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Observations of Hungary

Case C-434/16 \*

**Document lodged by:**

Hungary

**Usual name of the case:**

NOWAK

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**TO THE COURT OF JUSTICE OF THE EUROPEAN UNION**

Pursuant to the second paragraph of Article 23 of the

Statute of the Court of Justice

**HUNGARY**

represented by Miklós Zoltán Fehér, head of department, and Anita PÁLFY, legal expert, agents of the Hungarian Government (Ministry of Justice, 1055 Budapest, Kossuth tér 4, Hungary; Fax +36-1-795-0512; service of pleadings may be effected using e-Curia),

submits the following

**WRITTEN OBSERVATIONS**

**in Case C-434/16**

**Nowak**

reference for a preliminary ruling concerning the interpretation of Directive 95/46 on the protection of individuals with regard to the processing of personal data and on the free movement of such data

The relevant provisions of EU law

\* Language of the case: English.

- 1 Article 2(a) 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 <sup>1</sup> provides:

‘Article 2

Definitions

For the purposes of this Directive:

“personal data” shall mean 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’.

- 2 Article 4(1) of 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, and repealing Directive 95/46/EC (General Data Protection Regulation) <sup>2</sup> provides:

‘Article 4

Definitions

For the purposes of this Regulation:

(1) “personal data” means 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’.

Facts and questions referred for a preliminary ruling

- 3 The Hungarian Government refers to the order for reference for an account of the facts in the case. The Irish Supreme Court, which is hearing the case, has referred the following questions for a preliminary ruling:

‘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?

<sup>1</sup> OJ L 281, 23.11.1995, pp. 31 to 50, ‘Directive 95/46’.

<sup>2</sup> OJ L 119, 4.5.2016, pp. 1 to 88, applicable from 25 May 2018, ‘Regulation No 2016/679’.

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?’

The position of the Hungarian Government

- 4 It is apparent from the definition of the concept of personal data in Directive 95/46 or in Regulation No 2016/679, which is not yet applicable, that the two legal acts give the concept of ‘personal data’ the same substantive definition, with fairly general characteristics and a wide scope, and therefore in the case of individual data – in addition to the data listed by way of example in the definition – the scope of interpretation can necessarily be identified with the interpretation in law.
- 5 In what follows the Hungarian Government wishes to provide support for the answer proposed to the questions referred for a preliminary ruling by presenting the interpretation developed in the case-law of the Hungarian Data Protection Authority.
- 6 In the case-law of the Hungarian Data Protection Authority, in a case <sup>3</sup> arising from comparable facts to those on which the questions are based (language test scripts and access to assessment of them, right to reproduction) the data protection authority found that ‘according to the legal definition [of personal data] <sup>4</sup> everything that the examinee states in the examination script at the examination centre, including the answers given to the questions raised, which reflect his or her knowledge, must be considered to be personal data’, and that ‘thus, the answer which the examinee gave to a given question constitutes the personal data of the examinee, to which the rules on data protection are applicable mutatis mutandis.’
- 7 In its decision the Hungarian Data Protection Authority also observed – echoing the applicant’s observations in the present case – that ‘having regard to the fact that the script is also the personal data of the data subject, as is the order in which the answers to the test paper are written, whether at the top of the paper, at the bottom or on the other side of the paper – for disputes arising over numerical questions in the calculation of results often relate to such matters – a photocopy of the processed data is generally the most effective method of disclosure.’
- 8 It should also be pointed out that the Hungarian Data Protection Authority also examines the rights to have sight of test scripts in a wider context alongside the

<sup>3</sup> Recommendation of the Data Protection Commissioner of 23 July 2002 on the system of inspection of written language exam scripts (Case 336/A/2002); available at: <https://www.naih.hu/files/Adatvedelmibiztos-beszamolaja-2002.pdf>, pp. 212 to 216.

<sup>4</sup> At the time of the publication of that recommendation, Paragraph 2(1) of a személyes adatok védelméről és a közérdekű adatok nyilvánosságáról szóló 1992. évi LXIII. Törvény (the Law on the protection of personal data and public disclosure of data) defined personal data as follows: ‘Personal data: any information relating to any identified natural person (‘data subject’) and any inference drawn from such information pertaining to the data subject The personal data shall retain that status during the data processing, as long as it retains a connection with the data subject.’

effectiveness of data protection rules and in principle found, as a general rule, that ‘examination candidates exercise their right to disclosure derived from the right to protection of personal data not necessarily for its own sake but as an instrument of another right, the right to review of the assessment of test scripts. ... An essential prerequisite for the submission of an application for review is that the examinee should have sight of the scripts and assessments about which he wishes to submit his application ...’. That right to disclosure, however, comprises not only the right to inspection, according to the data protection supervisory authority, but ‘must necessarily include possession of the script, or availability of a copy of it, as in its absence the examinee can rely only on his memory when drafting his application for review.’

- 9 In that connection reference may also be made to the case-law of the Hungarian constitutional court, which establishes – in administrative proceedings but as a fundamental principle – that, as regards the right to a legal remedy, it is important, first, that the citizen should have cognisance of the decision within a reasonable time, since he must be allowed time to prepare a considered and well-founded application for review, and, second, that he should know the reasons for the adverse decision. For that reason, both the obligation on an administrative authority to state reasons and the obligation to disclose them constitute an important guarantee of the right to a review.<sup>5</sup>
- 10 The 4/27 opinion on the concept of personal data by the so called Article 29 Data Protection Working Party states that ‘[i]t needs to be noted that this definition reflects the intention of the European lawmaker for a wide notion of “personal data”, maintained throughout the legislative process. The Commission’s original proposal explained that “as in Convention 108, a broad definition is adopted in order to cover all information which may be linked to an individual”. The Commission’s modified proposal noted that “the amended proposal meets Parliament’s wish that the definition of ‘personal data’ should be as general as possible, so as to include all information concerning an identifiable individual”, a wish that also the Council took into account in the common position.’<sup>6</sup>
- 11 The Hungarian Data Protection Authority has always given a wide interpretation<sup>7</sup> and as explained in the above interpretation, the exercise of the right to disclosure is not subject to the condition that the data subject should seek to avail himself of it exclusively in exercise of his entitlement to data protection or in order to assert another substantive or procedural right.
- 12 As can be seen, in the present case, the assertion in paragraph 15 of the request for a preliminary ruling – originating from the Irish data protection authority – that

<sup>5</sup> 21/1997. (III. 26.) AB decision

<sup>6</sup> [http://ec.europa.eu/justice/policies/privacy/docs/wpdocs/2007/wp136\\_en.pdf](http://ec.europa.eu/justice/policies/privacy/docs/wpdocs/2007/wp136_en.pdf), p. 4.

<sup>7</sup> See the guide of 28 July 2015 of the Hungarian National Authority for Data Protection and Freedom of Information on the matters taken into account, as regards personal data, in decisions on the subjects giving rise to removal from Google search engine listings, [https://www.naih.hu/files/2015-07-29-Tajekoztato\\_Google\\_talalati\\_list\\_eltavol.pdf](https://www.naih.hu/files/2015-07-29-Tajekoztato_Google_talalati_list_eltavol.pdf)

‘there is no precedent for any other data protection body in Europe concluding that an examination script is personal data’ is thus not tenable, since the Hungarian Data Protection Commissioner – admittedly in cases published before the accession of Hungary to the European Union – had already examined the question, and his recommendation had been followed both by data handlers and by the legislature.

- 13 However all this is without prejudice to the fact that certain rights of the data subject (e.g. rights to access, correction, deletion) can legitimately be curtailed, both those applied in the case serving as a basis for the case-law described, as in the present case, and those to be applied on the basis of data protection rules as of May 2018, while the exclusion or curtailment of the exercise of certain rights also follows logically and inevitably from the nature of the personal data concerned.
- 14 Naturally, it is necessary to examine whether having unrestricted access to the script might, in some cases, damage an interest (e.g. in preventing influence on future exams) or the rights of others (e.g. copyright), in respect of which subsequent access – on the basis of a legal rule or other legal instrument – can be restricted. However, any legal restriction may occur only with reasonable prior disclosure in an acceptable form, and only with proper balancing of legal interests.
- 15 Thus, on the basis of settled case-law, in the view of the Hungarian Government, it is not possible to draw the conclusion that the data subject would be able to enjoy the unfettered exercise of his full rights under the applicable law, so that, for example, he would be entitled subsequently to correct the answers he gave in the exam script – in a way that could influence the exam.
- 16 The Hungarian Government takes the view that the opinion of the Hungarian data protection authority set out above can be regarded as sound in the context of the applicable EU law too, and any departure [from that position] would serve to reduce the level of protection of the basic rights of the data subject attained in Hungary and for that reason we ask the Court of Justice to take account of this interpretation when reaching its decision.

#### Conclusions

- 17 On the basis of the above considerations, the Hungarian Government proposes the following answer to the questions referred:

**Information/answers given in a professional examination by any candidate constitutes personal data within the meaning of Directive 96/46/EC, but certain rights of the data subject connected with the handling of that personal data (e.g. rights to access, correction, deletion) can be restricted legitimately under the general conditions for curtailment of rights, and the exclusion or curtailment of certain rights follows logically and inevitably from the nature of the personal data in question.**