

**Case C-245/20****Summary of the request for a preliminary ruling pursuant to Article 98(1) of the Rules of Procedure of the Court of Justice****Date lodged:**

29 May 2020

**Referring court:**

Rechtbank Midden-Nederland (Netherlands)

**Date of the decision to refer:**

29 May 2020

**Applicants:**

X

Z

**Defendant:**

Autoriteit Persoonsgegevens

**Subject matter of the main proceedings**

At issue in the main proceedings is whether the Autoriteit Persoonsgegevens (Data Protection Authority), the Netherlands supervisory authority within the meaning of Article 51 of the General Data Protection Regulation ('the GDPR'), is competent to rule on the question as to whether it is compatible with the GDPR for the Afdeling bestuursrechtspraak van de Raad van State (Administrative Jurisdiction Division of the Council of State; 'ABRvS') to grant journalists access to procedural documents.

**Subject matter and legal basis of the request for a preliminary ruling**

In order to resolve the dispute in the main proceedings, it is necessary to ascertain whether, when giving journalists access to procedural documents, the ABRvS is acting in its judicial capacity. The Netherlands Data Protection Authority is not competent to supervise the processing of personal data by judicial authorities acting in their judicial capacity. The question arises therefore as to what is to be

understood by ‘judicial capacity’ within the meaning of Article 55(3) of the GDPR.

### **Questions referred for a preliminary ruling**

1. Is Article 55(3) of the General Data Protection Regulation to be interpreted as meaning that ‘processing operations of courts acting in their judicial capacity’ can be understood to mean the provision by a judicial authority of access to procedural documents containing personal data, where such access is granted by making copies of those procedural documents available to a journalist, as described in the present order for reference?

1a. In answering that question, is it relevant whether the national supervisory authority’s supervision of that form of data processing affects independent judicial decisions in specific cases?

1b. In answering that question, is it relevant that, according to the judicial authority, the nature and purpose of the data processing is to inform a journalist in order to enable the journalist to better report on a public hearing in court proceedings, thereby serving the interests of openness and transparency in the administration of justice?

1c. In answering that question, is it relevant whether there is any express legal basis for such data processing under national law?

### **Provisions of EU law relied on**

Directive 2003/4/EC of the European Parliament and of the Council of 28 January 2003 on public access to environmental information and repealing Council Directive 90/313/EEC (OJ 2003 L 41, p. 26): Article 2(2)

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) (OJ 2016 L 119, p. 1): recital 20 and Articles 4, 5, 6, 9, 12, 13, 14, 15, 32, 33, 34 and 55

Directive (EU) 2016/680 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 by competent authorities for the purposes of the prevention, investigation, detection or prosecution of criminal offences or the execution of criminal penalties, and on the free movement of such data, and repealing Council Framework Decision 2008/977/JHA (OJ 2016 L 119, p.89): recital 80

## Provisions of national law relied on

Algemene wet bestuursrecht (General Administrative Law; ‘Awb’): Articles 6:5, 7:1a, 8:62, 8:78 and 8:79

## Brief summary of the facts and procedure in the main proceedings

- 1 On 30 October 2018, the ABRvS heard the appeal lodged by Z (‘applicant 2’) in an administrative law dispute with the mayor of Utrecht. In that case, as in the present case, X (‘applicant 1’) acted as applicant 2’s representative. After the hearing, in the presence of applicant 1, applicant 2 was addressed by a person who claimed to be a journalist. Applicant 1 noted during that conversation that that person had documents from the case file at his disposal. On being asked about this, the person stated that he had been given access to those documents thanks to the right of access to the case file given to journalists by the ABRvS.
- 2 Applicant 1 wrote to the President of the ABRvS on the same day to ascertain whether it was true that access had been given to the case file, if so, to whom, and whether copies had been made with the knowledge or approval of ABRvS staff.
- 3 By letter of 21 November 2018, the President of the ABRvS replied to applicant 1 as follows:
 

‘The Communication Department provides the media with information relating to hearings. It does this by publishing the press calendar on the website and by making information relating to hearings available for inspection to journalists who are in the building on that day to ‘cover’ hearings. This information consists of a copy of the notice of appeal (or higher appeal) and the response and, in the case of a higher appeal, the decision of the rechtbank (district court). [...] The documents that are available for inspection contain information that journalists would also hear when attending the hearing. These copies are only available for inspection on the day of the hearing itself. [...] This information is not sent to or shared with the media in advance, and paper copies of the information are available for inspection on the day of the hearing itself and may not therefore leave the premises and be taken home. [...] At the end of the hearing day, employees of the Communication Department destroy the copies.’
- 4 The applicants then sent enforcement requests to the defendant, the Data Protection Authority.
- 5 The defendant decided that it is not competent to take enforcement action against the ABRvS and forwarded the enforcement requests to the AVG-commissie bestuursrechtelijke colleges (the GDPR Commission for Administrative Law Tribunals; the ‘AVG-commissie’). This AVG-commissie was set up by the President of the ABRvS and the boards of the Centrale Raad van Beroep (Higher Social Security and Civil Service Court) and the College van Beroep voor het bedrijfsleven (Administrative Court of Appeal for Trade and Industry) to advise

those courts on how to deal with complaints about the privacy rights referred to in the GDPR and to assess whether the GDPR has been infringed when complainants' personal data are processed. The AVG-commissie forwarded the enforcement requests to the President of the ABRvS, who interpreted them as a complaint about his letter of 21 November 2018.

- 6 On the basis of an opinion from the AVG-commissie, the President of the ABRvS tightened the access policy. The website of the ABRvS now includes the following statement:

'The Communication Department of the Council of State offers journalists the opportunity to view substantive information relating to a hearing on the day of the hearing only. This information relating to the hearing consists of a copy of the notice of appeal or higher appeal, the response, and, in the case of a higher appeal, a copy of the decision of the District Court. These documents often contain information that journalists would also hear if they attend the court hearing. This information is not sent to or shared with the media in advance or afterwards. It can only be viewed by journalists who are present in the building of the Council of State on the day of the hearing. The documents may not leave the building of the Council of State. Nor may journalists copy them in any way for their own use. At the end of the hearing day, the information relating to the hearing is destroyed by the Communication Department.'

- 7 The ABRvS access policy for journalists means that third parties, who are not parties to the proceedings, have access to the personal data of the parties to the proceedings and their authorised representative(s), if any. Under Article 6:5 of the Awb, a notice of appeal or higher appeal must contain the name and address of the appellant. The letterhead of an authorised representative usually also contains various identifying personal data. Furthermore, it may be assumed that the procedural documents will contain one or more forms of (specific) personal data of the appellant and/or others, such as information relating to criminal records, commercial information or medical information.
- 8 In the present case, through the provision of procedural documents in the case of applicant 2, the applicants' personal data were processed, including the name and address of applicant 2 and the 'citizen service number' of applicant 1.
- 9 The District Court regards it as an established fact that the applicants had not consented to the provision of the procedural documents, that the procedural documents to which the journalist had access had not been anonymised and that those documents contained substantive information about the case of applicant 2, including various personal data.
- 10 It is apparent from the opinion of the AVG-commissie that, at the time of the incident on 30 October 2018, 'available for inspection' meant that, if they so wished, journalists could obtain a copy of the documents, which they had to return when they left the building of the Council of State.

- 11 The applicants lodged an objection to the decisions of the Data Protection Authority referred to in paragraph 5. The Data Protection Authority declared the objection of applicant 1 unfounded and, pursuant to Section 7:1a of the Awb, forwarded the objection of applicant 2 as a direct appeal to the rechtbank Midden-Nederland (Midden-Nederland District Court). Applicant 1 lodged an appeal against the decision on his objection with the Midden-Nederland District Court.

### **Main submissions of the parties to the main proceedings**

- 12 The applicants based their enforcement requests on the contention that the ABRvS infringes a large number of provisions of the GDPR (Articles 5, 6, 9, 12, 13, 14, 15, 32, 33 and 34) by giving journalists access to procedural documents. The applicants take the position that the defendant, as the national supervisory authority, is competent to supervise data processing and is competent to take enforcement action against the ABRvS.
- 13 The defendant takes the position that, under Article 55(3) of the GDPR, it is not competent to supervise the processing of personal data by the judiciary. In order to ensure the independence of the judiciary, it should be possible, according to recital 20 of the GDPR, for supervision of personal data processing operations by courts when acting in their judicial capacity to be entrusted to a body within the judicial system. The defendant contends that the access policy of the ABRvS, which is aimed at transparency and openness in individual cases, is an element of that judicial capacity.
- 14 According to the defendant, the concept of judicial capacity must be interpreted broadly. It refers in that regard to the *travaux préparatoires* of the GDPR. The original proposal for a General Data Protection Regulation (COM(2012) 11 final) contained a passage in recital 99 which, according to the defendant, pointed towards a more limited interpretation: ‘this exemption should be strictly limited to genuine judicial activities in court cases and not apply to other activities where judges might be involved in, in accordance with national law’. The defendant contends that it appears from the fact that that passage was omitted from the final text of that recital that the Union legislature supports a broad interpretation of the exception in Article 55(3) of the GDPR.
- 15 An interpretation of the concept of judicial capacity that only takes into account the question whether the processing of personal data has a direct influence on the judgment of the court in a specific case reflects, according to the defendant, too limited a view of the law. The defendant maintains that whether such processing can be regarded as judicial activities in the context of legal proceedings also depends on the nature and purpose of the processing. The defendant takes the position that making procedural documents available to journalists for inspection is conducive to openness and transparency in the administration of justice and promotes public trust in the administration of justice. Openness can therefore be

regarded as a fundamental pillar of the democratic constitutional state and is inextricably linked to the judicial task.

### **Brief summary of the reasons for the referral**

- 16 Offering access to procedural documents and the (temporary) provision of copies of those procedural documents are deemed by the District Court to constitute processing of personal data within the meaning of Article 4(2) of the GDPR.
- 17 The District Court finds that the concept of ‘acting in their judicial capacity’ is not further defined in the GDPR. The defendant’s argument in paragraph 14 does not convince the District Court. First, because it is an argument *a contrario*, which must be treated with caution. Second, the defendant has not explained why that passage was ultimately not included in the final text. That is not evident from the *travaux préparatoires* of the GDPR either. The District Court is of the view that no conclusions can as yet be drawn from the mere fact that that passage disappeared during the legislative process.
- 18 The District Court acknowledges that a similar passage has been included in recital 80 of the final text of Directive 2016/680. However, the District Court does not regard that difference as giving rise to a different assessment.
- 19 Nor has the District Court found any guidance in the case-law of the Court of Justice on how the concept of judicial capacity should be interpreted. However, there is currently a case pending before the Court of Justice which has points of contact with the present case, namely, the request for a preliminary ruling by the High Court (Ireland) in the *Friends of the Irish Environment* case (C-470/19). That case raised the question as to whether the control of access to closed court records is an exercise of judicial capacity. In order to answer that question it is therefore necessary to interpret the term ‘judicial capacity’ in Article 2(2) of Directive 2003/4/EC of the European Parliament and of the Council of 28 January 2003 on public access to environmental information and repealing Council Directive 90/313/EEC.

### *Independent judgment of the courts*

- 20 The District Court also considers it important to note that making procedural documents available to journalists for inspection is not an individual decision of the judge dealing with a particular case, but represents the implementation of the policy of the Council of State. That policy was laid down by the President of the ABRvS and applies to a large number of cases dealt with by the ABRvS. Which personal data are to be made available to journalists is not a matter that is considered in every case.
- 21 According to recital 20 of the GDPR, the exception provided for in Article 55(3) of the GDPR is intended to safeguard the independence of the judiciary in the performance of its judicial tasks, including decision-making. The defendant is

therefore right to argue that it should refrain from involvement in the substantive assessment of court cases, because decision-making in court cases is clearly part of the judicial task. From that perspective, it could be said that no judicial task is performed if the exercise of supervision by the national supervisory authority does not affect the independent judgment of the court in a specific case. The District Court notes that it must be inferred from the text of recital 20 that, given the use of the word ‘including’, the concept of judicial capacity encompasses more than just decision-making. The District Court refers in that regard to paragraph 44 of the judgment of 27 February 2018, *Associação Sindical dos Juizes Portugueses* (C-64/16, EU:C:2018:117), in which the Court of Justice, in the context of the independence of courts and tribunals, places the emphasis on independent judgment in specific cases.

- 22 The District Court is of the opinion that an assessment, by the national supervisory authority, of the compatibility with the GDPR of data processing in the context of the ABRvS access policy for journalists, does not affect the court’s independent judgment in specific cases. Data processing in the context of the access policy would not then constitute acting in a judicial capacity. The District Court therefore wishes to ascertain from the Court of Justice whether, in interpreting the term ‘judicial capacity’, account should be taken of the direct or indirect influence of the supervision of data processing on the court’s judgment in specific cases.

*Nature and purpose of the processing*

- 23 The District Court is of the view that journalism clearly plays an important role in ensuring the openness and transparency of the administration of justice and is also a pillar of everyone’s fundamental right to an effective legal remedy and to a fair trial. The purpose of the ABRvS giving journalists access to procedural documents is to facilitate the public reporting of court cases, and thus to promote openness and transparency in the administration of justice. By inspecting the procedural documents prior to a hearing, a journalist is better able to follow the hearing and, as a result, to report more effectively in the media. On the other hand, the journalist may find personal data in the procedural documents that are not discussed at the hearing, for example, a representative’s citizen service number, as in the present case. The District Court therefore wishes to ascertain from the Court of Justice whether the objective pursued by the ABRvS in relation to data processing also determines the answer to the question whether this is a matter of acting in a judicial capacity.

*No legal basis*

- 24 Finally, the District Court finds that there is no legal basis in national law for making copies of procedural documents available for inspection and (temporarily) providing them to journalists. The Awb provides that a hearing is to be held in public (Article 8:62(1)) and that the court’s decision is to be given in public (Article 8:78). Furthermore, Article 8:79(2) of the Awb provides that persons

other than the parties may obtain copies or extracts of the decision or of the record of the oral decision. However, neither the Awb nor any other legislation contains a provision on making procedural documents available to persons other than the parties to the proceedings. The District Court does not rule out the possibility that this is a relevant factor; it asks whether it is possible for the processing of data to be classified as being done in a judicial capacity in the absence of an express legal basis for this, such classification being based instead on the view of the ABRvS of its role as a judicial body in a democratic society. The District Court therefore wishes to ascertain from the Court of Justice whether any significance should be attached to the fact that there is no legal basis for making procedural documents available to journalists for inspection.

WORKING DOCUMENT