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Why the Revised Swiss Data Protection Act Matters for International Companies

Samuel Klaus, Roland Mathys

Key Take-aways

- 1.** The revised Swiss Data Protection Act has been aligned with the GDPR, but relevant differences remain and need to be addressed by Swiss entities and international companies doing business in Switzerland.
- 2.** GDPR compliant processes can be used as a baseline, but will require certain "Swiss Add-Ons" in order to be compliant with additional requirements under the revised Swiss Data Protection Act.
- 3.** As there is no transition period, we recommend to start implementation in early 2022. A risk-based approach focusing on high and medium risk items may help to prioritize action items.

1 Introduction

1.1 Revision of the Swiss Data Protection Act

The Swiss Data Protection Act (DPA) has been revised in 2020, inter alia to align it with the EU General Data Protection Regulation (GDPR). It is not yet clear when the revised DPA will enter into force, but most likely not before the end of 2022 or even beginning of 2023. There will be no transition period. From the day the revised DPA comes into force, its requirements will have to be met. This will impact not only Swiss companies, but also any international business with an entity (or doing business) in Switzerland.

1.2 GDPR as a Baseline

An international company will regularly **have GDPR compliant processes in place**. Based on the establishment of an entity in Switzerland, or the extraterritorial applicability of the revised DPA, such company will also have to meet the requirements of the revised DPA. While the revision aimed at aligning the DPA with the GDPR, some differences remain.

So the question for international companies is: What are the "**Swiss Add-Ons**" that will have to be implemented on top of the GDPR baseline already in place? In this overview, we aim to shed light on such relevant Swiss Add-Ons and how they may be handled, from the point of view of international businesses with a GDPR compliant setup.

1.3 Areas of Alignment

The current Swiss data protection regulation differs from most other data protection regimes in that it pertains to personal data relating to both individuals as well as legal entities. The revised DPA will, like the GDPR, **apply only to personal data pertaining to individuals**. This will in particular make cross-border data transfers easier.

The current Swiss data protection regulation's extraterritorial applicability is very limited and based on Swiss private international law. The revised DPA will, like the GDPR, have an **extraterritorial scope** and thus be applicable to international companies, under certain conditions even without such international business having a subsidiary in Switzerland.

2 Remaining Key Differences

2.1 Sanctions

While the current Swiss data protection regulation contains only a limited sanctions regime with fines of up to CHF 10'000, the revised DPA will introduce **fines of up to CHF 250'000**. This might not sound like much compared to the GDPR sanctions, which can reach up to EUR 20m or 4% of yearly global turnover. The big difference is that under the DPA the **fines are not aimed at the company, but at the person in charge, i.e. the decision makers and/or management**.

Sanctions under the revised DPA apply in particular to obligations related to privacy policies and cross-border transfers (cf. Sections 2.2 and 2.3 below), but also, inter alia, in relation to information/access requests, automated decision making, outsourcing and data security. Outside the scope of sanctions are, on the other hand, for example violations of data breach notification requirements and violations of the obliga-

tion to designate a Swiss representative.

Special mention should be made of an amended obligation regarding **professional secrecy relating to "secret personal data"**. Under the revised DPA, whoever (intentionally, but including contingent intent) discloses secret personal data, will be subject to a fine of up to CHF 250'000. There is no guidance as of today on how this potentially far-reaching provision will be applied by the courts.

**Fines are aimed
at the person in charge,
not at the company.**

2.2 Privacy Policy

Under the GDPR, the privacy policy needs to contain an extensive and quite specific list of elements. Under the revised DPA, this list should suffice in most cases, with the exception of one important difference: Whereas under the GDPR it just needs to be mentioned that there are cross-border transfers (if applicable), the revised DPA also **requires the disclosure of the target countries**, i.e. those countries to which the data is being transferred to (or accessed from).

Depending on the setup of the international company, regarding both group entities as well as third-party service providers, this may prove to be quite a challenge. The enumeration of geographical regions instead of specific countries may be a solution, to the extent it remains possible for the data subject to identify the specific countries (e.g. it is clear which countries belong to the EU, but unclear which countries would be meant by reference to Asia).

An existing GDPR privacy policy can thus provide a solid baseline for use under the revised DPA, but will need to be amended at least regarding cross-border transfers, and possibly also regarding wording to limit the potential applicability of the professional secrecy obligation mentioned in Section 2.1. Since violations of the information obligations are **subject to sanctions** under the revised DPA, caution should be exercised here.

2.3 Cross-Border Transfers

The general approach to cross-border transfers of personal data is identical under the GDPR and the DPA, with such transfers not requiring further measures if to a "safe country", but requiring additional safeguards if to countries without an adequate level of data protection. Under the GDPR, implemented safeguards will in most cases consist of the new **EU Standard Contractual Clauses (EU-SCC)**.

The Swiss data protection authority, the Federal Data Protection and Information Commissioner (**FDPIIC**), has recently accepted the EU-SCC as appropriate safeguard under Swiss data protection law as well, **subject to certain amendments required under Swiss law (CH-SCC)**. The extent of

such amendments depends on the nature of the personal data and the transfer in question. In most cases an international company would aspire to align the CH-SCC with the EU-SCC. As per the guidance published by the FDPIC, this is possible to a large extent, with certain mandatory "Swiss Add-Ons" remaining required.

In conclusion, the EU-SCC may provide a **good starting point** regarding cross-border transfers subject to the DPA, but will **need to be amended (e.g. with a "Swiss Rider")** to cover the mandatory requirements defined by the FDPIC. With cross-border transfers being an area **subject to sanctions** under the revised DPA, caution should be exercised here.

2.4 Data Breach Notifications

Whereas the GDPR allows for breach notification within a delay of 72 hours, the revised DPA requires notification as fast as possible. Furthermore, under the revised DPA the risk thresholds triggering a notification obligation to the data protection authority and/or the affected data subjects are defined slightly different from those under the GDPR. It might thus be necessary to **define separate processes and internal guidelines for breaches with a relation to Switzerland**. However, unlike under the GDPR, under the revised DPA the violation of breach notification obligations is not subject to sanctions.

2.5 Swiss Representative

Under the GDPR, an entity domiciled outside the EU, e.g. a Swiss company, will have to designate an EU representative in case such entity is, based on its activities, subject to the extraterritorial applicability of the GDPR, with limited exceptions. The revised DPA mirrors this requirement, but less extensively.

As a consequence, international companies without a Swiss entity, but doing business in Switzerland, will only have to **designate a Swiss representative in case of extensive high-risk processing**. This might e.g. be the case for a provider of health-related digital services, where a relevant amount of health data is processed on a regular basis. In case of regular processing of sensitive data relating to Swiss residents, it should thus be verified whether a Swiss representative has to be designated. Violations of the obligation to designate a Swiss representative are not subject to sanctions.

2.6 Further Relevant Topics

The revised DPA contains a more specific information duty regarding **automated individual decisions, subject to sanctions**. Any international company using automated individual decisions affecting Swiss residents should thus verify the underlying processes and internal guidelines.

Furthermore, the revised DPA does not provide for a specific list of information to be provided in case of a **data subject access request (DSAR)**, but rather contains an extensive general clause - with violations of the data subjects' information request rights being **subject to sanctions**. An international company is thus well advised to have the existing GDPR-based DSAR procedures and documents verified before implementation under the revised DPA.

Regarding the **processing registry**, required under both the GDPR and the revised DPA, the GDPR-based registry may also be used for Switzerland, with few amendments

where applicable (e.g. regarding the target countries in case of cross-border transfer; cf. Section 2.3). Companies with less than 250 employees will be exempt from the obligation to keep a processing registry, provided their data processing only involves a low risk.

3 How to Ensure Compliance

Existing GDPR processes and documentation are a good starting point. The additional step to ensure compliance with the revised DPA is not insurmountable, but a necessary step nevertheless, and should therefore be addressed with diligence.

Since the **revised DPA does not provide for a transition period**, it is recommended to prepare for readiness in early 2022 for when the revised DPA comes into force - and the sanctions aimed at the person in charge and/or the management become applicable.

A risk-based approach may help to **set focus topics** and allocate resources most efficiently. On a general level, and subject to alignment with (a) an international company's specific data protection regime already implemented, (b) the nature of the personal data and processing involved, and (c) the specific relation to Switzerland and the revised DPA, we recommend to follow a prioritized **action item list** as follows:

High Risk	Cross-Border Transfers: Assess the cross-border data transfers relating to Swiss residents and implement DPA compliant safeguards (e.g. CH-SCC).
Medium Risk	Privacy Policy: Review existing GDPR based privacy policies and amend with additional requirements under the revised DPA to the extent required.
	DSAR / Automated Individual Decision: Verify the existing processes under requirements of the revised DPA.
Low Risk	Data Breach Notifications: Provide a separate process and internal guidelines aligned with requirements pursuant to the revised DPA.
	Swiss Representative: Assess whether, based on the data processing related to Swiss residents, a Swiss representative needs to be designated.
	Processing Registry: Assess whether a processing registry needs to be kept under the revised DPA, and if so, amend the existing GDPR-based registry with the limited additional information required under the revised DPA.

4 Conclusion

The arrival of the revised DPA will bring the Swiss data protection law closer to the GDPR. Some differences will, however, subsist and will have to be complied with by international companies with entities or business in Switzerland, due to the revised DPA's extraterritorial applicability.

The key areas with "Swiss Add-Ons" relate to cross-border data transfers, privacy policies and data subject access requests. Non-compliance in these areas may result in sanctions (fines of up to CHF 250'000). Since the revised DPA is expected to become effective in late 2022 or early 2023 without a transition period, the necessary steps to ensure compliance should be initiated as of now.



Roland Mathys
Partner Zurich
roland.mathys@swlegal.ch



Dr. Samuel Klaus
Partner Zurich
samuel.klaus@swlegal.ch



Vincent Carron
Partner Geneva
vincent.carron@swlegal.ch



Dr. Catherine Weniger
Counsel Geneva
catherine.weniger@swlegal.ch

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Schellenberg Wittmer Ltd
Attorneys at Law

Zurich
Löwenstrasse 19
P.O. Box 2201
8021 Zurich / Switzerland
T +41 44 215 5252
www.swlegal.ch

Geneva
15bis, rue des Alpes
P.O. Box 2088
1211 Geneva 1 / Switzerland
T +41 22 707 8000
www.swlegal.ch

Singapore
Schellenberg Wittmer Pte Ltd
6 Battery Road, #37-02
Singapore 049909
T +65 6580 2240
www.swlegal.sg