

## Selected Aspects of International Cooperation under the New Swiss Federal Act on Data Protection\*\*

*The totally revised Swiss Federal Act on Data Protection (FADP) aims at strengthening the data protection of individuals in Switzerland, in particular through the alignment with the latest developments in data protection law at international level on the one hand, as well as through the adaptation to the latest technological developments on the other. This also extends to the enhancement of the powers of the Federal Data Protection and Information Commissioner (FDPIC). In addition to the consolidation of independence and autonomy from external instruction, the new FADP has also equipped the FDPIC with a range of new competencies in the domain of international cooperation. The cornerstones of this area are the international administrative assistance between data protection authorities and the direct delivery of documents abroad. The two legal concepts under discussion are both based fundamentally on the principle of reciprocity.*

**Keywords:** *Swiss Federal Data Protection and Information Commissioner, Swiss Federal Act on Data Protection, Administrative Assistance, International Cooperation, Direct Service of Documents.*

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\*\* The views expressed in this article are exclusively those of the author and do not in any way bind his employer. The paper is the text of a keynote speech presented at the 33<sup>rd</sup> European Conference of Personal Data Protection Authorities ("Spring Conference"), hosted by the Personal Data Protection Service and held in Batumi. The information and views set out in this article are those of the author and do not necessarily reflect the official opinion of the European Commission.



## **1. The New Swiss Federal Act on Data Protection**

The totally revised Swiss Federal Act on Data Protection (FADP) entered into force on the 1<sup>st</sup> of September 2023. It aims at strengthening data protection by improving the transparency of data processing and the control that data subjects have over their personal data. At the same time, the new law aims to increase the sense of responsibility of controllers, for example by requiring them to take data protection regulations into account when planning new data processing operations. Supervision of the application of and compliance with federal data protection standards is also to be improved. Finally, Switzerland's attractiveness on the global economic market is to be maintained and improved, in particular by facilitating the transfer of personal data to other countries or international organization and promoting the development of new economic sectors in the field of digitalisation of society, based on a high, internationally recognised standard of protection.

The international dimension of the new law played a pivotal role in the broader landscape against which this modern piece of privacy legislation was enacted. In addition to adapting to the latest technological developments, the primary reasons for the total revision of the FADP included the implementation of the latest international law requirements and the alignment with the most recent international standards.<sup>1</sup> The FADP has undergone extensive revisions with a view to implementing the international law obligations arising from Switzerland's Schengen association in the area of data protection (in particular, Regulation (EU) 680/2016 [LED]<sup>2</sup>) and the requirements of Convention 108+ of the Council of Europe (CETS No. 223)<sup>3</sup>, which Switzerland has ratified. It is also important to emphasise that the new FADP is intended to ensure that Swiss data protection law is equivalent to that of the EU and thus meets the EU's adequacy requirements under the GDPR<sup>4,5</sup>. Since 2000, Switzerland has already benefited from an adequacy decision by the EU under Directive 95/46/EC<sup>6</sup>. 2024, the European Commission confirmed the adequacy of the Swiss level of data protection in accordance with the GDPR.<sup>7</sup> Moreover, the new FADP

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<sup>1</sup> *Epiney A., Zlătescu E P.*, Art. 1 FADP, in: *Bieri A., Powell J.* (eds.), OFK DSG, Zurich 2023, note 4; see also *Frey N.*, Die Revision des Datenschutzgesetzes aus europarechtlicher Sicht, in: Jusletter 17. September 2018.

<sup>2</sup> 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, 89.

<sup>3</sup> Protocol amending the Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data of 10 October 2018 (CETS No. 223).

<sup>4</sup> 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, 1.

<sup>5</sup> *Epiney A., Frei N.*, Die völker- und europarechtliche Einbettung des DSG, in: *Bieri A., Powell J.* (eds.), OFK DSG, Zurich 2023, note 13 et seq.; see also *Wiewiórowski W.*, Welcome Letter, Journal of Personal Data Protection Law 1/2023, 11.

<sup>6</sup> Commission Decision 2000/518/EC of 26 July 2000 pursuant to Directive 95/46/EC of the European Parliament and of the Council on the adequate protection of personal data provided in Switzerland, OJ 2000 L 215, 1.

<sup>7</sup> COM(2024) 7 final.



codifies numerous elements of the case law of the ECtHR and the Swiss Federal Supreme Court, and introduces, for example, the right to erasure (Art. 32 para. 2 FADP).

## 2. New Powers and Competences of the FDPIC

The new FADP brought significant changes with regard to the competences and powers of the Federal Data Protection and Information Commissioner (FDPIC). The Commissioner is now elected by Parliament, and his independence and freedom from instructions are guaranteed by federal act.<sup>8</sup> This institutional strengthening of the federal data protection authority can be traced back primarily to international law, in particular Regulation (EU) 680/2016 (LED), which is binding on Switzerland due to its Schengen association. The 2014 EU evaluation of Switzerland's compliance with Schengen requirements also stipulated that the Commissioner must be empowered to issue legally binding rulings.<sup>9</sup> Further reasons for strengthening the independence and powers of the Commissioner can also be derived from Articles 15 and 16 of the Council of Europe's Convention 108.

In addition to the above-mentioned points, it is notable that the fully revised FADP also endows the Commissioner with competencies that enable effective engagement in the realm of international cooperation with foreign data protection authorities.<sup>10</sup> This corresponds to the role of data protection supervisory authorities prescribed by Convention 108+, which devotes a whole chapter<sup>11</sup> to cooperation and mutual assistance between data protection authorities. Such cooperation is meant to enable data protection authorities to carry out their respective responsibilities under national law. The aim is to address the increasingly frequent cross-border constellations in which personal data of data subjects from one jurisdiction are processed in the territory of another state. Various provisions of the FADP provide for specific means that the FDPIC can employ in cross-border cases, both in relation to foreign data protection authorities and to controllers abroad. In view of advancing digitalisation and the associated processing of almost incalculable quantities of personal data by global technology companies that are not bound by geographical borders, cooperation between data protection supervisory authorities at international level is essential.<sup>12</sup>

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<sup>8</sup> Art. 43 FADP.

<sup>9</sup> *Epiney A., Frei N.*, Die völker- und europarechtliche Einbettung des DSG, in: *Bieri A., Powell J.(eds.)*, OFK DSG, Zurich 2023, note 8.

<sup>10</sup> Art. 58 para. 1 let. b FADP.

<sup>11</sup> Chapter V Convention 108+ (CETS No. 223).

<sup>12</sup> *Kerbosas C., Lennman C.*, in: *Meier P., Métille S.*, (eds.), *Loi fédérale sur la protection des données*, Basel 2023, Art. 55 N 1 et seq..



Consequently, Art. 58 para. 1 let. b FADP stipulates that the FDPIC shall cooperate with foreign authorities in charge of data protection. More specifically, Art. 55 FADP empowers the Commissioner to engage in administrative assistance with foreign data protection authorities in accordance with the principle of reciprocity, and Art. 58 para. 3 FADP entails the competence of the FDPIC to declare to foreign data protection supervisory authorities that direct service of their official documents is permissible in the field of data protection in Switzerland, provided that Switzerland is granted reciprocal treatment. As is clear from the relevant provisions of the FADP, ensuring mutuality is the cornerstone and central prerequisite for the various forms of cooperation between the FDPIC and its counterparts from other jurisdictions. In addition, Switzerland is obliged under international law to cooperate and provide mutual assistance between data protection authorities: generally, under Art. 16 *et seq.* of Convention 108+) of the Council of Europe and, in the area of criminal prosecution, under Art. 46 para. 1 let. H and Art. 50 of Directive (EU) 680/2016 (LED).

### **3. Administrative Assistance**

#### **3.1. General Remarks**

Administrative assistance refers to the exchange of information and personal data between the FDPIC and foreign data protection authorities in a concrete case for the purpose of enabling the requesting data protection authority to fulfil its legal duties and competencies.<sup>13</sup> In implementation of Article 17 of Convention 108+ and Article 50 of Directive (EU) 2016/860, Article 55 regulates mutual assistance between data protection authorities at international level.<sup>14</sup> As stated in Article 17 of Convention 108+, data protection authorities are bound by a duty of cooperation, to the extent that is necessary for the fulfilment of their statutory tasks and powers.<sup>15</sup> The FADP conclusively regulates the conditions under which the FDPIC can engage in administrative assistance with foreign data protection authorities. A competence of the Commissioner which was discussed during the legislative process and which would have authorised him to regulate the modalities of cooperation with his foreign counterparts through the conclusion of public international law agreements was not included in the law.<sup>16</sup> However, this competence is delegated by the FADP to the Federal Council, which, pursuant to Art. 67 FADP, may conclude international treaties in the field of data protection. Such international agreements may also regulate cooperation between data protection authorities.

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<sup>13</sup> Baeriswyl B., in: Baeriswyl B., et al. (eds.), *Datenschutzgesetz*, Berne 2023, Art. 55 N 5; Rosenthal D., *Das neue Datenschutzgesetz*, in: Jusletter 16. November 2020, note 190.

<sup>14</sup> Kerbosas C., Lennman C., in: Meier P., Métille S. (eds.), *Loi fédérale sur la protection des données*, Basel 2023, Art. 55 N 7.

<sup>15</sup> See: Cécile DE TERWAGNE, *La nouvelle loi suisse de protection des données dans le contexte international*, in: Epiney A., Moser S., Rovelli S., (eds.), *Die revision des Datenschutzgesetzes des Bundes*, Zurich 2022, 47, 86.

<sup>16</sup> Federal Council, Message accompanying the totally revised FADP, 7104.



It should be emphasized that, within the scope of application of Art. 55 of the FADP, the FDPIC is in principle not obliged to engage in administrative assistance. This discretionary provision gives the Commissioner the power to decide whether and when to engage in administrative assistance. For instance, the FDPIC can decline a request for administrative assistance if the law of the requesting data protection authority does not guarantee an adequate level of data protection within the meaning of Art. 16 FADP.<sup>17</sup>

Despite the wording of Art. 55 para. 1 FADP, stricter rules on mutual assistance between data protection authorities apply in law enforcement matters between Schengen states. For example, under Art. 50 LED<sup>18</sup>, the FDPIC is obliged to provide mutual assistance to the data protection authorities of other Schengen states. Data protection authorities must provide each other with relevant information and mutual assistance to implement and apply the LED consistently, and to establish effective cooperation measures. This assistance covers information requests and supervisory measures, such as requests to carry out consultations, inspections and investigations. Under the scope of the LED, the Commissioner is required to reply to a request from another supervisory authority from the Schengen area without undue delay, and in any case no later than one month after receiving the request.

### **3.1.1. Conditions**

#### **3.1.1.1. Reciprocity**

Article 55 FADP has established a number of five cumulative conditions that must be met in order for the FDPIC to engage in administrative assistance. As highlighted above, the first and most relevant of these in practice is the requirement of reciprocity. Notwithstanding the view held by part of the doctrine,<sup>19</sup> neither the wording of Art. 55 FADP nor the materials arising from the legislative process leading to the enactment of the Act indicate that there are any formal requirements, such as the conclusion of an international agreement, nor is there a prescribed minimum content that must be stipulated.

#### **3.1.1.2. Purpose Limitation**

An essential feature of administrative assistance is that the information and personal data exchanged by the data protection authorities involved are used exclusively for the specific proceedings for which administrative assistance was requested, in accordance with the principle of specialty. The FDPIC must therefore

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<sup>17</sup> Federal Council, Message accompanying the totally revised FADP, 7095.

<sup>18</sup> See also Art. 349a et seq. Swiss Criminal Code.

<sup>19</sup> *Baeriswyl B.*, in: *Baeriswyl B.*, et al. (eds.), *Datenschutzgesetz*, Berne 2023, Art. 55 note 6.



ensure that this purpose limitation is guaranteed by the recipient data protection authority. The importance of the purpose limitation principle is also reflected by Article 19 of Convention 108+, according to which a data protection authority which has received information from one of its foreign counterparts, either accompanying a request or in reply to its own request, shall not use that information for purposes other than those specified in the request.

### **3.1.1.3. Professional, Business and Manufacturing Secrets**

A further condition for engaging in administrative assistance is the obligation of the recipient authority to comply with professional, business and manufacturing secrets contained in the information received in the context of administrative assistance. If such secrets are contained in the information transmitted, the FDPIC is required to inform the parties concerned before transmitting the information to the foreign authority and to invite them to submit their observations, provided that this is not impossible or would cause disproportionate effort. In practice, this requirement could have limited scope, as for instance according to Art. 50 para. 2 FADP, professional secrets are in principle excluded from the information to be made available to the FDPIC in the context of an investigation.

### **3.1.1.4. Disclosure to Third Parties**

The disclosure of the information and personal data transmitted by the receiving authority to third parties requires the prior approval of the data protection authority that transmitted the data.

### **3.1.1.5. Conditions or Restrictions**

The FADP also allows the transmitting data protection authority to impose conditions or restrictions on the receiving authority with regard to the personal data and information transmitted. Examples of possible conditions identified by the doctrine include requirements for the anonymisation of personal data, the setting of a specific time limit within which the personal data must be deleted by the receiving authority, or the condition that information and personal data may only be transferred if the FDPIC is also informed of the results of the investigation abroad.<sup>20</sup>

## **3.1.2. The Object of Administrative Assistance**

With regard to personal data and information that the FDPIC may exchange with its counterpart supervisory authorities within the scope of administrative assistance,

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<sup>20</sup> *Baeriswyl B., in: Baeriswyl B., et al. (eds.), Datenschutzgesetz, Berne 2023, Art. 55 note 11.*



the FADP provides a non-exhaustive list. This includes, in particular, the identity of the controller and the processor, the personal data processed, the purpose of the processing, the recipient or the identity of the data subject. The latter may only be disclosed either if the data subject has given their consent or if this is essential for the performance of a legal task of one of the data protection authorities involved.

## **4. The Direct Service of Documents Abroad**

### **4.1. General Considerations**

Another significant element of novelty of the totally revised FADP in the field of international cooperation between supervisory authorities relates to the direct service of official documents by foreign data protection authorities. The service of an official document to a recipient abroad or from abroad in Switzerland constitutes, under Swiss law, an act of public authority, which cannot be performed on the territory of another State due to its territorial sovereignty. In general, such an act must either be carried out by the recipient's country of residence through a public international law treaty or be authorised by the other country. In the absence of authorisation, the direct notification of decisions, rulings, or other official documents abroad without first obtaining the consent of the State of residence of the addressee and without complying with the procedures established by the latter's law or by a bilateral or multilateral international treaty constitutes a violation of the sovereignty and independence of that State. If this is the case, the notification is, according to the case law of the Federal Court, absolutely null and void.<sup>21</sup>

Swiss legislation contains two legal bases that enable the service of foreign official documents in the field of data protection within Swiss territorial jurisdiction: Article 58 para. 3 FADP and the European Convention on the Service Abroad of Documents relating to Administrative Matters of 17 November 1977 (CETS No. 094).

### **4.2. Article 58 paragraph 3 FADP**

In addition to the mutual assistance procedure in the strict sense regulated in Art. 55 FADP, the FDPIC may, pursuant to Art. 58 para. 3 FADP, allow foreign data protection authorities to transmit their rulings directly to Switzerland without violating Art. 271 of the Swiss Criminal Code. Direct service within the meaning of Art. 58 para. 3 FADP requires a general and abstract declaration by the Commissioner to a foreign data protection authority. It is not limited to a specific individual case or to a specific category of matters. As in Art. 55, Art. 58 para. 3 FADP presupposes reciprocal rights

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<sup>21</sup> Swiss Federal Supreme Court, BGE 143 III 28 cons.2.2.1.



as a prerequisite for direct service. The service may be effected either by postal service or through the diplomatic or consular representation of the delivering State.<sup>22</sup>

According to the wording of Article 58 para. 3 FADP, direct notification may be authorised in general by the FDPIC if three cumulative conditions are met: direct notification is limited to the field of data protection from a Swiss perspective, the notification is made by an administrative authority charged specifically with data protection, and Switzerland is granted reciprocal rights. In addition to these conditions, part of the doctrine is of the opinion that it is necessary to balance the interests at stake, taking into account the potential consequences of authorisation on Switzerland's sovereignty and on the recipients of foreign official acts. Among the public interests, consideration should be given to respect for the rule of law (in particular the principles of legality and proportionality), foreign policy interests and the consequences of authorisation or refusal for Switzerland, particularly in terms of the economy and the protection of personal data. According to the same author, private interests should include respect for legally protected secrets, the availability of effective legal remedies in foreign proceedings, the existence of independent and impartial judicial review, economic interests, the interests of data subjects in the protection of their personal data and the adequacy of the State's data protection regime for the purposes of the authorisation.<sup>23</sup>

#### **4.2.1. European Convention on the Service Abroad of Documents Relating to Administrative Matters**

Ten member states of the Council of Europe<sup>24</sup> have ratified the Convention. Article 1 para. 1 of the Convention stipulates that the contracting states undertake to provide mutual assistance in the service of documents in administrative matters. In principle, the agreement applies to all administrative matters, except tax and criminal matters. In accordance with Article 1 para. 3, the parties may also exclude other areas of law. At the time of signing the Convention, Switzerland issued a declaratory statement indicating that the Convention's scope did not encompass financial market supervision or intelligence matters. Consequently, it can be deduced that the provisions of this Convention pertain to the realm of data protection. This assertion is substantiated by the absence of any explicit exclusion of data protection in Article 1 para 2 of the Convention, and the absence of any declaration by Switzerland that data protection is to be excluded from its ambit. In particular, the Convention provides for notification to be made via diplomatic or consular channels (Article 12), postal services (Article 11), consular officers or diplomatic agents of the requesting state (Article 10),

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<sup>22</sup> Cattaneo G., in: Meier P., Métille S., (eds.), *Loi fédérale sur la protection des données*, Basel 2023, Art. 58 note 79.

<sup>23</sup> Cattaneo G., in: Meier P., Métille S., (eds.), *Loi fédérale sur la protection des données*, Basel 2023, Art. 58 note 79 et seq.

<sup>24</sup> For the status of ratifications, see: <<https://www.coe.int/en/web/conventions/full-list2?module=signatures-by-treaty&treaty-num=094>> [24.7.2025].



or the Central Authority of the requested state (Article 2 et seq.). As a rule, pursuant to Art. 6 of the Convention, the requesting authority may forward the order to a central authority in the country where the service is to be carried out. This authority will then serve the document on the addressee and return the requesting authority a certificate of service. As set out in Article 2, paragraph 1 of the Convention, each Contracting State shall designate a central authority responsible for receiving requests for the service of documents in administrative matters from the authorities of other Contracting States, and for responding to such requests. Federal states may designate more than one central authority. Switzerland has issued a declaration stipulating that its central authority for the purposes of the Convention is the Federal Office of Justice.

The Convention obliges the state parties to provide mutual assistance in the service of documents in administrative matters.<sup>25</sup> According to the message of the Federal Council, the agreement is intended to facilitate cooperation in cases where there are no legal provisions governing mutual assistance. Even if Art. 55 FADP does not refer to the service of documents; it must be interpreted in accordance with international law and in the light of the agreement. The Convention must also be taken into account when applying Art. 58 para. 3 FADP.

Given the federal law through Article 58 para. 3 of the FADP does not comprehensively regulate the direct service of foreign official administrative documents in the field of data protection, but rather through a single general provision, it can be assumed that the FADP and the Convention are compatible, as both aim to strengthen the rapid and effective application and enforcement of data protection provisions. In any event, Art. 58, para. 3 of the FADP must be interpreted in accordance with international law. It should also be noted that the legislative materials do not suggest that the Federal Assembly intended to adopt a provision contrary to the Convention when it adopted Art. 58 para. 3 FADP during the total revision of the Act. The notification procedures set out in the Convention therefore apply to cases, where data protection authorities from countries that have ratified the convention seek the service of documents on the territory of Switzerland.

## **5. Conclusion**

While the scale of cases data protection authorities face in their day-to-day practice can be formidable, the procedural aspects they manage play an equally crucial role in shaping the outcomes of their efforts. In the context of the international dimension of Switzerland's Federal Data Protection Act, procedural considerations come to the forefront. Topics such as administrative assistance between data protection authorities or the direct service of their documents abroad illustrate the complex processes involved in international collaboration. These elements underscore

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<sup>25</sup> Federal Gazette, 2017 5957.



the importance of efficient coordination to navigate major cases effectively. Various provisions of the FADP provide for specific means that the FDPIC can employ in cross-border cases, both in relation to foreign data protection authorities and to controllers abroad. Within the domain of these forms of international cooperation, the legally binding guarantee of reciprocity assumes a pivotal role.

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