

ANNEX 2

Reasoned opinion issued by the Riksdag of the Kingdom of Sweden

The Riksdag would first of all like to emphasise that it appreciates the Commission's work on reviewing the existing legislation in the EU on the protection of personal data and looking into different ways of improving it.

The Riksdag emphasises that the right to privacy must be guaranteed regardless of national borders, especially as regards personal data, and that there is a need for a comprehensive and effective system of protection of personal data in the EU. The Riksdag also stresses that law enforcement activities carried out by Member States' judicial and police authorities are a sensitive matter, so there is a need for special rules in a directive concerning the processing of personal data by these authorities that take the sensitive nature of these activities into consideration.

The Riksdag also considers that the objective of an effective system for the protection of personal data in the EU in general is better achieved through measures taken at Union level than through those taken by the Member States, and that the scale and effects of action taken at Community level generally offers clear advantages over measures at Member State level.

Having said that, the Riksdag would like to draw attention to the phrase 'only if and in so far as' in Article 5 of the Treaty on European Union. According to this Article, the Union, in areas which do not fall within its exclusive competence, shall act only if and in so far as the objectives of the proposed action cannot be sufficiently achieved by the Member States, but can rather, by reason of the scale or effects of the proposed action, be better achieved at Union level. The Riksdag considers that the words 'only if and in so far as' infer that the subsidiarity check involves a proportionality criterion and thus that the proposed action should not go beyond what is necessary to achieve the desired objectives. In a judgment issued in 2002¹ with respect to whether a directive had been adopted in compliance with the subsidiarity principle, the European Court of Justice (now the Court of Justice of the European Union), after first having established that the objective of the proposed action could be better achieved at Community level, ruled as follows:

Second, the intensity of the action undertaken by the Community in this instance was also in keeping with the requirements of the principle of subsidiarity in that, as paragraphs 122 to 141 above make clear, it did not go beyond what was necessary to achieve the objective pursued.

It is against this background that the Riksdag has examined whether the Commission's choice of a legislative act for the proposed action – a regulation – goes beyond what is necessary to achieve the objective pursued. In doing so, the Riksdag has looked especially at whether a new directive, rather than a regulation, would typically give the Member States more room to take national circumstances into account when implementing the provisions, e.g. as regards the different administrative and management structures in individual Member States.

¹ ECJ judgment of 10 December 2001 in case C-491/01 *British American Tobacco (Investments) Ltd and Imperial Tobacco Ltd*, [2001] ECR I-11453.

In addition, in the current proposal the rules concerning national supervisory authorities and administrative sanctions at least are unnecessarily detailed for achieving the objectives pursued and leave too little scope for taking Member States' national circumstances into account. The Riksdag considers, for example, that the proposed rules on appointing members of the national supervisory authorities and the powers they should have cannot be regarded as necessary for achieving more uniform application of legislation on the protection of personal data. It believes that more uniform application could be achieved through a new Directive focussing on areas where there are currently shortcomings. Such a solution would at the same time leave Member States greater scope for taking national circumstances into account when implementing the legislation.

The extent to which it is proposed that the Commission be given the power to adopt delegated acts seems inappropriate, inter alia because the proposal entails giving the Commission a legislative role in which the Commission may have an unforeseeable influence on the future shape and content of the regulation, a power which in many respects should normally lie with the legislative bodies or courts.

It is also questionable whether the national impact of the regulations will gain anything from such a comprehensive, detailed and complex set of rules as contained in this proposal for a regulation, which involves delegated acts adopted by the Commission and national provisions.

It follows from the above that regulation in the form of a directive ought to mean that action is designed to be as simple as possible, the objective of the action can be achieved in a satisfactory manner and the requirement for effective implementation is met. It is therefore the opinion of the Riksdag that regulation of the protection and free movement of personal data in a Regulation whose content is such as that proposed would go beyond what is necessary to achieve the objectives pursued and does not thus comply with the principle of subsidiarity.