Date de réception : 09/02/2017
TO THE PRESIDENT AND MEMBERS
OF THE COURT OF JUSTICE
OF THE EUROPEAN UNION

IN CASE C-434/16

PETER NOWAK
Appellant

V.

DATA PROTECTION COMMISSIONER
Respondent

WRITTEN OBSERVATIONS OF APPELLANT

Peter Nowak, pursuant to the second paragraph of Article 23 of the Protocol on the Statute of the Court of Justice, represented by Mr. Noel J. Travers, Senior Counsel of the Bar of Ireland, instructed by Mr. Gerard Rudden, Solicitor, of Ahern Rudden Quigley, Solicitors, 5 Clare Street, Dublin 2, Ireland, has the honour of submitting the following written observations to the Court of Justice of the European Union on the questions referred for preliminary ruling pursuant to Article 267 TFEU by the Supreme Court of Ireland, by order of that Honourable Court, perfected on 2nd August 2016, received at the Registry of the Court of Justice of the European Union on 4th August 2016.
I. INTRODUCTION AND OVERVIEW

1. This preliminary reference has arisen from legal proceedings which Peter Nowak, the appellant before the referring court, has brought through almost the entire of the Irish legal hierarchy to the Supreme Court against a refusal by the Irish Data Protection Commissioner ("DPC"), the respondent therein, by a letter dated 21st July 2010, to investigate two related complaints he submitted, on the basis that those claims were frivolous and vexatious for domestic law purposes because they did not concern "personal data". The main proceedings case illustrate how even the most basic question in a data protection complaint, viz. as to whether the complaint relates to personal data, can become the subject of protracted dispute. The essential reason this became the substantive issue in those proceedings is because of the refusal of the DPC to embrace the possibility that the examination script the subject of his complaints, namely the handwritten answer booklet completed by Mr. Nowak during the examination in question, together with any comments thereon by the examiner, could comprise personal data for the purpose of EU law, notwithstanding that the identification number on the script enabled him and the mark he was awarded for the examination to be identified by the controller of the data. This refusal led to the rejection of the complaints as frivolous and vexatious and the refusal substantively to investigate them. Accordingly, this Court is requested in this preliminary reference to address itself to the concept of "personal data" in EU law, the protection of which is ultimately guaranteed by of Articles 7 and 8 of the Charter of Fundamental Rights of the EU (the "Charter"), and most especially the latter.

2. The Supreme Court, in the two judgments given on 28th April 2016 that underlie the within preliminary reference, has recognised the exceptional circumstances of the main proceedings, wherein Mr. Nowak was required to undertake a perhaps unique legal journey through four levels of Irish courts (being the Circuit Court, the High Court, the Court of Appeal and, finally, the Supreme Court) in order to be vindicated finally by the referring court in his procedural claim; i.e. that he was entitled to invoke the statutory mechanism in the Irish Data Protection Acts 1988 and 2003 (discussed below) to bring an appeal against the DPC's refusal substantively to examine and
investigate his complaints.¹ This Court will be familiar from its seminal judgment in the Schrems case with the (regrettably widespread) practice employed by the DPC of not taking decisions on foot of complaints made to it and of rejecting them, if the complainant insists on a decision being given, as being frivolous and vexatious: the effect of which, up until the important decision of 28th April 2016 by the Supreme Court in the main proceedings, was to force the complainants involved to undertake expensive judicial review proceedings in the Irish High Court if they wished (and were in a position so to do; there being no legal aid available) to challenge by any of judicial review such DPC refusals to investigate their complaints.² This has enabled the DPC to eschew having to take actual reasoned decisions in relation to such complaints. The importance of the Supreme Court’s decision for the effectiveness in Ireland of the Data Protection Directive, Directive 95/46/EC — which was clearly influenced by the judgment ultimately given by this Court in answer to the Irish High Court’s reference to it in Schrems,³ and which, as this Court will recall, arose from a similar refusal by the DPC to investigate a complaint — is that the decision has opened up the entitlement of individuals like Mr. Nowak, who are dissatisfied at refusals by the DPC to investigate data-protection-breach complaints, to pursue a less expensive and less risky (in terms of the potential exposure to paying the legal costs of the DPC, if unsuccessful) statutory remedy before the regionally-structured Circuit Court in Ireland.⁴ Given the number of major technology companies in particular that are regulated primarily in the EU by the DPC, the practical importance of Supreme Court’s decision in the main proceedings for EU citizens and residents more broadly throughout the Union ought not to be underestimated.

3. As regards the preliminary reference, the issue that the Supreme Court has referred to this Court for interpretation concerns the second (and still pending) substantive

² See Case C-362/14 Schrems v Data Protection Commissioner; ECLI:EU:C:2015:650.
³ Determining Mr Nowak’s complaints to be frivolous or vexatious meant that, if he wanted to bring an appeal, then he would have to mount a full judicial review: the Supreme Court (per O’Donnell J.), in the main proceedings has observed, that this was “incongruous” in circumstances where the DPC had also determined Mr. Schrems’ complaint to be frivolous or vexatious - something which had sparked “perhaps the most important data protection case to emerge from this jurisdiction, and which has resulted in a landmark decision of the Court of Justice of the European Union, Schrems v. The Data Protection Commissioner (Case C-362/14)...” (at paragraph 13).
ground of Mr. Nowak’s appeal to it; viz. that the Irish Court of Appeal erred in law in holding that the DPC was entitled to conclude, in essence, that the answers given by Mr. Nowak in sitting the examination in question, i.e. that the subject matter of Mr. Nowak’s complaint, were not or could not contain personal data within the meaning of the Irish Data Protection Acts 1988 and 2003. The resolution of this issue calls for an interpretation of Directive 95/46/EC and the underlying provisions of Articles 7 and 8 of the Charter, which protect and guarantee the right to privacy and data protection in EU law, and consideration especially of whether the broad notion in EU law of what comprises, or may comprise, “personal data” extends to the information contained in such answers. The Court is particularly asked to consider and interpret the requirement that information from an identifiable individual (in the main proceedings, the information has been provided by the person involved in his own handwriting) relates to or concerns that individual. Underlying the DPC’s approach to rejecting Mr. Nowak’s complaint, as it emerges especially from the DPC’s submissions to the referring court (and which will likely be repeated before this Court), is the notion that information must be “biographical in a significant sense” or have the data subject as its focus, such that it “affects his or her privacy, whether in his personal or family life, business or professional capacity”, which the DPC derives in large measure from the 2003 decision of the Court of Appeal of England and Wales in English decision in Durant v Financial Services Authority. For the reasons developed below, it is submitted that his approach is wholly inappropriate to the interpretation of the board concept of “personal data” in EU law and as the concept, particularly under Directive 95/46/EC, has been interpreted by this Court.

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5 [2003] EWCA 1746, at paragraph 28. This approach is explicable when one considers that the old (and pre-Directive 95/46/EC) United Kingdom Act, the since repealed Data Protection Act 1984, only applied (see section 17(1) thereof) to the processing of personal data when the processing occurred “by reference to the data subject”.

6 In this respect, it is noteworthy that the Court has also adopted a broad approach to the type of information that constitutes “personal data” under Regulation (EC) No 45/2001 of the European Parliament and of the Council of 18 December 2000 on the protection of individuals with regard to the processing of personal data by the Community institutions and bodies and on the free movement of such data (OJ (2001) L 8, p. 1). See, in this respect, in particular, Case C-28/08 European Commission v Bavarian Lager, ECLI:EU:C:2010:378. In that case, the Commission appealed against a General Court judgment finding, in effect, that the requirements of Regulation 45/2001 only prevailed over the access-to-documents requirement of Regulation (EC) No 1049/2001 of the European Parliament and of the Council of 30 May 2001 regarding public access to European Parliament, Council and Commission documents (OJ (2001) L 145, p. 43), where the personal data that is the subject of the access request is capable of undermining the privacy and integrity of the data subject for the purpose of Article 8 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (“ECHR”): see Case T-194/04 Bavarian Lager Co. Ltd v Commission, ECLI:EU:T:2007:334, at paragraphs 111 to 120. This approach was categorically rejected by this Court in its judgment, which, referring
II. BACKGROUND FACTUAL & LEGAL CONTEXT

4. Mr. Nowak was an unsuccessful candidate in an examination set by the Chartered Accountants Ireland ("CAI"), which was held on 7th October, 2009. After obtaining his result, Mr. Nowak made an application, on 12 May 2010, to CAI to release personal data to him pursuant to the provisions of the Data Protection Acts 1988 and 2003, and in particular his examination script and the answers contained thereon and data relating to his appeal regarding the examination result awarded to him. The CAI duly sent him copies of 17 items but it declined to send him a copy of his exam script. The CAI took the view that, as his examination answer script was not "personal data" within the scope of the Data Protection Acts 1988 and 2003, it was not legally obliged to send him a copy of what he had written.

5. Mr. Nowak then asked the DPC for help. However, the latter declined to offer assistance because the office considered that examination answer scripts would not generally constitute personal data. Mr. Nowak then lodged an official complaint with the DPC regarding the CAI’s access-request refusal. However, the DPC considered that the CAI was correct and that the examination answer script at issue was not personal data, and concluded that the complaint was bound to fail, and so was "frivolous and vexatious" for the purpose of the Irish legislation, and therefore would not be investigated.

6. Mr. Nowak sought to appeal this decision to the Circuit Court. The DPC responded that no appeal lay or was possible because there had been no investigation, and, accordingly, no decision pursuant to section 10 of the Data Protection Act 1988 (as amended), which could be the subject of an appeal, had been taken. The Circuit Court upheld the DPC’s view that no appeal lay, because there was only a statutory right to appeal to it if there was a ‘decision’ to appeal, and that was not the case here. That is to say, the DPC had not taken ‘a decision’ about whether the complaint was vexatious

to the purpose of Regulation 45/2001, as expressed in Article 1(1) thereof, it held (at paragraph 61) that it "does not allow cases of processing of personal data to be separated into two categories, namely a category in which that treatment is examined solely on the basis of Article 8 of the ECHR and the case-law of the European Court of Human Rights relating to that article and another category in which that processing is subject to the provisions of Regulation No 45/2001". The Court proceeded to uphold the Commission’s refusal to disclose the names of several persons who were mentioned in the minutes of a Commission meeting as Bavarian Lager (which had requested disclosure) had not shown that it was necessary, nor had the data subject’s consent to disclosure been obtained.
or frivolous, but had merely made a ‘determination’. The Circuit Court held that, even if it were wrong on that point, then, if it were it to hear the substantive issue in Mr Nowak’s appeal, he would still be unsuccessful, because an examination answer script was not “personal data”.

7. Mr. Nowak appealed against this decision on a point of law to the High Court pursuant to section 26(3)(b) of the Data Protection Act 1988. The High Court (per Birmingham J.) adopted the same approach (in the alternative) as had the Circuit Court. Thus, the High Court found, in its judgment of 7th March 2012, that, while Mr. Nowak was identifiable from the document by his examination number, which enabled his script to be linked to him, since “if that were not so, there would be no point in setting the examination”, it upheld the conclusion of the DPC that, as “little or no personal information about Mr. Peter Nowak would be gleaned by anyone reading his script”, it did not comprise personal data.7

8. Mr. Nowak then appealed to the Court of Appeal, which, in an ex tempore judgment given on the same day of the hearing of the appeal before it, agreed with the reasoning of the High Court and rejected Mr. Nowak’s appeal.8 The Supreme Court, in a determination given on the 24th April, 2015, accepted that there was an arguable ground of appeal in relation to the true interpretation of the Data Protection Acts 1988 and 2003, which involved an issue of interpretation of important legislation having an impact on members of the public, and in particular the rights of members of the public to appeal determinations of the DPC, such that the point was therefore one of general public importance. The Supreme Court also considered that it was in the interests of justice that Mr. Nowak be permitted to argue that the decision of the Court of Appeal upholding the substantive decision of the DPC (and, therefore, also the decisions of the Circuit Court and High Court) was wrong, since otherwise his appeal would be limited to the procedural issue of whether he had a right to appeal the DPC’s decision to reject his complaint as being frivolous and vexatious and so not investigate it. Accordingly, leave to appeal was allowed.

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7 See Nowak v Data protection Commissioner [2012] IEHC 449, at paragraph 17. A copy of this judgment is included as Annex I hereto for information purposes for the convenience of the Court.
8 A note of that ex tempore judgment, as agreed between the parties, is included, as Annex II hereto for information purposes for the convenience of the Court.
9. Following written and oral submissions, the Supreme Court, as mentioned above, upheld the right of appeal in its judgments of 28th April 2016. On the procedural issue, it held in particular (at paragraph 64 of the judgment of O'Donnell J.) that:

“In a situation where the national supervisory authority comes to the conclusion that the arguments put forward in support of such a claim are unfounded and therefore rejects it, the person who lodged the claim must, as is apparent from the second subparagraph of Article 28(3) of Directive 95/46, read in the light of Article 47 of the Charter, have access to judicial remedies enabling him to challenge such a decision adversely affecting him before the national courts.”

10. With regard to the substantive issue, the Supreme Court recalls in its order for reference the key definitions in the Irish and EU legislation.

11. “Personal data” is defined in section 1(1) of the Data Protection Act 1998 as follows:⁹

“[D]ata relating to a living individual who is or can be identified either from the data or from the data in conjunction with other information that is in, or is likely to come into, the possession of the data controller.”

12. In Directive 95/46/EC, “personal data” is defined in Article 2(a) thereof as meaning:

“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.”

13. The Supreme Court refers to the three-fold basis in the DPC’s submissions for denying that examination answers may constitute personal data. Firstly, an open book

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⁹ One finds the same broad and general definition in Article 2, indent (a), of Regulation 45/2001, cited ibid. The definition has been expanded further in 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), which entered into force on 4 May 2016 and will apply from 25 May 2018; OJ (2016) L 119, p. 1. Article 4(1) provides that, for the purposes of the regulation: “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” (emphasis added).
exam, such as that the subject of Mr. Nowak’s complaints, would not be expected to contain any personal information about him. Furthermore, it is difficult to see how a right of correction could be applied to a examination script, particularly in its unmarked form. Secondly, there was no question at issue of making Mr. Nowak aware of what was in his answers because he himself had generated the content thereof. Thirdly, Advocate General Sharpston in her Opinion in the *E.S.* case had made a distinction between facts about an individual being disclosable data, while, in contrast, a legal analysis based on such facts for the purposes of an administrative decision-making process regarding a claim made by the individual concerned was not disclosable personal data. The DPC relied by analogy on this reasoning, which, in its written submissions to the Supreme Court, it observed was followed by the Court in its conclusion regarding the concept of “personal data” at paragraph 48 of the judgment.

14. In contrast, it notes Mr Nowak contention, *inter alia*, that his examination script comprises personal data because it contains biometric data in that it is handwritten and because his answers therein reflect his intellect, thought processes and judgement, and because the script may also contain comments by the examiner regarding his answers. Mr. Nowak also relied upon section 4(6)(a) of the Data Protection Act, 1988, which provides a specific rule as to when a request by an individual in relation to the results of an examination at which the individual was a candidate is deemed to be made, and upon section 4(6)(b), which defines “examination” in broad terms. If an examination result was personal data, then, consequently, the examination answer script, and possibly even the examiner’s marks or comments thereon, also comprise personal data.

15. The Supreme Court, provisionally acknowledging that Mr. Nowak’s interpretation may be correct, considered that it was “not inconceivable that there might be circumstances in which a data subject might wish to control the processing of such information outside of the examination process”. However, as this was ultimately a

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10 Case C-141/12: ECLI:EU:C:2013:838.
12 Thus, Section 4(6)(b) defines “examination” as meaning “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” (emphasis added).
matter of EU law, which was not acte clair, and because it was the final court of appeal, it decided, in light of the CILFIT test, that a preliminary reference to this Court was necessary.\textsuperscript{13}

16. Accordingly, it decided to refer the following questions under Article 267 TFEU:

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?"

III. ANALYSIS

17. Mr. Nowak submits that the key issue in this case is that raised by the referring court's first question. In his respectful submission, the answer to that question should be in the affirmative. The second question seems to seek to distinguish between information contained in examination answers that may, as such, be capable of being considered to be personal data but which may not, in fact, \textit{i.e.} in a given case, constitute such data. The second question would appear, with all due respect, to be based on a misplaced premise, namely that information that is capable of constituting personal data for the purpose of Article 2(a) of Directive 95/46 because it relates "to an identified or identifiable natural person" may yet be classified as not constituting such information. The flaw in the logical underpinning of this question is that it assumes that information must be personal in nature in order to be capable of being classified as "personal data" for the purpose of Article 2(a). The latter, however, defines "personal data" as information that relates to an identified or identifiable person. Thus, what is of critical import for the purpose of applying the definition, is to determine what information may be considered to relate to an identifiable natural person. As the 'Article 29 Data Protection Working Party' under Directive 95/46, in its Opinion 4/2007 of 20\textsuperscript{th} June 2007, has noted: "From the point of view of the

\textsuperscript{13} Case 238/81 CILFIT and Lanificio (1982) ECR 3415, at paragraph 16 in particular.
content of the information, the concept of personal data includes data providing any sort of information." Mr. Nowak agrees. Accordingly, it is respectfully suggested that it would be appropriate for this Court to consider both questions referred together (and it is, accordingly, proposed in these submissions so to do) and to provide a cumulative answer to the questions.

18. The right to respect for private life is guaranteed by Article 8 ECHR and by the Article 7 of the Charter, as well as that of Article 8 thereof which specifically guarantees the protection of personal data, in whose light Directive 95/46 must be interpreted. This justifies a broad approach to interpreting the material scope of the concept of personal data. Thus, almost 20 years ago, Dammann and Simitis, in their seminal work, EG-Datenschutzrichtlinie, opined that the term 'personal data' includes all data about a person, including economic, professional, etc. data and not just data about personal life. Furthermore, the Article 29 Working Party, in its Opinion 4/2007, has observed that the intention of the legislature throughout the legislative process that led to the adoption Directive 95/46 was to favour a broad notion of "personal data". As Advocate General Campos Sánchez-Bordona has observed in his Opinion in Case C-582/14 Breyer:

"the possibility that advances in technical means will, in the more or less immediate future, significantly facilitate access to increasingly sophisticated instruments for collecting and processing data justifies the safeguards put in place in defence of privacy"; such that: "[e]fforts have been made, when defining the relevant legal categories in the field of data protection, to include factual scenarios which are sufficiently broad and flexible to cover any conceivable situation".

19. Furthermore, the preparatory works for Directive 95/46 indicate an intention to make the definition of "personal data" in the Directive "as general as possible, so as to

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14 See 01248/07/EN WP 136, at p. 6 (original emphasis).
15 See, in that regard, Joined Cases C-465/00, C-138/01 and C-139/01 Österreichischer Rundfunk and Others [2003] ECR I-4989, paragraph 68; and the Opinion of Advocate General Kokott in Case C-275/06 Promusicae, EU:C:2007:454, at paragraph 51 et seq.
17 See 01248/07/EN WP 136, at p. 4.
18 See Case C-582/14 Breyer v Bundesrepublik Deutschland, ECLI:EU:C:2016:339, at paragraph 66 of the Opinion of 12 May 2016 (discussed further below).
include all information concerning an identifiable individual" (emphasis added).\footnote{See the ‘Amended proposal for a Council Directive on the protection of individuals with regard to the processing of personal data and on the free movement of such data’, COM (92) 422 final –SYN 287 of 15 October 1992 at p. 9. This is expressed to be in response to a specific request from the European Parliament that the definition of "personal data" should be general. The Commission further noted that: "A person may be identified directly by name or indirectly by a telephone number, a car registration number, a social security number, a passport number or by a combination of significant criteria which allows him to be recognized by narrowing down the group to which he belongs (age, occupation, place of residence, etc.). The definition would also cover data such as appearance, voice, fingerprints or genetic characteristics."}

Most importantly, the definition in Article 2(a) of Directive 95/46 is clearly, on its face, drafted in broad and general terms. Thus, this Court has already had occasion, for example, to hold that the term covers a very broad range of information: the name of a person in conjunction with his/her telephone coordinates or information about his working conditions or hobbies;\footnote{See Case C-101/01 Lindqvist [2003] ECR I-12971, paragraph 24.} his/her address;\footnote{See Case C-553/07 Rijkeboer [2009] ECR I-3889, paragraph 42.} his/her daily work periods, rest periods and corresponding breaks and intervals;\footnote{See Case C-342/12 Worten, ECLI:EU:C:2013:355, paragraphs 19 and 22} monies paid by certain bodies and the recipients;\footnote{See Österreichischer Rundfunk and Others, cited in note 15 above, paragraph 64.} amounts of earned or unearned incomes and assets of natural persons;\footnote{See Case C-73/07 Satakunan Markkinapörssit and Satamedia [2008] ECR I-9831, paragraphs 35 and 37.} addresses of internet users.\footnote{See Case C-70/10 Scarlet Extended: EU:C:2011:771.}

20. It is submitted that two cumulative conditions for data to be “personal” can be discerned from Article 2(a) of Directive 95/46. First, the data must relate to or concern a natural person, and, secondly, it must permit or enable the identification of such a person. Notably, there is no reference in the definition to the data needing to relate to any particular private sphere of activity of the person concerned activity. This is, of course, because (as discussed above and especially in paragraph 19 immediately above) the legislative intention was to adopt a broad definition, so as to include all information concerning an identifiable individual. Contrariwise, central to the approach of the DPC and to its submissions in the main proceedings, and especially to those developed before the referring court, is the fundamentally circular notion that information must, in order to be personal data, concern an individual in some personal way. In other words, to be personal data the relevant information about the individual concerned must be personal in nature. This, of course, begs the question of what is personal information, which brings one back to one’s starting point; hence the circularity. In substance, the approach of the Irish courts right up to
the Court of Appeal has been to allow a deferential margin of appreciation to the DPC, because, as the High Court observed, the DPC deals with "issues involving data protection on a daily basis". Emphasis was placed on the DPC's contacts with colleagues in other Member States and the likelihood that the DPC is "fully au fait with developments internationally" and the contention that, as regards examination scripts, there was "no example of any other Data Protection Authority within the EU considering such material to be personal data". Thus, the response of the DPC has been (at least in the present case) to reject the possibility that the information at issue may constitute personal data. This may be contrasted with the more open approach of the Supreme Court, which observed in its order for reference (at paragraph 15) that: "it must be said that the opposite is also true at least as far the submissions to this Court go: it has not been shown that there is any precedent deciding the such scripts are not personal data."

21. Since data will usually relate to a person if it enables that person's identity to be identified, the key criterion, as matter of EU law, is that concerned with identifiability. In respect of this criterion, the Court held recently in Breyer that (paragraphs 40-42):"...

"... it is clear from the wording of Article 2(a) of Directive 95/46 that an identifiable person is one who can be identified, directly or indirectly.

The use by the EU legislature of the word 'indirectly' suggests that, in order to treat information as personal data, it is not necessary that that information alone allows the data subject to be identified.

Furthermore, recital 26 of Directive 95/46 states that, 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

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26 Cited above, at paragraph 17. A copy of this judgment is included as Annex I hereto.
27 See also paragraph 33 of the judgment of O'Donnell J. of 28th April 2016, which was transmitted to the Court with the order for reference.
28 See, in this respect, Kuner, European Data protection law, 2nd edn., (Oxford, 2007), who opines that the "key to interpreting" the definition of 'personal data' in Article 29(a) of Directive 95/46 "is its requirement that data be related to 'an identified or identifiable natural person'"; at p. 91.
29 Case C-582/14: ECLI:EU:C:2016:779: Judgment of 19th October 2016 The Court held that a dynamic IP address, which is registered by an 'online media services provider' (that is by the operator of a website) when its website, which is accessible to the public, is consulted, constitutes personal data with respect to the operator if it has the legal means enabling it to identify the visitor with the help of additional information which that visitor's internet service provider has.
22. In the present case, even if the answers given by Mr. Nowak in his script do not permit him, as such, to be identified, it is clear that his examination identification number, which is unique to him, and which was assigned to him by the data controller concerned (the CAI in the main proceedings), together with the other information held by that data controller, including as to Mr. Nowak's name, enables him readily to be identified. This, indeed, was recognised by the Irish High Court in its judgment in the main proceedings, and is not, consequently, in issue therein. In any event, it is submitted that the information contained in an examination script like that at issue readily permits a candidate, like Mr. Nowak, to be identified. In this respect, it is noteworthy that the new slightly more detailed definition of personal data contained in Article 4(1) of the General Data Protection Regulation, which is now in force (albeit not yet in application), refers to direct or indirect identification "by reference to an identifier such as a name, an identification number, location data, an online identifier" (emphasis added). Accordingly, in a case such as that in the main proceedings, where there is such an identification number, the critical condition of identifiability is, it is submitted, plainly satisfied.

23. The argument that has been especially forcefully advanced before the Irish courts by the DPC is, in effect, that the information contained in the answers given by Mr. Nowak, although clearly of significance to him, is not actually about him. Thus, it is argued that his answers do not contain information that relates to him for the purpose of Article 2(a) of Directive 95/46. In this respect, the DPC has sought to draw an analogy with the Court's findings in the Y.S. case with regard to the analysis contained in a legal opinion, which legal analysis it held could not be classified as personal data.

24. This argument is misplaced. Firstly, it appears to focus on the text of section 1(1) of the Irish Data Protection Act 1998, which differs from that of Article 2(a) of Directive 95/46, in that the former refers to "data relating to a living individual", which is potentially more limiting (at least on a literal interpretation thereof) than the broader (and, it is submitted, clearly prevailing in the event of a conflict) wording of Article 2(a) of Directive 95/46, which refers to "any information relating to an identified or
identifiable natural person” (emphases added). The concept of “any information” (see also, for example, “toute information” in the French text; “qualsiasi informazione” in the Italian text, “alle Informationen” in the German text and “wszelkie informacje” in the Polish text) relating to a person is manifestly not confined, it is submitted, to what might traditionally be regarded as data (“données”/”Daten”/”dati”/”dane”) relating to a person, such as name, address and telephone number. Under the more general wording of the Article 2(a), in the light of which the Irish transposing provision falls clearly, in any event, to be construed, neither the nature nor focus of the information concerned is, or ought to be, the appropriate subject of inquiry. Instead, that inquiry should centre on whether the information relates to an individual.

25. Secondly, it is submitted that, where an individual uses his/her intellectual skills to create, biometrically in his/her own hand, a document that is the reflection of his intellectual output at a particular point in time, the said document contains information that relates to its author for the purpose of Article 2(a) of the Directive. Where the author, i.e. the person to whom the information relates, can be identified, as with an examination script like that in the main proceedings, the information therein relates to its author. In this respect, it is difficult to conceive of how the information provided by a candidate in an examination on a particular subject in response to questions on the examination paper cannot concern or relate to the individual candidate providing those answers: just like a book cannot fail to relate to its author just because its content may, for instance, be fictional. Information such as that contained in an examination script like that at issue in the main proceedings, therefore, constitutes personal information for the purpose of Directive 95/46.

26. In this respect, Mr. Nowak refers, in particular, to the Court’s judgment in Ryneś, where (answering negatively a question whether the operation of a camera system, as a result of which a video recording of people is stored on a continuous recording device such as a hard disk drive, installed by an individual on his family home for protection purposes but which also monitored a public space, amounted to the processing of data in the course of a purely personal or household activity, for the purposes of Article 3(1) of the Directive) it held that:
"The term 'personal data' ... covers, according to the definition under Article 2(a) of Directive 95/46, 'any information relating to an identified or identifiable natural person', an identifiable person being 'one who can be identified, directly or indirectly, in particular by reference ... to one or more factors specific to his physical ... identity';

and that:

"Accordingly, the image of a person recorded by a camera constitutes personal data within the meaning of Article 2(a) of Directive 95/46 inasmuch as it makes it possible to identify the person concerned".30

A handwritten examination answer script or answer booklet, comprising answers containing the intellectual output of a particular person at a particular point in time, to which may also later be added comments about the information contained in those answers from an examiner, comprises information that relates to the candidate concerned. It relates to the person in question at least as much as does an image of him or her taken in a public place, such as the contemporarily hugely popular 'selfie' images (i.e. self-portrait photographs, typically taken with a digital camera or camera phone held in the hand or supported by a 'selfie stick') or video images taken by or under the control of a third party like those at issue in the main proceedings in Ryněň. Such information is clearly information that can, and, in the case of an examination script, will, invariably be processed to learn, record and decide something about an identifiable individual. As the Article 29 Working Party notes in its Opinion 4/2007:

"a "purpose" element can be responsible for the fact that information "relates" to a certain person. That "purpose" element can be considered to exist when the data are used or are likely to be used, taking into account all the circumstances surrounding the precise case, with the purpose to evaluate, treat in a certain way or influence the status or behaviour of an individual".31

27. It is noteworthy that section 4 of the Irish Data Protection Act 1988 expressly envisages that "the results of an examination at which he was a candidate" may be the subject of a personal data access request under section 4(1) thereof, as amended by the 2003 Act. Mr. Nowak submits this constitutes, at the very least, implicit statutory

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31 See O1248/07/EN WP 136, at p. 10.
recognition that examination results comprise personal data under the Irish legislation. Indeed, one may reasonably ask why a right of access would be granted by section 4(6) of the 1988 Act if such results did not comprise personal data. Moreover, in its written submission to the referring court, the DPC accepted that "[S]ection 4(6) treats examination results as personal data".\textsuperscript{32} This recognition, it is further submitted, is not only compatible with, but clearly mandated by, Article 2(a) of Directive 95/46; as it could scarcely be disputed that the information comprised in such a result relates to an identifiable person. Since an examination (which is defined broadly in section 4(6)(b) of the 1988 Act, as meaning "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") result falls to be deemed to be personal data, it is unclear how the information provided by the candidate concerned during the examination in his/her answer book(s) for the purpose of the relevant examination, and on the basis of which the candidate has been assessed by the examiner(s), can any less fall to be considered as information relating to an identifiable candidate, and, thus, natural person, for the purpose of Article 2(a) of the Directive.

28. Furthermore, there is express statutory recognition, at least in the United Kingdom under its Data Protection Act 1998, that the information provided by candidates during examinations comprises personal data. Thus, Article 9 of Schedule 7 to that Act expressly recognises that "information recorded by candidates during an academic professional or other examination" shall be considered to be "personal data", whilst simultaneously exempting examination scripts from having to be provided pursuant to a request for access to personal data under section 7 of that Act. That such data is considered to be personal data is confirmed in academic commentary on the UK legislation. Thus, Jay, in her leading commentary, Data Protection Law and Practice, makes the following comment on the exemption in respect of examination scripts:\textsuperscript{33}

\textit{"There is no test of prejudice and it appears to be an absolute exemption to subject access. It is difficult to ascertain how this can be justified under the Directive or indeed in common sense terms, given that the personal data would

\textsuperscript{32} At paragraph 74 thereof, emphasis in original.
\textsuperscript{33} See 3\textsuperscript{rd} edn. (Sweet & Maxwell, 2007), at paragraph 19.25.
have been provided by the subject directly in the examination. The Commissioner in the Legal Guidance suggests that the exemption does not extend to 'comments recorded by the examiner in the margins of the script' which it advises should be given 'even though they may not appear to the data controller to be of much value without the script itself'. This assumes that the scripts are covered by the Act ... '"

It is submitted that it would be incompatible with the objective underlying Directive 95/46, as expressed in particular in recitals 7 to 9 and Article 1 thereof, for information contained in examination scripts or answer books to be considered as personal data in one Member State (and potentially in others who follow the UK approach) but not in another (viz. Ireland and perhaps in other Member States where a narrow approach like that of the DPC may currently also hold sway). Such a divergence in the level of protection as regards a matter as important as examination scripts could serious undermine the free movement of personal data within the Union, whilst weakening the effectiveness of the fundamental right to privacy of one's personal data that is guaranteed by the Article 8, in particular, of the Charter, the protection of which right this Court has been exemplary in assuring.

29. Turning, thirdly, to the arguments made before the Supreme Court by the DPC and which are likely to be repeated in the DPC's written submissions to this Court and which are based on Y.S., it is submitted that the analogy they seek to draw between the information contained in an examination script, like that of Mr. Nowak's in the main proceedings, and the legal analysis of the residency-claims of the applicants in the main proceedings in Y.S. (who were third-country nationals who had applied for lawful residence in the Netherlands) is misplaced. The questions referred in Y.S. concerned, inter alia, the concept of "personal data". They focused on whether the legal analysis included in the minute to which access had been sought in those main proceedings was personal data. The Court was therefore asked for the first time by those questions "to examine whether and why a document containing legal analysis or advice is different from one having a different content." 34

30. In respect of the concept of personal data in this context, the Court, confirming its judgment in C-524/06 Huber, held that "data relating to the applicant for a residence permit and contained in a minute, such as the applicant's name, date of birth,

34 See paragraph 48 of the Opinion of Advocate General Sharpston.
nationality, gender, ethnicity, religion and language, are information relating to that natural person, who is identified in that minute in particular by his name, and must consequently be considered to be 'personal data'”. The Court distinguished the legal analysis itself made by the relevant Netherlands authorities of the applicants’ claims from the personal data regarding the applicants included in it and that was undoubtedly considered by those authorities in formulating that legal analysis. It did so on the following basis (at paragraphs 39-40):

“As regards, on the other hand, the legal analysis in a minute, it must be stated that, although it may contain personal data, it does not in itself constitute such data within the meaning of Article 2(a) of Directive 95/46.

As the Advocate General noted in essence in point 59 of her Opinion, and as the Netherlands, Czech and French Governments noted, 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” (emphasis added)

In other words, the legal analysis comprised information regarding either a purely “abstract interpretation of the law” or at most information relating to “the assessment and application by the competent authority of that law to the applicant’s situation”. As Advocate General Sharpston had opined in paragraph 59 of her Opinion: “Personal data and other elements of fact may very well be inputs in the process leading to answering that question [of right to lawful residence]; but that does not make the legal analysis itself personal data” (emphasis added). Thus, the information in the analysis concerned an objective legal analysis by a public authority of a claim made by a natural person but did not relate to the person him or herself. It is submitted that the information contained in an examination script, which is prepared and written by an individual and comprises his or intellectual output, is information that relates to that person and to that person alone; specifically to his or her intellectual capability and skill with regard to the subject-matter of the examination, and which will lead to a decision being taken and a result being awarded.

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35 EU:C:2009:293, paragraphs 49 and 51.
with regard to the specific candidate.

31. Furthermore, it is equally clear from the judgment in Y.S., (especially paragraphs 41 to 48) that the Court considered that this interpretation of the concept of 'personal data' for the purposes of the Directive followed not just from the wording of Article 2(a) of Directive 95/46 but was also borne out by the objective and general scheme of the Directive, which, under Article 1 thereof, "is to protect the fundamental rights and freedoms of natural persons, 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". However, the Court held that, in circumstances such as those of the main proceedings in Y.S., that (paragraph 46):

"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 of guaranteeing the protection of the applicant's right to privacy with regard to the processing of data relating to him, but would serve the purpose of guaranteeing him a right of access to administrative documents, which is not however covered by Directive 95/46"

32. By contrast, in the main proceedings, it is that right of privacy that Mr. Nowak seeks to exercise through his request for access to the examination script and to correct any errors that may recorded therein, including in the examiner's comments recorded thereon or separately in relation thereto. The script is not an administrative document; far from it, since it is a document of which Mr. Nowak himself is the author. The contention of the DPC that the content of such a document does not relate to its author, but that a third-party assessment thereof resulting in a determination or result (in casu an examination result) does, is illogical. Furthermore, such a restrictive interpretation flies in the face of the broad concept that is "personal data" in EU law, as recognised in Directive 95/46, Regulation 25/2001 and in the General Data Protection Regulation, as well as in the consistent case-law of this Court.36

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36 Thus, from one of it earliest pronouncements on the scope of Directive 95/96, in Joined Cases C-465/00, C-138/01 and C-139/01 Rechnungshof [2003] ECR I-6041, the Court has consistently adopted a broad approach to what information comprises personal data and has never required, for breaches of the privacy of such data to be established, that the information communicated, disclosed or improperly processed be "of a sensitive character or whether the persons concerned have been inconvenienced in any way"; at paragraph 75.
33. In the light of the foregoing, Mr. Nowak respectfully submits that the questions referred by the Supreme Court of Ireland should be answered cumulatively as follows:

"Information recorded in/as answers given by a candidate as the product of his or her intellectual output during a professional examination, as well as comments, observations or opinions in relation thereto recorded by the relevant examiner, constitute information relating to an identified or identifiable natural person and, thus, "personal data" within the meaning of Article 2(a) of Directive 95/46/EC, in circumstances where the specific candidate the author of the information is identifiable to the data controller concerned by reference to his or her examination identification number.

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Original dated this 18th day of November 2016:

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LIST OF ANNEXES
