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Court procedural document

**TO THE PRESIDENT AND MEMBERS
OF THE COURT OF JUSTICE**

WRITTEN OBSERVATIONS

Submitted pursuant to Article 23 of the Statute of the Court

by the European Commission, represented by Herke KRANENBORG and Daniele NARDI, acting as agents, with a postal address for service in Brussels at the Legal Service, Greffe Contentieux, BERL 1/169, 200, rue de la Loi, 1049 Brussels, who consent to service by e-Curia,

in Case C-434/16

concerning a reference to the Court under Article 267 TFEU by the Supreme Court of Ireland for a preliminary ruling in the proceedings pending before that court between

Peter NOWAK (applicant in the main proceedings)

and

The DATA PROTECTION COMMISSIONER (respondent in the main proceedings)

on the interpretation of the notion of 'personal data' as laid down in Article 2(a) of Directive 95/46/EC.

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The Commission has the honour to submit the following observations:

1. LEGAL CONTEXT

1.1. European legislation

1.1.1. Directive 95/46/EC

1. Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 lays down the rules on the protection of individuals with regard to the processing of personal data and on the free movement of such data (OJ 23.11.95, L281, p. 31).

2. In Article 2(a) of Directive 95/46 the notion of 'personal data' is defined as:

"any information relating to an identified or identifiable natural person ('data subject'); an identifiable person is one who can be identified, directly or indirectly, in particular by reference to an identification number or to one or more factors specific to his physical, physiological, mental, economic, cultural or social identity;"

3. Recital 26 of Directive 95/46 reads as follows:

"Whereas the principles of protection must apply to any information concerning an identified or identifiable person; whereas, to determine whether a person is identifiable, account should be taken of all the means likely reasonably to be used either by the controller or by any other person to identify the said person; whereas the principles of protection shall not apply to data rendered anonymous in such a way that the data subject is no longer identifiable; whereas codes of conduct within the meaning of Article 27 may be a useful instrument for providing guidance as to the ways in which data may be rendered anonymous and retained in a form in which identification of the data subject is no longer possible;"

1.1.2. Regulation (EU) 2016/679

4. Regulation (EU) 2016/679 of the European Parliament and of the council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data (OJ 4.5.2-16, L119, p. 1) will repeal Directive 95/46 with effect from 25 May 2018 (see Article 94 of Regulation 2016/679).

5. In Article 4(1) of Regulation 2016/679 the notion of 'personal data' is defined as:

"any information relating to an identified or identifiable natural person ('data subject'); an identifiable natural person is one who can be identified, directly or indirectly, in particular by reference to an identifier such as a name, an identification number, location data, an online identifier or to one or more factors specific to the physical, physiological, genetic, mental, economic, cultural or social identity of that natural person;"

6. Article 4(14) of Regulation 2016/679 defines the notion of 'biometric data' as:

"Personal data resulting from specific technical processing relating to the physical, physiological or behavioural characteristics of a natural person, which allow or confirm the unique identification of that person, such as facial images or dactyloscopic data;"

7. Recital 26 of Regulation 2016/679 reads as follows:

"The principles of data protection should apply to any information concerning an identified or identifiable natural person. Personal data which have undergone pseudonymisation, which could be attributed to a natural person by the use of additional information should be considered to be information on an identifiable natural person. To determine whether a natural person is identifiable, account should be taken of all the means reasonably likely to be used, such as singling out, either by the controller or by another person to identify the natural person directly or indirectly. To ascertain whether means are reasonably likely to be used to identify the natural person, account should be taken of all objective factors, such as the costs of and the amount of time required for identification, taking into consideration the available technology at the time of the processing and technological developments. The principles of data protection should therefore not apply to anonymous information, namely information which does not relate to an identified or identifiable natural person or to personal data rendered anonymous in such a manner that the data subject is not or no longer identifiable. This Regulation does not therefore concern the processing of such anonymous information, including for statistical or research purposes."

1.2. National legislation

8. The Irish Data Protection Acts 1988-2003 give effect to Directive 95/46. In section 1(1) of these acts 'personal data' is defined as:

"Data relating to a living individual who is or can be identified either from the data or from data in conjunction with other information that is in, or is likely to come into, the possession of the data controller".

9. Section 4 of the Irish Data Protection Act 1988 deals with the right of access. Subsection (6) of this provision specifically mentions examinations:

"(a) A request by an individual under subsection (1) of this section in relation to the results of an examination at which he was a candidate shall be deemed, for the purposes of this section, to be made on-

(i) the date of the first publication of the results of the examination, or

(ii) the date of the request,

whichever is the later; and paragraph (a) of the said subsection (1) shall be construed and have effect in relation to such a request as if for "40 days" there were substituted "60 days".

(b) In this subsection "examination" means any process for determining the knowledge, intelligence, skill or ability of a person by reference to his performance in any test, work or other activity."

2. THE FACTS IN THE MAIN PROCEEDINGS AND THE QUESTIONS REFERRED FOR A PRELIMINARY RULING

10. The applicant in the main proceedings sought access to his examination script held by the Institute of Chartered Accountants of Ireland (CAI) on the basis of his right of access to personal data under section 4 of the Irish Data Protection Acts 1988-2003 (hereinafter 'the Data Protection Acts'). CAI declined to release the examination script arguing that the script did not constitute 'personal data' within the meaning of the Data Protection Acts.
11. When contacting the Office of the Data Protection Commissioner (DPC) on the matter, the applicant was advised that exam scripts do not generally constitute personal data. A formal complaint against CAI with the DPC was rejected.

12. In subsequent court proceedings the applicant contested the position of the DPC arguing that his examination script was personal data since, for example, his handwriting constitutes biometric data, his answers reflect his intellect, thought processes and judgment, and the script may contain comments by the examiner (see point 16 of the order for reference).
13. As the matter concerned a question of interpretation of a measure of EU law, specifically the meaning of the notion of 'personal data' within Directive 95/46, the Supreme Court of Ireland (hereinafter 'the referring court') decided to refer the following two questions to the Court of Justice:

"1. Is information recorded in/as answers given by a candidate during a professional examination capable of being personal data within the meaning of Directive 95/46/EC?"

2. If the answer to Question 1 is that all or some of such information may be personal data within the meaning of the Directive, what factors are relevant in determining whether in any given case such script is personal data, and what weight should be given to such factors?"

3. IN LAW

3.1. Preliminary remarks

14. The questions put to the Court of Justice in the present case deal with the scope of the notion of 'personal data' as laid down in Article 2(a) of Directive 95/46. Although the request of the applicant for access to his examination script is at the basis of the present case, the referring court does not ask whether, once it has been established that the examination script constitutes personal data, the applicant would be entitled to actually have access to that script under Directive 95/46.
15. In this respect, the Commission wishes to underline that the possibility to invoke the right of access to one's personal data, as laid down in Article 12 of Directive 95/46, depends not only on the qualification of certain information as one's own 'personal data'. Once certain information qualifies as personal data, the person concerned is not automatically entitled to get access to the personal data under the rules of Directive 95/46. It also has to be ascertained that the situation as such falls within the material scope of the rules as laid down in Article 3 of Directive 95/46. According to Article 3(1) the data protection rules

only apply to the processing of personal data 'wholly or partly by automatic means, and to the processing otherwise than by automatic means of personal data which form part of a filing system or are intended to form part of a filing system'. In addition, certain activities, such as purely personal or household activities or activities of the state in areas of criminal law, are excluded from the scope of Directive 95/46 (see Article 3(2)).

16. If the matter falls within the material scope of Directive 95/46, it subsequently has to be seen whether the right of access is not subject to exemptions and restrictions laid down in national legislation considered necessary to safeguard one of the interests listed in Article 13 of Directive 95/46. In addition, Member States may also provide exemptions or derogations from the right of access if they are necessary to reconcile the right to privacy with the rules governing the freedom of expression (see Article 9 of Directive 95/46).
17. Once it is established that the data protection rules apply, and there are no relevant exemptions, restrictions or derogations, the data subject can indeed invoke his right of access. However, it still has to be assessed in what actual material form the person involved is entitled to have access to the personal data. Article 12 of Directive 95/46 requires 'communication [...] in an intelligible form of the data undergoing processing' which, according to the Court of Justice in the *Y.S.* ruling does not entail 'the right to obtain a copy of the document or the original file in which those data appear' (CJEU 17 July 2014, *Y.S.*, Joined Cases C-141/12 and C-372/12, ECLI:EU:C:2014:2081, pt. 58).

3.2. Assessment of the questions referred

18. Before discussing the questions of the referring court, the Commission would like to make some general remarks about the notion of 'personal data'.

3.2.1. The notion of 'personal data'

19. The notion of 'personal data' is defined in Article 2(a) of Directive 95/46 as 'any information relating to an identified or identifiable natural person'.
20. When talking about personal data a distinction should be made between, on the one hand, information which as such identifies the natural person, the so-called 'identifiers', and, on the other hand, information which taken alone, does not allow the identification of that person.
21. Article 4(1) of Regulation (EU) 2016/679, which will replace Directive 95/46 as from 25 May 2018, gives examples of identifiers: 'a name, an identification number, location data,

an online identifier'. Also biometric data, such as a facial image or dactyloscopic material (fingerprints) can 'allow or confirm the unique identification of the natural person' (see Article 4(14) of Regulation 2016/679).

22. Information which cannot be qualified as 'identifier' still falls with the definition of personal data if it relates to an 'identifiable' natural person.
23. According to recital 26 of Directive 95/46, to determine whether a person is identifiable, account should be taken of 'all the means likely reasonably to be used either by the controller or by any other person'. In the *Breyer* ruling the Court has explained the meaning of this (CJEU 19 October 2016, *Breyer*, C-582/14, ECLI:EU:C:2016:779). The Court considered that a data subject is not identifiable if the identification of the data subject is prohibited by law or practically impossible on account of the fact that it requires a disproportionate effort in terms of time, cost and man-power, so that the risk of identification appears in reality to be insignificant (see pt. 46 of the ruling).
24. If the natural person is identified or identifiable, the information at stake should still 'relate to' that person in order to fall within the definition of 'personal data' in Article 2(a) of Directive 95/46. In this respect, 'the actual content of that information appears to be of no consequence as long as it relates to an identified or identifiable natural person (see the opinion of Advocate General Sharpston of 12 December 2013 in *Y.S.*, Joined Cases C-141/12 and C-372/12, ECLI:EU:C:2013:838, pt. 45).
25. As a consequence, information about an object, e.g. the value of a house, although as such not information about a natural person, could come within the scope of the definition of 'personal data' if that information can be linked to an identified or identifiable natural person.
26. The words 'relating to' and 'identifiable' in the definition of 'personal data' have given the notion a very broad meaning. This is also reflected in the case law of the Court of Justice. As Advocate General Sharpston has summarised in her opinion in *Y.S.*, the Court has held that 'personal data' covers, for example, 'the name of a person in conjunction with his telephone coordinates or information about his working conditions or hobbies', his address, his daily work periods, rest periods and corresponding breaks and intervals, monies paid by certain bodies and the recipients, amounts of earned or unearned

incomes and assets of natural persons (see pt. 44 of the Advocate General's opinion in *Y.S.*, ECLI:EU:C:2013:838, with references).

3.2.2. *The questions referred to the Court of Justice*

27. With its first question the referring wants to know whether 'information recorded in/as answers given by a candidate' is capable of being personal data in the meaning of Directive 95/46. The quoted phrase seems to refer to the actual answers given by the candidate and the comments of the examiner put 'in' those answers. The Commission notes that no reference is made in the question to the examination script as such, or to other information that may be contained in the examination script, such as the name and/or identity number of the candidate, the questions asked and the result of the exam.
28. The second question, although use is made of the word 'script', also seems to concern only the information mentioned in the first question. This follows from the reference to 'such information' and 'such script' (emphasis added). With its second question, the referring court wants to know what factors should be taken into account, and what weight should be given to those factors, in order to conclude that the information recorded in/as answers given by a candidate are indeed personal data.
29. The Commission understands these questions in the first place as an inquiry on whether the information recorded in/as answers given by a candidate can be considered as 'relating to' the candidate in the sense of Article 2(a) of Directive 95/46.
30. However, since the questions are phrased in general terms and not put in relation with the request of the applicant in the present case for access to his examination script, they also imply an inquiry on whether the information relates to an 'identified or identifiable' natural person. This element of the definition of 'personal data' is relevant from the perspective of a third party.
31. Obviously, whether the natural person is 'identified or identifiable' is not an issue in the present case, where it is the alleged data subject himself who requested access to his own data. However, for a third party it has to be ascertained whether the alleged data subject is identified or identifiable from the information at stake. This might not be obvious in a situation in which only 'information recorded in/as answers given by a candidate' is available to the third party and not the exam script as a whole.

32. Both preliminary questions are strongly connected. Furthermore, the Commission takes the view that determining whether information qualifies as 'personal data' cannot depend on the weighing of factors, as the referring court seems to suggest in its second question. This is because the notion of 'personal data' needs to be objective in nature. The requirement to assess 'all the means likely reasonably to be used either by the controller or by any other person' in order to ascertain whether a person is identifiable does not as such entail a 'weighing of factors'. The determination of whether information constitutes personal data or not should be the verifiable result of a 'pass/no pass' test conducted in relation to the specific circumstances of the case. The Commission would therefore suggest the Court to examine both questions together and, for the sake of clarity, to rephrase the two questions as follows:

"Is information recorded as/in answers given by a candidate during a professional examination information 'relating to' a natural person and capable of qualifying as 'personal data' in the sense of Article 2(a) of Directive 95/46?"

33. Before assessing whether the information in the present case 'relates to' the data subject, the Commission will first discuss whether from the perspective of a third party such information can be seen as relating to an 'identified or identifiable' natural person.

3.2.3. *Is the candidate an 'identified or identifiable' natural person?*

34. In a situation in which only 'information recorded in/as answers given by a candidate' is available to the outsider and not the exam script as a whole it depends on the actual content of the answers and comments and on all the means likely reasonably to be used either by the controller or by any other person (see point 23 above) whether such information can be considered as relating to an 'identified or identifiable' natural person.

35. Such would be the case if the answers to an exam and the comments made to them *as such* identify the examinee. In other words, if the answers and the comments are, or contain, *identifiers*.

36. This would first of all depend on the content of the answers. Although answers and comments normally do not contain information identifying the individual it can obviously occur that such information is contained in the answers of comments.

37. In addition, although this has not been explicitly raised in the questions of the referring court, it follows from the order for reference that the applicant in the main proceedings

argued that his answers constitute biometric data in that they were handwritten. The Commission would agree that someone's handwriting could indeed qualify as biometric data and could serve as an identifier. However, it would require an assessment of the concrete situation to see whether the handwriting at stake would indeed be capable of identifying a unique natural person. Once it is concluded the handwriting constitutes such an identifier, a third party would in principle be able to identify the person who gave the answers in the exam, and, if also handwritten, to identify the person who made the comments in those answers.

38. In case the answers and comments as such do not qualify as or contain identifiers, other information available or relevant circumstances with use of all the means likely reasonably to be used, as explained by the Court in *Breyer* (see point 23 above), still might allow the identification of the person involved. This would require an assessment of the circumstances of the case.
39. It follows from the foregoing that for a third person the answers and comments taken in isolation do not necessarily fulfil the condition that the information should relate to an 'identified or identifiable' natural person. However, this would depend on the content and format of the answers and comments and on the further circumstances of the concrete situation.

3.2.4. *Does the information 'relate to' the candidate?*

40. If it is concluded that the outsider can indeed identify the person involved, and in any event for the candidate itself, the question remains whether answers and comments given during an exam can be seen as information 'relating to' the candidate, assuming those answers and comments are not directly about the individual (*i.e.* assuming that they do not have the individual as object).
41. The definition of the notion of 'personal data' in Article 2(a) and recital 26 of Directive 95/46 do not provide further guidance on when information can be considered as 'relating to' an identified or identifiable natural person.
42. In the national proceedings of the present case the Irish Data Protection Commissioner relies, *inter alia*, on the *Y.S.* ruling of the Court of Justice for concluding that the answers and comments cannot be considered as 'relating to' the candidate (CJEU 17 July 2014, *Y.S.*, Joined Cases C-141/12 and C-372/12 ECLI:EU:C:2014:2081).

43. The *Y.S.* case concerned a request by Y.S. for access to minutes relating to a decision to reject his application for a residence permit in the Netherlands. The Court considered that the legal analysis in a minute, 'although it may contain personal data, it does not in itself constitute such data' (pt. 39). Furthermore, the Court considered:
- 'such a legal analysis is not information relating to the applicant for a residence permit, but at most, in so far as it is not limited to a purely abstract interpretation of the law, is information about the assessment and application by the competent authority of that law to the applicant's situation, that situation being established inter alia by means of the personal data relating to him which that authority has available to it' (pt. 40).
44. According to the *Y.S.* ruling, that interpretation of the concept of 'personal data' is also borne out by the objective and general scheme of Directive 95/46 (pt. 41). The Court looked at the purpose of Directive 95/46 as such and the objectives of the right of access to personal data in particular. This right of access is 'necessary, inter alia, to enable the data subject to obtain, depending on the circumstances, the rectification, erasure or blocking of his data by the controller' (pt. 44).
45. Following this, the Court considered that '[i]n contrast to the data relating to the applicant for a residence permit which is in the minute and which may constitute the factual basis of the legal analysis contained therein, such an analysis [...] is not in itself liable to be the subject of a check of its accuracy by that applicant and a rectification under Article 12(b) of Directive 95/46' (pt. 45). In those circumstances, according to the Court, 'extending the right of access of the applicant for a residence permit to that legal analysis would not in fact serve the directive's purpose' but rather 'the purpose of guaranteeing him a right of access to administrative documents, which is not however covered by Directive 95/46' (pt. 46). The Court subsequently concluded that legal analysis cannot in itself be classified as personal data (pt. 48).
46. The ruling of the Court in *Y.S.* indeed has relevance for the present matter. However, in the *Y.S.* case it was possible to make a clear distinction between on the one hand the 'factual' information about the situation of the applicant (name, date of birth, nationality gender, etc.) and on the other hand the legal analysis of this situation by the Dutch authorities.

47. In the present case, such a clear distinction is less obvious because the answers provided by the candidate are not as such objective 'facts' about the candidate. Rather, they reflect, as the applicant puts it in the present case, 'his intellect, thought processes and judgment' (see pt. 16 of the order for reference). The *Y.S.* ruling does not provide guidance on whether such information could qualify as personal data. What is clear is that the answers do not constitute information which is comparable to the legal analysis in the *Y.S.* case as the answers are provided by the candidate himself. It would rather be the comments in the answers by the examiner which could be compared to the legal analysis in the *Y.S.* ruling.
48. It follows that despite the ruling in *Y.S.* the question still is whether the answers given during an exam can be seen as information 'relating to' the candidate.
49. The Commission takes the view that even if the answers are not directly about the candidate, they can still be considered as information 'relating to' the candidate in as far as they reflect 'his intellect, thought processes and judgment' in the setting of an exam. Once such answers can be linked to an identified or identifiable person, which is beyond doubt in the present case, where the author of the answers requested access, the answers relate to him in the sense that they reflect an opinion or an analysis which can be qualified as his own, and thus necessarily relate to him. The purpose of examination procedures is indeed to evaluate the quality of an opinion or analysis on a given topic performed by an identified or identifiable person.
50. By way of contrast, following the reasoning of the Court on the 'legal analysis' in the *Y.S.* case (pt. 40), the Commission considers that the comments of the examiner 'in' the answers given during the exam normally fall outside the scope of the notion of 'personal data' since such comments relate normally only to the answers, and not to their author or other natural persons.
51. As to the answers given during the exam, it could be argued, according to the reasoning of the Court of Justice in points 44-46 of the *Y.S.* ruling, that they are not in itself liable to be the subject of a check of its accuracy by the candidate and a rectification under Article 12(b) of Directive 95/46 and therefore that 'extending' the right of access of the candidate would not serve the purpose of Directive 95/46. Allowing the rectification of answers could even be seen as 'absurd', as the Civil Service Tribunal has put it in its ruling in the case *Gonzalo de Mendoza Asensi* (see CST 12 February 2014, *Gonzalo de Mendoza Asensi*, F-127/11, ECLI:EU:F:2014:14, pt. 101).

52. However, the Commission takes the view that this argument on its own does not justify the general conclusion that such answers fall outside the scope of 'personal data' as laid down in Article 2(a) of Directive 95/46. Such a conclusion would deny the general privacy interest the data subject has in the lawful processing of such information by the controller, *in casu* the CAI, e.g. when storing the exam scripts.

4. CONCLUSIONS

53. From the foregoing, the Commission would draw the conclusion that information recorded as answers given by a candidate during a professional examination constitutes information 'relating to' a natural person and can qualify as 'personal data' in the sense of Article 2(a) of Directive 95/46 if the person is identified or identifiable.

54. According to the Commission, information recorded 'in' answers given by a candidate during a professional examination (the comments of the examiner) normally does not constitute information 'relating to' a natural person and would therefore normally not qualify as 'personal data' in the sense of Article 2(a) of Directive 95/46.

55. On these grounds, the Commission suggests that the Court rule:

"Information recorded as answers given by a candidate during a professional examination constitutes information 'relating to' a natural person and can qualify as 'personal data' in the sense of Article 2(a) of Directive 95/46 if the natural person is identified or identifiable.

Information recorded in answers given by a candidate during a professional examination (the comments of the examiner) normally does not constitute information 'relating to' a natural person and therefore does not qualify as 'personal data' in the sense of Article 2(a) of Directive 95/46."

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