THE SWEDISH MEASURES ACCOMPANYING THE GDPR

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I-INTRODUCTION

On the 18th of April 2018 the Swedish Parliament, the Riksdag, passed the *Act with supplementing provisions to the EU Data Protection Regulation*[1], or in short, the *Data Protection Act*[2] (DPA). With the new Act and the General Data Protection Regulation (GDPR)[3], both entering into force on May 25th 2018, Sweden enters its third generation of data protection legislation. The DPA replaces the *Personal Data Act* (PDA) and the *Personal Data Ordinance* (PDO) introduced in 1998 to transpose the Data Protection Directive 95/46/EC which in turn replaced the *Data Act* from 1973, the first national data protection legislation of its kind in the world.

The work of drafting the new Swedish Data Protection Act aimed at complementing the GDPR began officially on the 25th of February 2016 – that is about two months before the adoption of the GDPR by the EU Parliament and the Council – with the Government's decision on terms of reference.[4] According to these guidelines, the task of the committee of inquiry appointed, named the *Data Protection Inquiry*[5], was principally circumscribed to propose a repeal of the current data protection legislation as well as to propose *"legal provisions which, on a general level, complement the GDPR"*.[6] In order to successfully deliver a timely, satisfying, accessible and coherent legal framework, the legislator had to focus on the more urgent issue, i.e. the drafting and enactment of a general Act, thus setting aside the sectoral regulations.[7]

The Committee of inquiry submitted a report, entitled *The New Data Protection Act - supplementing provisions to EU Data Protection Regulation*[8] to the Government on May 12, 2017. This report of about 500 pages contained a general introduction to the GDPR and a detailed overview of the components of the GDPR that had lead to the enactment of supplementary national provisions.[9] It also contains a proposal for the draft of a new data protection act. The proposal was then referred to the Council of legislation for consideration and submitted for comments to different organisations (public authorities, universities etc.). Backed by the committee's report, the Council of legislation's assessment and submitted comments, the Government then proposed, a revised draft of a new Data Protection Act.[10] The bill was then examined by a Parliamentary committee[11] before a vote by the Riksdag. The new Act was passed on the 18th of April, just one month before the GDPR's entry into force.

The task of tackling the transposition of the Directive (EU) 2016/680 into the Swedish legal system was entrusted to a distinct inquiry committee.[12] The special investigators and the secretaries of the two committees of inquiry met several times, including in the begining of their missions, in order to plan their investigative work. The Data Protection inquiry however confessed that the *"limited available time for our investigative*

1 *Lag med kompletterande bestämmelser till EU:s dataskyddsförordningen* (2018:218).
2 *Dataskyddslagen.*
3 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.
4 Kommitteedirektiv 2016:15. The terms of reference are based on the version of the GDPR to be found in document 2012/0011(COD, 5455/16 from 28 January 2016.
5 Dataskyddsutredningen. The Committee was composed of a special investigator and about 10 experts.
6 Dir. 2016:15, p. 6. The question of the future supervisory authority has been left outside the scope of the remit of the Data Protection Committee as another committee of inquiry (Utredningen om tillsynen över den personliga integritet) has been assigned the task.
7 Prop. 2017/18:105, p. 23. This does not exclude, says anyways the legislator, that other important changes might be required and discussed in other contexts.
8 Ny dataskyddslag, Kompletterande bestämmelser till EU:s dataskyddsförordningen.
9 SOU 2017:39.
10 Prop. 2017/18:105, Ny dataskyddslag.
11 Report of Committee on Constitutional affairs which took position on the Government proposal. (2017/18:KU23), February 15, 2018.
12 JU 2016:06.

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work has not allowed us the opportunity to sufficiently process the proposal and other documents from the committee of inquiry on the data protection directive from 2016". It concludes that *"there might therefore be unintentional differences between the two committees' stances on various issues"*. [13]

The enthusiasm preceding the entering into force of the new data protection affected not only the legislature but also the Swedish Data Protection Authority (the Datainspektion, DI) and data controllers. The DI worked tremendous hard and introduced a variety of measures to help data controllers prepare for the new law. The supervisory authority has *inter alia* published comprehensive guidelines and other information on its website and has offered several training sessions. For Swedish data controllers the fear and panic associated with the 25th of May 2018 could be compared to the premonitions of the Y2K scare at the turn of the last Century.

The remained of this paper, will focus on Sweden's supplementary provisions to the GDPR, i.e on the Data Protection Act (2018:218). First, the scheme of the new Swedish Act will be examined (I), secondly the impact of the GDPR and of the accompanying adaptation measures on the Swedish legal system will be analysed (II).

II-THE SCHEME OF THE SWEDISH DATA PROTECTION ACT

As mentioned above, the terms of reference gave the special investigator and the experts of the Data Protection inquiry the task of proposing the repeal of the Personal Data Act (1998:204) and of the Personal Data Ordinance (1998:1191) as well as the enactment of a new national Act. There doesn't seem to have been any discussion on whether to keep and adapt the existing Personal Data Act as was the case in France with the Loi Informatique et Libertés. On the contrary, the preparatory works sharply assessed that the GDPR *"will constitute the general regulatory framework on the processing of personal data within the EU"* which *"means that the Personal Data Act and related regulations have to be repealed"*.[14] The preparatory works explain further that *"the Swedish general regulatory framework on data protection can not continue to exist as it would lead to prohibited duplication of regulation"*.[15] The choice of the name of the new Swedish Act - the A*ct containing supplementary provisions to EU General Data Protection Regulation* - may be regarded as marking a break with the previous national legal framework. It is motivated by the intention to *"emphasise the fact that the statutes are not comprehensive and that they are simply a supplement to the GDPR"*.[16]

This begs the following questions: (A)? What is the content of the new Act (B)? What is its scope of application, (C) How does the new act tie with the GDPR?

A-The content of the Data Protection Act (2018:218)

The Data protection Act is comprised of 40 provisions arranged in seven chapters.

Chapter 1, with the heading *Preliminary provisions*, contains provisions of different kinds: it informs of the supplementary nature of the Data Protection Act and determines the substantive scope of application of the GDPR and of the Data Protection Act – it extends beyond the scope of application of the GDPR. It also sets out the territorial scope of application of the Data Protection Act. Additionally, the first chapter contains a provision on the relationship between the GDPR and the Data Protection Act on one hand and the freedom of the press and freedom of expression on the other hand. It also contains a provision on professional secrecy for data protection officers.

Chapter 2, with the heading *Legal basis*, contains provisions related to the processing of personal data when there is a legal obligation, when a task is carried out in the public interest or a task is carried out in the exercise of official authority. The second chapter also contains a provision concerning private archives as well as a provision about childrens' consent, fixing the age of consent at 13 years.

Chapter 3 is related to the *processing of certain categories of personal data* and encompasses provisions on when sensitive personal data according to GDPR, art. 9.1 may be processed (in the field of employment, social security and social protection; when an important public interest exists; in the field of health services, medical care and social car ; in the fields of archives and statistics). The chapter also contains provisions on personal data relating to criminal offences and on identification numbers.

Chapter 4 contains provisions on *Limitations of use* related to archives and statistics.

13 SOU 2017:39, p 61.
14 Id., p. 77.
15 Id., p. 78.
16 Id., p 29.

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Chapter 5 lays down *Limitations of certain rights and obligations*, which are the right of information and the right of access to information.

Chapter 6, with the heading *The supervisory authority's handling and decisions* contains a provision dedicated to the supervisory authority's competence. This explicitly gives the Swedish authority the competence to monitor the Data Protection Act and other Swedish regulations that supplement the GDPR, according to articles 58.1, 58.2 and 58.3 of the GDPR. This does not mean, however, that the monitoring authority has the right to levy fees for other violations as the ones referred to in article 83 of the GDPR. The remaining six provisions of Chapter 6 deal with penalties.

The last chapter, *Chapter 7* on *Damages and appeal*, contains, besides a provision on damages, four provisions dedicated to the question of appeal. One provision deals with appeals lodged against decisions taken by public authorities in their capacity of data controllers. Such decisions may be submitted to the administrative courts. However neither the decisions of the Government nor the decisions of the Supreme Court, the Supreme Administrative Court or the Parliamentary Ombudsman are subject to appeal. The chapter furthermore contains a provision about the appeal lodged against the decisions of the supervisory authority. The competent court is, here as well, the administrative court. Chapter 7 ends with two provisions, one that states which kinds of other decisions may be appealed against, another that lays down the prohibition to lodge an appeal against all remaining decisions taken on the basis of the GDPR or on the basis of the Data Protection Act.

B-The scope of the new Act

As was the case for the transposition of the Data Protection Directive, the Swedish legislator chose to extend the scope of application of the general rules of the data protection legislation beyond what is required by the European legal instrument.[17] Indeed, the GDPR and the Data Protection Act are, in Sweden, intended to *"even apply for activities outside the scope of application of the European law as well as when it concerns Sweden's participation in the Common Foreign and Security Policy "*.[18]

The reasons for this choice are manifold. Some of the arguments for applying the general rules to all kinds of processing related to the need to have a high level of *privacy protection* within the whole public sector – which is the sector concerned by the exemptions provided in the GDPR.[19] Arguments of a more technical and practical nature were also considered by the legislator for justifying the extension of the scope of the general rules beyond what is required by the GDPR. The legislator referred to the difficulty of *"precisely determin*[ing] *the frontiers of the scope of application of EU law"*. It also emphasizes that this approach would allow public authorities that carry out activities both within and outside the scope of EU law to apply the same rules to all kinds of activities.[20] An additional argument related to Sweden's international obligations; the legislator referred to the obligation, steeming from the Convention No. 108 of the Council of Europe, to set up a general legal framework on data protection.[21]

The legislator's choice to extend the GDPR's rules into the national data protection landscape is enshrined in the Data Protection Act under Chapter 1, Section 2 under the heading *"Extended application of the provisions of the EU General Data Protection Regulation.". Section 2 states "The provisions of EU's Data Protection Regulation in its original form, and of the current Act are even applicable to the processing of personal data in the course of an activity which falls outside the scope of EU law and in the course of an activity covered by Title V, Chapter 2 of the Treaty on European Union"*.

There are however some exceptions. According to Section 3, the abovementioned doesn't apply to activities covered by:

1. Act (2007:258) Concerning The Processing Of Personal Data In The Armed Forces ' Defence Intelligence And Military Security Service

2. Act (2007:259) Act on Processing of Personal Records within the Scope of the Defence Intelligence and Development Activities of the National Defence Radio Establishment

3. Chapter 6 of the Police Data Act (2010:361). The chapter in question contains provisions related to the processing of personal data in the course of the activities of the security police.[22]

17 Prop. 2017/18:105, p. 28.
18 Ibid.

19 See Prop. 2017/18:105, p.28
20 Prop. 2017/18:105, pp.. 29-30.
21 Id., p. 29.
22 The DPA also laid down a specific provision stating that articles 33 and 34 of the GDPR do not apply when it concerns personal data breach that have to be notified according to the Protective Security Act (1996:627) or to rules enacted on its basis. The legislator emphasizes, in the preparatory works, which in Sweden constitute

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C. The relationship to the GDPR

The new Swedish Data Protection Act uses two methods for referencing provisions in the GDPR: references of a dynamic nature and references of static nature.[23]

The term *dynamic references* means that the references made to the GDPR concerns the version applicable at any given moment. The mechanism ensures direct application of potential changes that may occur in the lifetime of the GDPR. It does not discount however the fact that changes in the GDPR may lead to changes in the Data Protection Act.[24] This dynamic method of reference is used in provisions of informative character such as the provisions concerning the legal basis required for sensitive personal data and the provisions related to damages. The method is similarly used for an informative purpose when the DPA advises that the terms and expressions employed in the Act have the same meaning than in the GDPR.[25] Dynamic references are also used for GDPR provisions that had to be introduced *"in Swedish law in order for Sweden to comply with its European obligations"*.[26] These are inter alia the provisions on which public authorities are competent or have obligations to adopt measures and the provision about data protection officer's professional secrecy obligation. A final category of dynamic references covers exemptions from the provisions of the GDPR regarding the rights of the data subjects and the obligations of the data controllers.

Two s*tatic references are included in the new Swedish Data Protection Act*. The term 'static' means that the references made in the PDA to the GDPR concern the GDPR in its original form. The first static reference concerns the provision regarding the processing of personal data outside the scope of the GDPR, while the second concerns provisions on penalties.[27]

III-THE IMPACT OF THE NEW EUROPEAN DATA PROTECTION LEGISLATION ON SWEDISH LAW

Below, three questions are posed and answered to allow us to assess the impact of the GDPR on the Swedish data protection legislation. First, what is the relationship between freedoms of opinion and the data protection legislation? While this question was not the subject of controversy in the context of the transposition of the Data Protection Directive, it has been the forefront of debate regarding the new data protection Act (See A below). Secondly, the question of formalism: while the new philosophy of the GDPR, which places less importance on formalities, suits the Swedish legislator better than the highly formalistic and prescriptive approach in the Data Protection Directive, the replacement of the Directive by the GDPR nevertheless constitutes a step backwards for Sweden in terms of formalism (B) Thirdly, the question of the increase of the rights of the data subjects in their relationship to the Supervisory authority (C).

A-The relationship between the GDPR and freedom of opinion

Before going deeper into the wording of the law, it is worth mentioning that freedom of opinion, i.e. freedom of the press, freedom of expression and the right of access to official documents, are highly valued freedoms, with constitutional protection, in Sweden. [28]. These freedoms are also highly valued in society, not least among politicians and journalists. One may recall that it was the Swedish Government who, fearing that the transposition of the Data Protection Directive would impair the generous right of access to information as laid down in Swedish law, pushed for the introduction of recital 72 in the Preamble of the Directive allowing «[…] *the principle of public access to official documents to be taken into account when implementing the principles set out in this Directive*». Swedish journalists have, on several occasions, shown a strong commitment to protecting the abovementioned freedoms against limitations, including limitations justified by the need to protect privacy. For example, the Association of Swedish journalists initated a campaign called "Don't touch my principle of publicity" at the time of the transposition of the Data Protection Directive. The journalists feared a negative impact of the European Act on the right of access to official documents.

an important legal source, that *"Sweden has not transferred the decision-making competence to the EU within the areas the GDPR's rules will apply according to the* [current] *bill"*. Therefore, *"If the GDPR is reformed, the Swedish legislator should […] decide if the changes also will impact the areas that are* [according to the European law] *exempted from the scope of application of the GDPR"*. This is why the Data Protection Act refers to the GDPR's *"original form"*. Prop. 2017/18:105, p. 32.

23 Prop. 2017/18:105, p. 24.

24 Id., p. 25.

25 Chap. 1, Section 1.

26 Prop. 2017/18:105, p. 25.

27 The committee of inquiry had proposed to apply the system of dynamic references regarding the penalties but the Government decided to apply the static approach to these sanctions. See Prop. 2017/18:105, p. 24.

28 The freedom of the press is regulated in the Freedom of the Press Act and the freedom of expression in the Fundamental Law on Freedom of Expression. The right of access to official documents is regulated in the Freedom of the Press Act (Chapter 2).

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When the Data Protection Directive was in force, the Swedish Personal Data Act contained two provisions dedicated respectively to the relationship of the data protection legal framework to freedom of the press and freedom of expression on the one hand (Section 7) and the principle of public access to official documents on the other hand (Section 8). The first section was a transposition of article 9 of the Directive, the second took into account the margin of appreciation offered to member States by recital 72.

The GDPR contains two articles respectively dedicated to processing and public access to official documents (art. 86) and to processing and freedom of expression and information (art. 85). However, the new Data Protection Act contains only one provision, with the heading *"Relationship to freedom of the press and freedom of expression"*.

Chapter 1, Section 7 states *"Neither the GDPR nor this Act shall apply so far that they will infringe upon the Freedom of the Press Act or the Freedom of expression Act.*

Articles 5-30 and 35 to 50 of the GDPR as well as Chapters 2 to 5 of this Act shall not apply on the processing of personal data for journalistic purposes and the purposes of academic, artistic or literary expression."

Although the heading only refers to the freedom of the press and freedom of expression, the provision also encompasses the right of access to official documents. I will analyse this right before examining the freedom of the press and freedom of expression.

1) The relationship between the right of access to official documents and the data protection legislation

The right of access to official documents in Sweden is, regulated in detail, by the Second Chapter of the Freedom of the Press Act (FPA). The Personal Data Act (1998:204), mirroring the margin of appreciation offered by Recital 72 in the Directive, had facilitated this in Section (Section 8)[29] which stated: *"The provisions of this Act are not applied to the extent that they would limit an authority's obligation under Chapter 2 of the Freedom of the Press Act to provide personal data"*.

The Committee in charge of the first draft of the new Data Protection Act, considered that *"the scope for allowing the principle of public access to official documents to take priority over the personal data regulations is clear in the General Data Protection Regulation"*[30], and accordingdly decided that there was was no need to have an equivalent provision to section 8 of the Personal Data Act in the new Data Protection Act.. Consequently, the only provision addressing the relationship between data protection legislation and freedom of opinion proposed by the committee concerned the relationship to the freedom of the press and the freedom of expression.

Therefore, the provision, under the heading *"Relationship to the freedom of the press and the freedom of expression"*, had the phrase *"Neither the GDPR nor this Act shall apply so far that they will infringe the provisions on freedom of the press and freedom of expression laid down in the Freedom of the Press Act or in the Fundamental Law on Freedom of Expression"* in the version proposed by the Committee. However, the Government assessed that there was a crucial need for making the relationship between the data protection legislation (GDPR and the Swedish Act) and the Swedish constitution clear,[31] not least because of the high penalties that may apply under the GDPR. The changes made by the Government - and endorsed by the Parliament - in the provision proposed by the committee consist of omitting the reference to the *provisions* on the freedom of the press and the freedom of expression and instead refer to the *constitutional acts* themselves. As the right of access to official documents is regulated by the Freedom of the Press Act, this right automatically falls within the scope of the new provision. Nevertheless the Government did not make any adjustment to the heading of the provision, which is still entitled *"The relationship to the freedom of the press and the freedom of expression"*. Since this choice of words does not include the right of access to information, the adopted provision is confusing.[32]

29 Under the heading *"Relationship to the principle of public access to official documents"*.

30 SOU 2017:39, s. 31.The Swedish legislator is of the meaning that the GDPR does not impact this regime, i.e that it is possible to maintain a system where precedence is given to the right of access to official documents. The terms of reference notice for instance: *"it is even clearer as it is in the Data Protection Directive that the European Data Protection legislation does not impinge the field of the Freedom of the Press Act* [...].", Dir. 2016:15, p. 22.

31 Prop. 2017/18:105, p. 43.

32 It had been more correct to have a heading not only mentioning the relationship to the freedom of the press and the freedom of expression but also the relationship to the right of access to official documents. Or even better, as it better corresponds to the very wordings of the provision, to entitle the heading *"Relationship to the Freedom of the Press Act and to the Fundamental Law on Freedom of Expression"*. The preparatory works, here the proposition, giving the explanations if needed that this covers the three freedoms of opinions. One may regret that neither the Council of legislation nor the Datainspektion had per definition the possibility to express themselves on this question as it was not tackled in the first report they had to address comments on.

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2) The relationship between the freedom of expression and the data protection rules

Read from the perspective of the relationship to the freedom of the press and the freedom of expression, Section 7, Chapter 1 of the DPA is composed of two parts corresponding to two legal regimes, as was also the case under the Personal Data Act.

The first paragraph, which applies to processings falling within the scope of the constitutional protection of the freedom of press and freedom of expression, lays down in a general manner the principle of precedence of the constitutional legal framework of the freedom of the Press and the freedom of expression over data protection legislation. The second paragraph that regulates freedom of expression outside the scope the constitutional protection sets out a special regime for the processing of personal data for journalistic purposes and the purposes of academic, artistic or literary expression.

In this second paragraph, that was not subject to controversy during the legislative procedure, the legislator followed the model adopted when transposing the Data Protection Directive, i.e. it made maximum use of exemptions offered in the GDPR[33] only applying the provisions related to security and inspection.[34]

The first paragraph on the question of the relationship between the data protection legislation on one hand and the freedom of the press and the freedom of expression as constitutionally guaranted on the other hand had been the subject of a less straightforward legislative process. Firstly, the committee of inquiry decided of its own volution to take on this task even though the terms of reference had not asked it to propose provisions on this issue. The committee proposed a provision similar to its counterpart in the PDA, i.e. laying down the rule of the precedence of e provisions concerning the freedom of the press and the freedom of expression contained in the Freedom of the Press Act (FPA) or the Fundamental Law on Freedom of Expression (FLFE).[35]

The reasons invoked by the committee for regulating this issue were,firstly, that it was *"important that the provisions of the GDPR and of the Data Protection Act do not raise uncertainty about the possibilities to process personal data within the scope of the constitutional regulation* [of freedom of expression and of the press] *as this may impact vital and very sensitive parts of the opinion-making activities such as freedom of communication and protection of sources"*.[36] Furthermore the committee advanced that since the European law is now directly applicable regulation, for which violations may lead to significant penalties, it increases the need for a clear relationship between the laws. Beyond arguing for the *need* to introduce such a provision of informative character, the committee also defended the possibility of maintaining a provision laying down *the rule of the precedence* of the constitutional legal framework before the data protection legislation.[37] The Committee referred for that purpose to the fact that the previous provision of the Personal data Act[38] with a similar content had not been the subject of legal challenges nor had it been questioned by the European Commission during its 20 years of application.

The Swedish Data Protection Authority (DI), when asked to give comments on the first draft of the new Data Protection Act criticized serveral of the proposed provisions. Firstly, it pointed out the incorrect legal interpretation of the relationship between EU law and national law by the committee. The DI argued that the situation is different under the GDPR than it was under the Data Protection Directive. To consider that the Swedish constitutional texts have precedence pver the GDPR is therefore *"not a correct description of the legal situation"*.[39]

Secondly, the DI critised the committee for its interpretation of the margin of appreciation provided by the GDPR and denied that Article 85 of the GDPR allows the member States to set out general exemptions such as the one proposed by the Swedish legislator. The DI argued that as there are two crucial human rights that have to be balanced against each other, an appreciation of proportionality has to be made in the individual cases, according to the case law of the CJEU and of the ECtHR.[40] The DI made use of the ECtHR case: *Satukunnan Markkinapörssi OY and Satamedia OY v. Finland* to support its argument. In this

33 See Blanc-Gonnet Jonason, P., *Protection de la vie privée et transparence à l'épreuve de l'informatique, droit francais, droit suédois et directive 95/46/CE du Parlement européen et du Conseil du 24 octobre 1995*, Université Paris XII, 2001, pp. 64-65.

34 *"We are of the opinion that the exemption from the provisions of the Data Protection Act and the GDPR have to be made so long as the GDPR allows, with the exemption of the provisions related to the security of personal data and to inspection"*, See SOU 2017:39, p. 102.

35 PDA, Section 7.

36 SOU 2017:39, p. 100.

37 This was not questioned by the Government in the terms of reference though.

38 I.e. Section 7. See SOU 2017:39, p. 101.

39 Remittering av betänkandet SOU 2017:39 Ny dataskyddslag.

40 Id.

case concerning mass collection of personal taxation data (publicly accessible information in Finland) and its publication, the Strasbourg Court established that Finland's administrative Supreme Court, which had prohibited the publication, had correctly balanced the protection of privacy against freedom of expression considerations so that no infringement of article 10 ECHR had occurred.[41] Finally the DI argued that the Swedish system of so called *certificate of publication* which extends the constitutional protection of the FLFE to the databases of the entities in possession of such a certificate, whether or not they exists a journalistic purpose, may lead to infringement of privacy.[42]

However, the Datainspektion that wanted the provision to be withdrawn has not been heard by the Government[43] which, as described before, kept the provision and added changes in order to cover the right of access to official documents.

B-An increase of formalism

The Swedish legal system had initially based the protection of personal data on formalities, i.e. procedures prescribed in the Personal Data Protection Act, supervised and enforced by the Data Protection Authority, that to be complied with by data controllers.[44] When evidence was adduced that the data protection supervisor and data controllers were experiencing difficulties enforcing and complying and complying with the formal requirements of the law, [45] the Swedish legislature decided to reduce the formalism on the two abovementioned aspects.

The alleviation of the formalism firstly consisted of suppressing, through provisions in the Act of 1998, the procedures having to be complied with by the data controllers in relation to the data protection authority (.e.g. registration, notification of processing activities, etc.). The Swedish legislator made great use of the possibilities offered by the directive to exempt processing from these kinds of procedures.[46] The data protection reform generated by the GDPR was imbued with a similar philosophy to Sweden's and, in a way, may be said to enshrine the Swedish position, positively impacting on the Swedish data protection regime.

However, the fight against formalism has not been restricted to reducing the procedures that have to be complied with prior to the processing but has also secondly consisted, in Sweden, in suppressing, under certain conditions, the data controllers' obligations to comply with several data protection rules. This special regime, introduced in the Personal Data Act in 2007 and known under the name of *the abuse-centered model* has not however been renewed on the occasion of the implementation of the GDPR. This may lead to an increase of the formalism in the new Act in comparison to the PDA from 1998.

1) The GDPR leads to fewer preliminary procedures

The Swedish legislature, which made great use of the possibility of exempting processing activities from notification obligations under the Directive (art. 18), uses, after the GDPR reform, the authorization procedure with caution.

The first Swedish Data Protection Act from the 1970's laid down a general obligation for the data controllers to notify the Data Protection Authority of processing activities. Processing activies considered to be especially harmfull for privacy were submitted to an additional authorization procedure by the supervisory authority. About 20 years later, the Swedish legislature that had planned to reduce the formalities surrounding the processing took the opportunity of the transposition of the Directive to reform its law in that direction.[47]

41 The DI interprets this case as when the Parties to the Convention lay down a large openness to personal data, this choice has to be balanced with privacy protection measures which means that public authorities and the courts should be able have to make a proportionality appreciation in accordance to the case law of the European court of human rights in the particular cases they handle. This Finnish case, which tackle the freedom of expression in combination to the right of access to information, is of particular interest for Sweden which, as Finland, has a generous right of access to official documents.

42 The procedure for aquiring this certificate is easy and not specifically onerous (about 200 Euros). For more information on this Swedish mechanism see Österdahl, I., Between 250 years of free information and 20 years of EU and Internet, Etikk i praksis, 2016, Vol.10(1), pp.27–44.

43 The Government did not take into consideration the Datainspektion's criticisms. On the contrary it establishes that article 85 of the GDPR gives a larger space for exemptions to the member States than the Data Protection Directive did, not least because the new provision does not requires that the processing shall be carrioud "solely" for journalistic purposes, or the purpose of artistic or literary expression. Moreover the Government put to the forth that recital 153 of the GDPR states that the concept of freedom of expression has to be interpreted broadly. See Prop. 2017/18:105, pp. 41-42.

44 See Blanc-Gonnet Jonason, P., Vers une meilleure adaptation du droit de la protection des données personnelles à la réalité informationnelle: les exemples français et suédois, Actualité juridique - édition droit administratif, Nº 38, 2008, pp. 2105-2108.

45 According to a survey made 1993 only 10 % of the processing existing in Sweden had been notified to the DI.

46 The Swedish legislator took the opportunity given by the transpostion of the directive 95/46/EC for alleviating the formalism but the idea to carry out such a reform is more ancient in Sweden.

47 The Swedish legislator did actually found the European Act too formalistic and bureaucratic and made the larger use as possible of the possibilities offered by the Directive to lighten the preliminary

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The Personal Data Act 1998 laid down, as required by the Directive, the principle of the notification for data processing but sets out a large number of exemptions.[48] The non-inclusion of the requirement of notification in the GDPR may be said to suit the Swedish legislator well.

The wish to use as few formalities as possible is also tangible when it comes to the processing that had to be submitted to a procedure of pre-processing checking/ approval. Art 20.1 of the Directive stated that member states had to *"determine the processing operations likely to present specific risks to the rights and freedoms of data subjects and shall check that these processing operations are examined prior to the start thereof"*, and the Swedish legislator had transposed this provision in the PDA by further delegating to the Government to decide the kinds of processing to be submitted to this procedure. The Personal Data Ordinance had in the past contained such provisions (these were repealed in 2013).[49] So also did some sectoral regulation.[50] The Swedish legislator explicitly expresses its satisfaction that the GDPR, contrary to the Directive, does not require regulation of the question of pre-processing checks.[51] It further assessed that there was no need to delegate in a general manner to the Government, in the DPA, the competence to set out obligations to carry out prior checks. However, there may be reasons to lay down such obligations in sectoral legislation.[52]

2) The GDPR confirms the regulatory model

The Swedish legislator not only wished to reduce the preliminary formalities imposed on the data controllers but also wanted to take the opportunity to introduce a lighter compliance regime. The idea was to replace the regulatory model in place – a law that lays down every step in the processing of personal data – with a so-called abuse-centered model which focuses on uses of personal data considered to be abusive. At first The legislator considered such a model incompatible with the Directive.[53] However, it changed its mind in the middle of the 2000's[54] and carried out a reform to that effect. This consisted of the introduction in 2007 of a provision in the PDA (Section 5a) exempting the processing of personal data that may be deemed processing in *unstructured material* from the majority of the provisions of the PDA. This included *inter alia* the rules on the conditions of legitimation of the processing of personal data, the rules concerning the obligation of information, the rules on rectification, the rules prohibiting the processing of sensitive data and the rules on the transfer to third countries. Thanks to this new provision, continuous texts, for example, published on the Internet or not, or in e-mail were exempt from the processing rules in the PDA, subject to a backstop rule that the processing of personal data in unstructured material should not occur *"if it entails an infringement of the privacy of the person concerned"* (Section 5a in fine, PDA).

This Swedish model is not applicable in the context of the GDPR, which means an increase in the number of rules data controllers who process of personal data have to comply with compared to the position under the abuse-centred rules.[55] The omission of the abuse-centered model will also impact on rule making. Indeed, as stated in the preparatory works when the question of exemptions to the prohibition on processing sensitive personal data is discussed *"the need for exemptions will probably increase"* due to the fact that *"the so called abuse rule in Section 5a of the PDA will not be able to constitute a basis for processing when the GDPR will enter into force"*. [56]

C-The improvement of the data subjects' rights in regard to the Data Protection Authority

Because of the reinforcement of certain existing rights (e.g. the right to information) and of the introduction of new rights (e.g. the right of portability) vis-à-vis the data controllers, the protection of data subjects' rights is generally improved with GDPR compared to the Directive. The strenghening of the protection is also a result of the data subjects' rights as they relate to the Data Protection authorities. Indeed it is a consequence of the introduction of: (1) an explicit right to logde a complaint before the supervisory authority and of the obligations imposed on this authority to examine complaints, and (2) the reinforcement of the

formalities.

48 These exemptions applied when a data protection officer was appointed or according to the exemptions decided by the Government or the supervisory authority.

49 Concerning the processing of genetic data.

50 E.g. concerning processing of personal data regarding the fiscal administration cooperation in criminal investigations.

51 SOU 2017:39, p. 246.

52 Ibid.

53 Sweden hoped that the European institutions would come themselves to the conclusion that the legal framework had to be lightened.

54 The reasons were *inter alia* the flexible character of the case law of the CJEU and the incentive of the Commission to the member States to make use of the margin of manoeuvre offered by the Directive for processing personal data.

55 The Datainspektion has taken measures on its website in order to make the data controllers aware of the changes in the legislation.

56 SOU 2017:39, p. 181

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protection is also a result of the introduction of legal remedies against Data Protection Authorities .

1) The right of the data subject to lodge a complaint and the obligation of the supervisory authority to examine the complaint

The Personal data Act did not contain any provision about a data subject's right to lodge complaints to the Data protection authority nor did it contain any legal obligation for the Datainspektion to examine complaints. Nevertheless, the DI claimed on its website that it examined all the complaints, determined whether there was a need for an investigation and informed the complainant of the outcome. The indication provided by the Datainspektion – was not, however, a decision in the legal sense of the term- it did not contain any legally binging obligations to change practice, nor was it subject to appeal or judicial appeal.

The entry into force of the new GDPR constitutes an improvement of data subjects' rights according to the letter of the law as it gives data subjects a legal right to lodge a complaint before the data protection authority (according to article 77.1 GDPR that is directly applicable[57]). Furthemore, the Data protection authority now has an explicit obligation to examine complaints (article 57f GDPR).

This raises the question whether the situation will improve for data subjects? In practice it seems that a decision made by the DI to investigate or not, following a complaint made by a data subject, will not be considered to be a proper "decision". The DI explains on its website that data subjects may leave tips or lodge a complaint to the DI.[58] The supervisory authority explains further that it will decides whether to conduct an investigation and that the data subject will *"get an answer telling him or her if there will be an investigation or not, and why"*.[59] If the "answers" of the DI are not considered to be *"legally binding decisions"*, they will not be subject to an *"effective judicial remedy"* (Article 78 GDPR, see next section). And what about the reason for the decision? Will the rules of the Administrative Procedure Act[60] apply when the DI decide to not investigate.

2) The rights of the data subjects to judicial remedies against the supervisory authority

According to article 78.1 of the GDPR, data subjects *"shall have the right to an effective judicial remedy against a legally binding decision of a supervisory authority concerning them"* and according to article 78.2 of the GDPR, data subjects *"shall have the right to an effective judicial remedy"* where the supervisory authority *"does not handle a complaint or does not inform the data subject within three months on the progress or outcomes of the complaint lodged"*.

The first paragraph of article 78 has led to the enactment of a provision in the Data Protection Act stating that the decisions of the supervisory authority may be submitted for review by the administrative courts.

The second paragraph is not subject to supplementary provisions in the Data Protection Act, although the terms of reference as well as the committee of inquiry in charge of the first draft of the DPA had proposed to introduce an action for failure to act in the new Swedish law. Indeed, the committee of inquiry had proposed to introduce a mechanism by which the DI would be required, if it had not, within three months, considered the complaints lodged before it, and after a written request has been made by the data subject, to indicate whether or not it intended to exercise supervision, or in a "specific decision", reject the request for indication. If the DI had rejected the request for such an indication the data subjet could then lodged an appeal against this decision before an administrative court (claim of delay). If the court granted the appeal, it might have required the monitoring authority to, within a determined time period, give an answer to the data subject regarding the investigation. The decision of the court was not possible to appeal against.

In this way the committee has proposed a mechanism similar to the general action on failure to act that will be introduced in the Administrative Procedure Act that will enter into force in July 2018. In the revised draft, the Government having taken *inter alia* account of the comments from certain organisations that found

57 The Swedish legislator takes into consideration that the right for the data subject to make complaints as laid down by art 77 of the GDPR is directly applicable and that there is no need to write this right in the new act. Additionally the obligation of the data protection authorities to handle a complaint is laid down by art 57.1 f of the GDPR. SOU 2017:39, p. 306 and Prop. 2017/18:105 p. 152.

58 Under the theme *"The supervisory authorithy's role"* and not under the theme *"The rights of the data subjects"*.

59 The website also informs the potential complainant that all information they send, to the Datainspektion, including the complaints, are considered to be official documents, i.e. covered by the right of access to official documents laid down in the Freedom of the Press Act. The Data protection authority recommends therefore to the complainants to give no more information than necessary and to avoid to provide the DI with sensitive information.

60 In the new version of the Act, which will enter into force in July 2018, the obligation of the public authorities to provide a clear motivation is reinforced.

the system to be unnecessary complicated, time consuming and expensive,[61] decided not to introduce the provision proposed by the committee. No provision at all was actually proposed, the Goverment having considered that the current rules were sufficient for complying with the GDPR. The Government put forth the existence of the directly applicable provision of the GDPR obligating the Data Protection Authority to handle complaints, as well as the provisions of the Swedish Administrative Procedure Act on prompteness and on the obligation to inform. Additionnally the Government referred to the fact that there were no reported cases of unhandled or delayed handling of complaints by the DI[62] and that, if in the exceptional case that a data subject would not get any response from the DI, he/she may logde a complaint with the Ombudsman. The Govermnent also referred to the possibility of a data subject receiving damages according under the Tort Liability Act (1972:207). Lastly, the Government referred to the procedure on failure to act set out in the new Administrative Procedure Act. This procedure, the government says, may be applicable where slow handling occurs in a case initiated by a complaint but *"only against the final decision"*. The Government concluded that *"effective remedies* (effektiviva rättsmedel) already existed *for the data subjects within the Swedish legal order"*. [63] In reality it may be questioned if the Swedish legal order complies with the GDPR, as it looks like there is no *"right to a judicial remedy"*, meaning a right to lodge an appeal to a court, as required by the GDPR in a case where the Datainspektion *"does not handle a complaint or does not inform the data subject within three months on the progress or outcome of the complaint"*. In defence of the Swedish legislator one may mention the limited period of time – about 9 months – the Government had at its disposal to review the first draft of the DPA presented by the committee of inquiry. Another aspect that might have lead to the Government's misunderstanding of the GDPR's requirements might be the partially misleading translation of article 78, in that a *"right to an effective judicial remedy"* has been translated as *"a right to effective remedy"*.

IV-CONCLUSION

The Swedish legislator has accomplished the task of introducing supplementary provisions to the GDPR in a national law with tenacity - delivering a quite satisfactory supplementing act. The new Data Protection Act is, with some exceptions, intrinsingly clear, and its relationship to the GDPR is easy to understand. If one regret is permitted, it is that the short period of time the legislature had at its disposal negatively impacted the final text, not least when it concerns the relationship between data protection legislation and the right of access to official documents and on the question of effective judicial remedies.

61 Prop. 2017/18:105, p. 152.
62 Id., p. 153.
63 Ibid.