

Data Protection in Switzerland

Relationship of GDPR and the New Swiss Federal Act on Data Protection

The Swiss Federal Act on Data Protection (FADP) is currently under revision with the aim to implement Directive (EU) 2016/280 on the processing of personal data in the area of criminal law and to align the FADP with the GDPR. Switzerland is neither a member state of the European Union nor the European Economic Area. While Switzerland is required to implement Directive (EU) 2016/680 based on the Schengen Agreement, there is no legal obligation to implement GDPR. Aligning the FADP with GDPR, however, is a key requirement for the European Commission to confirm its adequacy decision regarding the Swiss data protection level. This adequacy decision is crucial for the Swiss economy and a clearly stated goal of the revision of the FADP.

The revision of the FADP is currently pending with the National Council, one of two chambers in of the Swiss Federal Parliament. Afterwards, it will be debated in the Council of States Chamber. The new FADP will not enter into force before the end of 2018. One of the committees preparing the debate of the FADP proposed splitting the new law in two packages: In a first step, the FADP would be aligned with Directive (EU) 2016/680 and in a second step, the FADP would be aligned with GDPR. Such a split would likely further delay the process.

Overall, the current version of the proposed new FADP is less stringent than GDPR. This means that by complying with GDPR, data processors will achieve a reasonable level of compliance with the new FADP. Given that Switzerland is not a member state of the European Union, however, minor changes will be required in data protection policies and similar documents to ensure that Switzerland is included and to provide for the competence of the Swiss Federal Data Protection Commissioner instead or in addition to the data protection authority in the relevant member states of the European Union.

A more detailed comparison of FADP and GDPR reveals the following:

- The GDPR provides stricter requirements regarding the consent of data subjects, the right to object, the right to erasure, the right to restriction of processing, and the processing of data of children.
- The GDPR provides for more rigid requirements regard data breach notifications.
- The FADP does not include a right of data portability.
- The GDPR's threshold to notify data protection authorities in the case of data breaches seems lower than the threshold under the FADP.
- There is no mandatory data protection officer under the FADP.

There are a few exceptions, however, where the FADP provides for stricter requirements than the GDPR:

- While article 13 and 14 GDPR provides for an exhaustive list of information requirements, the FADP is not exhaustive and requires that the data subject be given all information needed to ensure transparent data processing and to allow the data subjects to assert their rights under the FADP.
- The right to rectification under the FADP seems stricter as there is no overriding private interest exemption.
- The FDAP protects data related to social welfare in the special categories of personal data that is subject to stricter protection mechanisms.
- The FDAP's threshold triggering the obligation to conduct a data protection impact assessment seems lower.

Finally, the sanctions under the FADP differ significantly from the sanctions under the GDPR. The fines under the FADP are clearly lower (up to CHF 250'000), but the FADP allows for criminal sanctions against the private individuals dealing with the data processing.

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