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Observations of the Czech Republic

Case C-434/16 *

Document lodged by:

Czech Republic (Ministry of Foreign Affairs)

Usual name of the case:

NOWAK

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WRITTEN OBSERVATIONS

submitted in accordance with Article 23 of the Protocol on the Statute of the Court of Justice of the European Union by

THE CZECH REPUBLIC

represented by Mr Martin Smolek and Mr Jiří Vlášil

in Case C-434/16

Nowak

concerning a reference for a preliminary ruling submitted to the Court of Justice under Article 267 of the Treaty on the Functioning of the European Union by the Irish *Supreme Court* on 29 July 2016.

The Czech Republic hereby submits the following written observations in connection with the above case:

1. FACTUAL BACKGROUND AND PROCEEDINGS BEFORE THE NATIONAL COURT

- 1 The Czech Republic refers to the text of the order for reference for details of the dispute.

* Language of the case: English.

2. RELEVANT PROVISIONS OF NATIONAL AND EU LAW

- 2 The Czech Republic refers to the relevant provisions of national and EU law set out in the order for reference.

3. QUESTIONS SUBMITTED TO THE COURT OF JUSTICE FOR A PRELIMINARY RULING

- 3 The following questions were submitted 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?*

4. THE CZECH REPUBLIC'S VIEW REGARDING THE QUESTIONS REFERRED

- 4 The referring court raises the issue of whether answers given by a candidate during a professional examination may be considered personal data within the meaning of Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data ('the Directive') and, if so, on the basis of what criteria that assessment is to be carried out.
- 5 The Czech Republic will first submit observations regarding both questions together. In addition, the Czech Republic considers it necessary to state its view on the issue of the rights claimed by the applicant with regard to the objective of the Directive.

4.1 On the questions referred

- 6 Pursuant to Article 2(a) of the Directive, personal data means '*any information relating to an identified or identifiable natural person ...*'. To answer the question as to whether answers to examination questions may be classified under that definition, it is always necessary to assess the character of the information included in those answers.
- 7 It is clear from the very nature of a professional examination that the answers provided by a candidate during an examination as a rule will constitute '*information relating to an identified or identifiable natural person*', since the purpose of that type of examination is precisely to gain information concerning

the knowledge or abilities of the specific person sitting the examination. In that regard, in the view of the Czech Republic the answers given by a candidate in an exam must be considered to be personal data at least to the extent to which they attest to the specific way in which that candidate actually resolved the tasks he was set.¹ In the case of handwritten examinations, the answers also include information on the handwriting of the candidate, from which it is possible on the basis of a handwriting or graphology analysis to ascertain certain other information about that candidate.²

- 8 Having regard to the foregoing, the Czech Republic takes the view that the answers given by a candidate in a professional exam are personal data within the meaning of the Directive to the extent to which they attest to the specific way in which that candidate actually resolved the questions he was set.

4.2 On the issue of the rights claimed by the applicant

- 9 It is apparent from the order for reference that the applicant as a candidate in a professional examination is not satisfied with the result of that examination, which he first sought to ‘challenge’. Finally, however, he decided instead to claim rights under the Directive, those rights being the right of access to personal data and the right to rectification of personal data.³ Given that it is also apparent from the order for reference that the Irish data protection body [the Office of the Data Protection Commissioner] regarded the applicant’s claim in this respect as frivolous or vexatious,⁴ the Czech Republic considers it necessary to comment on that aspect of the case under consideration as well.
- 10 It must be observed, as a preliminary point, that, ‘*according to settled case-law, the provisions of a directive must be interpreted in the light of the aims pursued by the directive and the system it establishes*’.⁵ It also follows from the wording of the Directive and the related case-law of the Court of Justice that the aims of the Directive are to ‘*protect the fundamental rights and freedoms of natural persons, and in particular their right to privacy with respect to the processing of personal data and thus to permit the free flow of personal data between Member States*’. In addition, ‘*[t]he importance of protecting privacy is highlighted in recitals 2 and*

¹ Compare Opinion 4/2007 of the Data Protection Working Party, according to which personal data also covers data serving to evaluate a specific individual (p. 10), including, for example, drawings made by a child for the purposes of a psychological test (p. 8).

² The Czech Republic submits that answers to an examination question may be considered not to fall within the definition of personal data within the meaning of the Directive only when those answers cannot be connected with an identified or identifiable natural person, or when those answers in fact cannot constitute information about that person. That is the case, for example, where the answers are simply to multiple choice questions and may not be linked to a specific exam candidate or in cases in which such an answer, for example because it cannot be linked with a specific question, is not of any value when it comes to attesting to a particular candidate.

³ See point 4 of the order for reference.

⁴ See point 5 of the order for reference.

⁵ Judgment of 16 December 2008, *Satakunnan Markkinapörssi and Satamedia*, C-73/07, EU:C:2008:727, paragraph 51.

10 in the preamble to the Directive and emphasised in the case-law of the Court'.⁶ It must also be emphasized that it is settled case-law of the Court of Justice that the rights deriving from EU law cannot be relied on for abusive ends.⁷

- 11 **First**, it is apparent from the order for reference in this connection that the applicant is not seeking access to his answers to the exam questions for the purposes of the protection of his personal data, or his privacy, but for the purposes of calling into question the result of the examination. However, the Directive clearly is not intended for that purpose.
- 12 **Secondly**, it is also apparent from the order for reference that the applicant is seeking access to his '*examination script*' [the document containing his answers to the examination questions].⁸ However, the Directive enables the applicant to claim access purely to his personal data in this connection, and not to the document containing those answers as a whole.⁹ In this connection, there is nothing to prevent the Data Protection Commissioner from offering the applicant simply a full summary of that data in an intelligible form.¹⁰
- 13 **Thirdly**, concerning the right to the rectification of personal data claimed by the applicant,¹¹ the Czech Republic notes that Article 6(1)(d) and Article 12(b) of the Directive grant the data subject only the right to the rectification of inaccurate or incomplete personal data. 'Inaccurate or incomplete data' for those purposes cannot be regarded as covering, for example, an incorrect answer to an examination question. From the perspective of the accuracy of personal data, it is thus important only whether the answer noted down corresponds to the version recorded by the exam candidate on the date of the examination. A candidate in a professional examination may in that regard claim rectification, for example, in cases where the answer of a different exam candidate was attributed to him.
- 14 In the light of the above, the Czech Republic takes the view that the Directive does not grant a candidate in a professional examination a right of access to the entire document containing his answers, but only a right of access to his personal data. A right to rectification of an incorrect answer as incomplete or inaccurate personal data may not be claimed either under the Directive.

⁶ See judgment of 7 May 2009, *Rijkeboer*, C-553/07, EU:C:2009:293, paragraph 47 (emphasis added).

⁷ See, for example, judgment of 6 April 2006, *Agip Petroli*, C-456/04, EU:C:2006:241, paragraph 19.

⁸ See point 1 of the order for reference.

⁹ See judgment of 17 July 2014, *YS and Others*, C-141/12 and C-372/12, EU:C:2014:208[1], paragraph 58, and Opinion of Advocate General Sharpston in Joined Cases *Y S and Minister voor Immigratie, Integratie en Asiel*, C-141/12 and C-372/12, EU:C:2013:838, paragraph 79.

¹⁰ See judgment of 17 July 2014, *YS and Others*, C-141/12 and C-372/12, EU:C:2014:208[1], paragraph 59.

¹¹ See point 4 of the order for reference.

5. THE CZECH REPUBLIC'S PROPOSAL AS TO THE ANSWER TO BE GIVEN BY THE COURT OF JUSTICE

Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data must be interpreted to the effect that the answers given by a candidate in a professional exam are personal data within the meaning of that Directive to the extent to which they attest to the specific way in which that candidate actually resolved the questions he was set.

The Directive does not grant a candidate in a professional examination a right of access to the entire document containing his answers to the examination questions, but only a right of access to his personal data.

A right to rectification of an incorrect answer as incomplete or inaccurate personal data may not be claimed under the Directive.

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