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Written Observations of the Republic of Poland

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**TO THE PRESIDENT AND MEMBERS
OF THE COURT OF JUSTICE OF THE EUROPEAN UNION
WRITTEN OBSERVATIONS**

submitted by the Republic of Poland pursuant to Article 23 of the Statute of the
Court of Justice

in the request for a preliminary ruling in Case

C-434/16

Nowak

(national court: Supreme Court — Ireland)

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THE FACTS OF THE CASE AND THE QUESTIONS REFERRED FOR A PRELIMINARY RULING

- 1 The Agent for the Republic of Poland before the Court of Justice of the European Union received the request from an Irish court (Supreme Court) for a preliminary ruling in Case C-434/16 *Nowak* on 7 September 2016. That request concerns the interpretation 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.¹
- 2 The proceedings before the referring court concern refusal of access to an examination script which, in the appellant’s opinion, contains his personal data. The Institute of Chartered Accountants of Ireland, which set the accountancy examinations which the appellant sat, denied him access to the examination scripts containing his answers on the ground that they do not constitute personal data within the meaning of the provisions of Irish law. That view was also upheld by the Irish Data Protection Commissioner.
- 3 During the court proceedings brought by the appellant, the referring court raised doubts as to whether answers contained in an examination script could be regarded as personal data under Directive 95/46/EC and referred the following questions to the Court 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?*
 - (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 REPUBLIC OF POLAND’S POSITION

II.1. First question

- 4 The first question seeks to establish whether answers contained in an examination script are capable of being personal data.
- 5 According to the definition given in Article 2(a) of Directive 95/46/EC, ‘personal data’ means 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

¹ OJ 1995 L 281, p. 31.

factors specific to his physical, physiological, mental, economic, cultural or social identity.

- 6 In its case-law to date, the Court has explained, *inter alia*, that the term ‘personal data’ undoubtedly covers the name of a person in conjunction with his telephone coordinates or information about his working conditions or hobbies.² It has also acknowledged that fingerprints,³ tax data⁴ and an IP address⁵ are also regarded as personal data.
- 7 The definition of personal data has also been analysed by the Data Protection Working Party set up under Article 29 of Directive 95/46/EC. In its Opinion 4/2007 on the concept of personal data,⁶ the Working Party stated that that definition may be divided into four elements.
- 8 The first of those elements, that is to say ‘any information’, means that the concept of personal data includes data containing any sort of information. It also includes information relating to an individual’s private and family life and information regarding any types of activity undertaken by that individual, such as information concerning working relations or the economic or social behaviour of the individual. Furthermore, the concept of personal data includes information accessible in any form, for example information kept on paper or in graphical or acoustic form. Personal data also include biometric data defined as biological properties, physiological characteristics, living traits or repeatable actions, where those features or actions are unique to that individual. An example of such data is a person’s handwriting.⁷
- 9 The second element in the definition of personal data is concerned with the term ‘relating to’. For information to be classed as relating to a natural person, it must be possible to link that information with that individual. The Working Party also expressed the view that the fact that information may be used for the purpose of assessing an individual or that its use may have an impact on that person’s rights and interests is sufficient for that information to be regarded as ‘relating to’ that individual.⁸
- 10 Personal data must also relate to ‘an identified or identifiable’ natural person (the third element). The Working Party drew attention to the fact that a person may be identified directly by name or indirectly by information which, combined with

² Judgment in *Lindqvist*, C-101/01, EU:C:2003:596, paragraph 24.

³ Judgment in *Schwarz*, C-291/12, EU:C:2013:670, paragraph 27.

⁴ Judgment in *Bara and Others*, C-201/14, EU:C:2015:638, paragraph 29.

⁵ Judgment in *Scarlet Extended*, C-70/10, EU:C:2011:771, paragraph 51.

⁶ Opinion 4/2007 of the Article 29 Data Protection Working Party on the concept of personal data, http://ec.europa.eu/justice/data-protection/article-29/documentation/opinion-recommendation/files/2007/wp136_en.pdf

⁷ Loc. cit., pp. 6-9.

⁸ Loc. cit., pp. 9-12.

other information (whether the latter is retained by the data controller or not), allows that person to be distinguished from other individuals.⁹

- 11 The last element for determining that information is personal data is that it relates to natural persons.¹⁰
- 12 As regards answers contained in examination scripts, the Republic of Poland will consider the first and second elements of the definition of personal data together, on the ground that they are closely linked and that they are interdependent.
- 13 The Republic of Poland considers that information recorded in/as answers given by a candidate during a professional examination is capable of identifying that person. Examination answers are a reflection of that candidate's thought and decision-making processes and therefore contain certain information about his intellect. By analysing those answers, the logic involved and the way conclusions are constructed and expressed, it is possible to obtain information on whether the candidate is capable of analytical and rational thought. A distinction must be drawn here between answers to 'open questions', which require the candidate to set out his own views and justify them, and answers to 'closed questions', which simply require the candidate to select one of several answers supplied by the examiner. In the first case, the candidate is usually required to engage more, to develop his thoughts and to justify his opinions. An examination of this type therefore enables a candidate's mental capacities to be assessed to a considerably greater extent than in the case of answers to 'closed questions'.
- 14 In some cases, information about the candidate can also be obtained directly from the content of the answers to an examination question. For example, where an answer contains autobiographical details, it will provide information relating to the candidate's working and private life. It is also worth mentioning that examination scripts may additionally show a given name and surname for the purpose of identifying the candidate or his telephone number or contact address (for example, in order to inform him about the examination results). In each case, such information should be regarded as personal data.
- 15 Information about an individual may also take the form of his handwriting, which specifically may enable him to be identified, because handwriting is one of an individual's non-repeatable characteristics. When assessing whether a given examination script contains personal data, the question of whether the script has been handwritten or whether it has been completed using IT equipment (a computer, for example) is therefore also an essential factor.
- 16 It follows from the foregoing considerations that, when assessing whether an answer contained in an examination script is personal data, account should be taken of both the content of the answers given and their form.

⁹ Loc. cit., pp. 12-21.

¹⁰ Loc. cit., pp. 21-24.

- 17 To sum up, answers contained in an examination script may contain both the first element of the definition of personal data (the answers may contain any information, including biometric data) and the second element of that definition (that information may relate to the candidate).
- 18 Next, the Republic of Poland points out that, given the purpose and nature of examinations, the answers in them are always attributable to a specific natural person, either directly, where the examination script shows the candidate's given name and surname, or indirectly, for example where the answers are coded. There can therefore be no doubt that answers contained in examination scripts will contain both the third element of the definition of personal data (the candidate's identity can be established without excessive costs, time or actions) and the fourth element of that definition (the candidate is a natural person).
- 19 When applying the above considerations to the facts of the case before the referring court, it should be noted that the professional examination that the appellant sat was intended to assess his knowledge of accountancy. Moreover, it was an 'open book' examination, which meant that the questions could be answered by studying the materials made available to the candidates during the examination. The information supplied in the request does not therefore indicate that the content of the appellant's answers conveyed information relating specifically to him. However, it is not inconceivable that information about the appellant may be obtained from the content, formulation and form of his answers.
- 20 It is therefore for the referring court to assess whether, in the case at issue, the examination script contains personal data. Taking into account the form and content of the answers contained in the examination script, the referring court should assess whether they make it possible to obtain information about the candidate. In view of the diverse nature of examinations, each case should be assessed individually, taking account of whether a particular answer contains information relating to a given person, whether it is possible to obtain information about him from the content of the answers given and whether the script was handwritten in such a way as to enable the candidate's handwriting to be identified.

II.2. Second question

- 21 The second question concerns the factors for determining whether an examination script containing personal data may be regarded as personal data.
- 22 When answering that question, it should be noted that a script is simply a medium containing information which may be classed as personal data. Therefore, even if it is acknowledged that a particular examination script contains personal data, those data are not necessarily personal data within the meaning of Directive

95/46/EC. As may be seen from the judgment in *YS and Others*,¹¹ the legal analysis contained in an administrative document, with which that judgment was concerned, is not necessarily personal data itself, but may contain personal data. The Court held that data relating to the applicant for a residence permit in the legal analysis contained in the relevant administrative document constituted personal data, although the analysis itself could not be classified as such. Of particular significance in that case was the fact that, since the legal analysis constituted information relating to an assessment and the application of the law by the appropriate legal body to the applicant's situation, which would be determined *inter alia* by using personal data relating to him held by that body, that analysis was not in itself liable to be the subject of a check as to its accuracy by that applicant and a rectification under Article 12(b) of Directive 95/46/EC.¹²

- 23 It therefore follows from the judgment in *YS and Others* that acknowledging information to be personal data does not determine whether the data subject may exercise all the rights defined in Article 12 of Directive 95/46/EC, including, *inter alia*, the right to rectification, erasure or blocking of data. In that connection, acknowledgment that an examination script contains personal data does not mean that a candidate is entitled to check the accuracy of the data contained in that script or to rectify any such data as relates to the content of the answers given.
- 24 Under Article 12(b) of Directive 95/46/EC, a person whose personal data are being processed may ask for the rectification of incomplete or incorrect data. Under Article 6(1)(d) of Directive 95/46/EC, when the accuracy of data is being assessed, account should be taken of the purpose for which those data were collected. In the case of examination scripts, the data are collected for the purpose of assessing the candidate's knowledge on the day on which he sat the examination. In that connection, any possibility of rectifying information contained in examination scripts must be ruled out, since this would be contrary to the purpose for which they were collected.
- 25 Furthermore, granting a candidate the right to correct data contained in an examination script under Article 12(b) of Directive 95/46 would not serve the directive's purpose of guaranteeing the fundamental rights and freedoms of natural persons, in particular their right to privacy with regard to the processing of personal data, but would serve the purpose of guaranteeing that candidate a right of access to administrative documents, which is not covered by that directive.¹³

PROPOSED REPLY TO THE QUESTIONS REFERRED FOR A PRELIMINARY RULING

- 26 On the basis of the arguments set out above, the Republic of Poland proposes that the Court should reply as follows to the questions submitted by the referring court:

¹¹ Judgment in *YS and Others*, C-141/12 and C-372/12, EU:C:2014:2081, paragraph 39.

¹² Judgment in *YS and Others*, paragraph 45.

¹³ Judgment in *YS and Others*, paragraph 46.

Information recorded in/as answers given by a candidate in an examination script during a professional examination is capable of being personal data within the meaning of Directive 95/46/EC. When determining whether an examination script contains personal data, account should be taken of both the content and the form of the answers given. The decisive factor is whether information about a particular individual may be obtained from the answers given.

Irrespective of whether it is acknowledged that an examination script contains personal data, a candidate in an examination is not entitled to exercise the rights arising from Article 12 of Directive 95/46/EC, including the right to check the accuracy of the data contained in that script or to rectify any such data as relates to the content of the answers given.

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