due to its interest in the Paks Nuclear Power Plant, by the Defendant, just like it coordinated the Lévai Project, since it provided specialist assistance to implementation through the companies in its holding, but in addition, it also attached a newspaper article to support its claim that the Defendant also treated the Lévai Project as its own (similarly to the Teller Project). Therefore, in summary, it represented that the information requested about the above subject-matter relating to nuclear energy was clearly a request for information of public interest, since the request was related to decision-making in one of the areas of business operations by the state.

In response to the counterclaim of the Defendant on the merits whereby some of the requested information was information relating to decision preparation, it represented that the Defendant should also specify what decision it wished to prepare with the information requested to be disclosed. The Plaintiff did not consider the arguments stated by the Defendant in this respect at the request of the Court to be well-founded, because the Plaintiff does not request information that would apply to any decision not yet made, since the planned total cost of the project is already known (it should be) and its existing schedule is also an issue of fact, just like its existing results to date, which are also pieces of information that can be disclosed (if it does not have any result, it is requested to be stated so). In respect of the evaluation of this representation made by the Defendant, it submitted the court decisions passed on an information request case relating to the Teller Project preceding the Lévai Project, pointing out that the judicial forums had explained that the information requested to be disclosed (relating to the Teller Project) had no effect on the technical implementation of the subsequent (Lévai) project, the requested information were information of public interest and of financial and economic nature, the disclosure of which might not be refused by referring to either the decision preparation nature thereof or trade secrets. In response to the argument of the Defendant on the latter legal grounds, the Plaintiff emphatically pointed out that none of the information was specialist data relating to know-how, the Plaintiff would like to become familiar with the system of the project, and pointed out that if the information requested to be disclosed included secret personal data belonging to the business interests of the Defendant, the Defendant might block them out when disclosing the data, but the whole data disclosure might not be refused in reference thereto.

The Defendant requested the dismissal of the petition and the obligation of the Plaintiff to pay a fee payable to the counsel of the Defendant. First and foremost, it represented that it did not qualify as an agency performing public service tasks (and thus it did not handle information of public interest either, and might not be obliged to disclose such data), because a change in the Electricity Act regulating its activities, which had come into force after the decision of the Court of Appeal referred to the Plaintiff had been made, terminated the exclusive rights attached to public utility wholesale activities and the obligations to supply electricity, thus electricity supply did no longer qualify as a public service and thus a public service task (on which the decision of the Court of Appeal based the capacity of the Defendant as controller of data of public interest), but it also disputed that it would be an organisation managing the assets of the state and thus it would handle information of public interest, because its understanding was that the interest held by the state in its assets was essentially shares held by the state, the management of which, decision-making by the shareholder during the

exercise of shareholder rights, did not represent the existence of state assets; the Defendant was a business association managing its assets on its own, the assets of which were not state assets. In addition to the foregoing, it also lodged an objection regarding competence, because its understanding was that besides not qualifying as an agency performing public service tasks, it was not an agency with nationwide competence either, and thus not this Court was entitled to assess the claim enforced by the Plaintiff. In accordance with the contents of its letter of rejection preceding the lawsuit, it referred to the fact on the merits that some of the information requested to be disclosed was information to be used for decision preparation, thus its disclosure might be refused on firm grounds in reference to Section 19/A of the Data Protection Act. It represented that the Lévai Project was a project to prepare and facilitate decision-making by Parliament on the expansion of the Paks Nuclear Power Plant. In this respect, it pointed out that the organisation background for the project was provided by the Paks Nuclear Power Plant, and in this work, the preparatory work was performed with the specialist participation of the Defendant company and the companies in its holding, but pointed out that these companies operated under the direction of the Project Management of the Paks Nuclear Power Plant, thus in reference to this, too, it disputed that it had the requested information in its possession or would be a data controller (in reference to this, it attached a sheet of the Paks Nuclear Power Plant, which, as understood by the Plaintiff, presented the Lévai Project as a project of the Paks Nuclear Power Plant, thereby supporting the argument of the Defendant that the Defendant could not be deemed a data controller in connection with this project). It also represented that the claim enforced by the Plaintiff requested the obligation of the Defendant to disclose lists by which information of a new quality were generated; in this respect, it pointed out that no lists that would contain data on the total cost of the project or the share of the companies participating in the project were available. Finally, in respect of the rejection of the petition (in reference to Section 19(6) of the Data Protection Act), it also argued that (some of) the information requested to be disclosed constituted a trade secret, and at the request of the Court, it also specified them, thus, of the information requested to be disclosed, it primarily specified information on the subject-matters of, and parties to, the contacts, and in this respect, it represented that should they be disclosed, the direction of the planned development, even technical processes, could be inferred, which obviously prejudiced the business interests of the Defendant.

The claim is well-founded.

Pursuant to **Section 1(1) of Act LXIII of 1992 on the Protection of Personal Data and the Publicity of Data of Public Interest (Data Protection Act), *the purpose of this Act is to ensure* that, unless an exception is provided by a legal rule specified in this Act, everybody make decisions on their personal data themselves, and *everybody can get acquainted with information of public interest*.**

Section 2 For the purposes of this Act,

***information of public interest* under paragraph 4: information or knowledge managed by agencies or persons performing state or municipal responsibilities and other public service tasks specified by law and relating to their activities, not within the concept of personal data, recorded in any way or form, irrespective of the method of management and the stand-alone or collective nature thereof;**

***information deemed in the public domain out of public interest* pursuant to paragraph 5: all information not within the concept of information of public interest which is ordered to be made public or accessible by law out of public interest;**

***data controller* pursuant to paragraph 8: a natural person or legal entity or unincorporated organisation that determines the purpose of data management, makes and implements the decisions on data management (including the means used therefor) or have them implemented by a data processing agent engaged by it;**

and *data management* pursuant to paragraphs 9, 10 and 11: irrespective of the method used, any operation or all operations performed on data, such as the collection, recording, capture, classification, storage, alteration, use, transmission, making public, coordination or connection, freezing, deletion and destruction thereof, as well as the prevention of the further use of data.

Pursuant to **Section 19(1) of the Act, *agencies* or persons *performing state or municipal responsibilities and other public service tasks specified by law* (hereinafter collectively referred to as the 'Agency') *shall facilitate and ensure the accurate and quick provision of information to the public* in cases falling within its sphere their responsibilities, in particular, in respect of the *state and municipal budgets and the implementation thereof, the management of state and municipal assets, the use of public funds and contracts concluded therefor*, and of granting special or exclusive rights to market players and private organisations and persons. Pursuant to subsection (6), *the provisions of the Civil Code applicable to access to trade secrets shall govern* access to, and the publicity of, information of public interest.** Pursuant to **Section 20(1) to (3), anyone may submit a request to access information of public interest orally, in writing or electronically.** Pursuant to **subsections (4), (5) and (7), if the document containing the information of public interest also contains information that may not be disclosed to the requester, the information that may not be disclosed shall be rendered unrecognisable on the duplicate copy.**

Pursuant to Section 19/A(1) and (2), information generated or recorded during procedures aimed at making a decision falling within the scope of duties and authority of the agency and serving to provide grounds for the decision shall not be in the public domain for ten years from the generation thereof. Access to such information may be authorised by the head of the agency managing it, by considering the provisions of Section 19(1). The request for access to information serving as a basis for decision-making may be refused within the period specified in subsection (1) after the decision has been made if access to the information would jeopardise the lawful operational procedures of the agency or the fulfilment of its duties and authority without any unauthorised external influence, in particular, freely stating the position of the party generating the information during the preparation of decisions.

Pursuant to Section 21 of the Act, if its request for information of public interest is not fulfilled, the requester may initiate proceedings with the court. Lawsuits instituted against an agency with nationwide competence falls within the competence of the county (metropolitan) court. *The agency managing the data shall prove that its refusal is lawful and well-founded. If the court entertains the request, it shall, in its decision, oblige the data management agency to disclose the requested information of public interest.*

Pursuant to **Section 164(1) of Act III of 1952 on Civil Proceedings (Civil Proceedings Act), usually the party that is interested in ensuring that the facts be accepted by the court as true is required to prove the facts for the determination of the lawsuit.** Pursuant to **Section 206, the court shall establish the facts on the basis of the comparison of the representations of the parties and the evidence presented during the evidence procedure; it shall evaluate the evidence on the whole and shall assess it according to its belief. *On the basis of consideration relating to the information presented in the lawsuit, the Court shall also decide according to its belief on the importance to be attached to the fact if* a party summoned to be present in person did not appear before the court *or the party or its representative did not fulfil a request, did not respond to a question asked from it, him or her, or declared that it, he or she was not aware of, or could not remember, the truth of a fact.* If it cannot be established on the basis of an expert opinion or**

other evidence, the court shall determine the amount of damages or other claims at its discretion, by considering all circumstances of the lawsuit.

According to the above general and special evidence rules, in connection with the information disclosure enforced in this lawsuit, the Plaintiff had to prove that the Defendant was the controller of the data requested to be disclosed, and the Defendant had to prove that refusing the disclosure of the requested information on its part was lawful, because it was not a data controller or if it was a data controller, it was not obliged to disclose the requested information.

Assessing the claim of the Plaintiff within the limits of claim and counterclaim, the Court first had to take a position on whether it had competence to assess the statement of claim on the merits. In this respect, it also extended its discretionary powers to the representation made by the Defendant whereby the Defendant was not only not an agency of nationwide competence, but did not perform public service tasks either. The existence of such public service tasks would give rise to its obligation to disclose information of public interest. The Court did not see these two representations made by the Defendant to the subject-matter of the lawsuit to be well-founded either, agreeing with the argument of the Plaintiff that the amendment of the Electricity Act in the meantime with respect to the scope of those providing mandatory services did not mean that the provision of electricity supply, which is (continues to be) the core activity of the Defendant, would not be a public services task (of public interest); the circumstance that the Defendant provides this service in the liberalised market, competing with its competitors in this area, does not mean that the issues affecting the performance of this task are a subject the information on which would not be information of public interest. Therefore, the Defendant continues to qualify as an agency performing public service tasks, but its capacity as controller of data of public interest is based primarily on the fact that *it is a business organisation operating with an interest held by the state in the long term*, in which the state exercises its ownership rights through MNV Zrt. (Hungarian state Holding Company Ltd.). The Court did not consider the arguments of the Defendant whereby the exercise of shareholder rights through MNV Zrt. did not represent state assets, the Defendant was a business organisation making independent decisions during its business operations, and no state budget funds were used for its business operations to be well-founded and correct, because this position would consider it to be the management of state assets where only budgetary funds are used (since the Defendant argued that the state participated in the business operation of the Defendant company when purchased the shares), but this cannot be accepted. As understood by the court, *operation* with an interest held by the state in the long term (as opposed to the argument of the Defendant) means that *the state has an influencing role in the economic decision-making by the given business agency (i.e. not only financial commitments that may also burden the central state budget are relevant);* however, this influencing power is undeniable in the case of a block of shares guaranteeing 75%+1 of the votes, and if the state may make decisions affecting the business operations of a given business organisation, the basic principle set as a fundamental goal of the Data Protection Act *shall be enforced in respect of the decisions made on the business operations of this company*, i.e. everybody (including the Plaintiff) is entitled to the right to become familiar with such information of public interest. The Defendant is not an administrative body, thus its qualification of having nationwide competence, which provides grounds for the competence of this Court, does not result from its nationwide competence regarding its issues taken in the sense of administrative law, but the activity performed by it, i.e. electricity supply, which it performs, as it can be established as an undoubted fact, in the territory of the country and not concentrated to a single area. But its qualification of having nationwide competence can also be established as a result of the nature of the information affecting the subject-matter of the lawsuit, namely, information on the development of the nuclear industry in the country. Its disclosure is requested by the Plaintiff in this lawsuit, which also justifies the decision-making competence of a county-level judicial forum.

Considering the arguments of the Defendant on the merits, the court came to the conclusion that the Defendant qualified as a data controller in respect of the information requested in the statement of claim to be disclosed, but joining the Plaintiff, the Court points out that the Defendant did not exercise its rights in good faith in this lawsuit. Respecting the rights of the Defendant attached to the free expression of legal arguments providing grounds for its counterclaim, the argumentation technique used in the lawsuit cannot be regarded as a good faith technique, whereby, in addition to the counter-arguments given in response to the information request preceding the lawsuit, the Defendant disputes even its capacity as data controller notwithstanding that it is aware that the court(s) has (have) explained is several final and non-appealable decisions that they regarded it a state-owned business agency of national importance, performing public service tasks, in information request lawsuits. Furthermore, the Defendant stated that it was not the project owner in this lawsuit notwithstanding the fact that it mentioned it as its own in a nuclear energy journal, and names the chief executive of the Defendant as the main coordinator of the programme. In conclusion, taking into account the individual arguments of the Defendant into account, the Court did not deem the request of the Plaintiff groundless and did not find the counter-arguments aimed at refusing information disclosure by the Defendant well-founded.

The Defendant refused to disclose certain pieces of information, primarily relating to the contracts of the Lévai Project, by claiming that they were information *to be used for decision-making and representing trade secrets, and as such, its disclosure might be lawfully refused.* Referring back to the arguments of the Plaintiff detailed above, the Court did not accept this representation, pointing out that the Defendant did not prove the existence of the statutory requirements with anything, but it did not render it likely either; therefore, in this respect, it was not proven that *access to the information would jeopardise the lawful operational procedures of the agency or the fulfilment of its duties and authority without any unauthorised external influence, in particular, freely stating the position of the party generating the information during the preparation of decisions, and neither was the fact proven that the details requested to be disclosed are facts, information, solutions or data associated with the economic activity of the Defendant, which, if made public or obtained or used by unauthorised persons, would infringe or jeopardise the lawful financial, economic or market interests of the Defendant, and in the interest of keeping them confidential, it took the necessary measures.*

In this respect, the assumption to which the Defendant made reference, i.e. that the players in the small market of nuclear energy operations would obtain knowledge of the possible direction of the expansion of the Paks facility merely by becoming familiar with the names of the contracting partners of the Defendant or the subject-matters of their contracts, in possession of which they could influence the subsequent decisions of decision-makers, is not supported by anything, therefore, it was not proven that *the information requested to be disclosed was used for decision preparation* or *represented a trade secret,* because it implied the technical direction of subsequent development, would be certain information representing know-how or its disclosure would infringe the economic interest of the Defendant. In the assessment of the Court, this argument is unsubstantial and is not supported by any data. The argument and evaluation given by the Plaintiff are also acceptable in this respect, whereby *the purpose of the information request by the Plaintiff is to be able to become familiar with the system of the project, and to be able to monitor it to see how much money the Defendant wishes (wished) to spend on what, over what period and using what parties under the Lévai Project.* In this respect, in the opinion of the court, the Plaintiff requests the disclosure of the following on firm grounds:

– the planned total cost of the project, which may not be part of a set of data associated with decision preparation, since the amount of the *planned* cost is a decision already made, but it may not be treated as trade secret either, since it cannot infringe the market interests of the Defendant if it can be learnt

how much it plans to spend on this project preparing the development of the Paks facility. But the Plaintiff requests
– the time plan of the project, too, on firm grounds, and this cannot infringe any business or subsequent decision-making interest, and neither can
– the schedule of the project associated with it.
– The results to date are also deemed information of public interest, just like the persons of the participants; in this respect, it may be warranted to disclose
– data on the share of the companies of the MVM Holding in the project (since this way it can be seen to what extent it is the Defendant's own project), and in this respect, the Defendant may be obliged, on firm grounds,
– to provide a list of companies and organisations not belonging to the MVM Holding and participating in the project (this way it can be monitored with which parties the Defendant or its subsidiaries enter into contracts in connection with a project falling within the decision-making competence of the state),
– and to provide a list of contracts concluded under the project, because they do not contain any non-disclosable information either, stating the subject-matters and amounts of the contracts and the dates of performance set forth in the contracts.
By referring to Section 20(4), (5) and (7) of the Data Protection Act cited above, the Court provided for rendering information unrecognisable from among the information requested to be disclosed, which could not be disclosed to the Plaintiff as personal data of third parties managed by the Defendant or as classified information. In the assessment of the Court, in respect of the list of the participants of the project and contracts, the claim enforced by the Plaintiff is not aimed at the disclosure of data that could not be compiled from data managed by the Defendant; it is not grouping or classification, but a simple list, which the Defendant can prepare without creating a new database or new data, thus this representation made by the Defendant was not satisfactory either as a reason for refusing the request.

The Defendant became the judgment debtor, thus the Court provided for the defrayal of the unpaid procedural duty by the state in accordance with Section 39(3)(b) of Act XCIII of 1990 on Duties, pursuant to Section 78(1) of the Civil Proceedings Act in such a way that the judgment debtor Defendant would be obliged to pay the duty, but since the lawsuit is a lawsuit relating to information of public interest, the proceedings are free from duty. Therefore, the Court did not oblige the judgment debtor to pay the unpaid duty advanced by the state, in reference to Section 57(1) of the Duties Act, pursuant to Section 14 of Decree No. 6/1986 (VI.26.) IM. The counsel of the judgment creditor Plaintiff submitted a claim for legal costs. The Court provided for it pursuant to Decree No. 32/2003 IM, taking into account primarily the work performed and not the small general amount in dispute.

Budapest, 8 September 2011

(sgd) Dr Renáta Bérces, Judge

Date drawn up: 6 October 2011

Certified true copy:

<Illegible signature>

L. S.