

***Data and Data Protection:  
Growing Opportunities and Increasing Legal Risk***

Legal Overview  
Clara-Ann Gordon

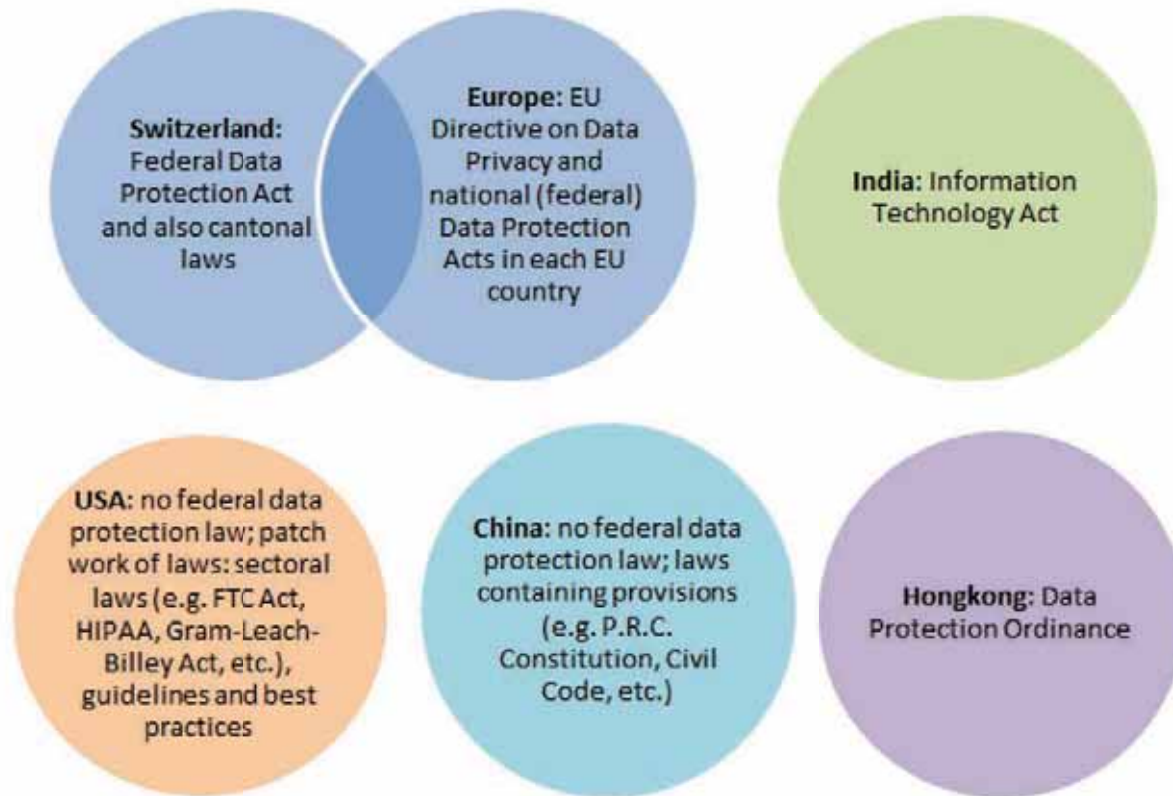
# What is Data Protection About?



# Data Protection

- Protection of personality rights and not of the data itself
- Personal data is any data relating to an **identified** or **identifiable** person
- Accordingly anonymous data is not considered personal data
- Federal Act on Data Protection dated 19 June 1992 (DPA)

# Different Data Protection Regimes



# Swiss and EU Data Protection Laws

- Swiss and EU systems are equivalent
- Revision of EU Data Protection Framework
- Revision of DPA in the pipeline:
  - No change of concept/structure,
  - Increased due diligence obligations
  - Increased rights of data subjects
  - extended competencies of the Federal Data Protection and Information Commissioner (FDPIC) and the planned monetary penalty for violations of the DPA

# Transfer of Data to Foreign Countries I

- Transfer of personal data outside Switzerland/EU:
  - Article 6 subpara. 1 DPA:

„Personal data may not be disclosed abroad if the privacy of the data subjects would be seriously endangered thereby, in particular due to the absence of legislation that guarantees **adequate protection**.”

# Transfer of Data to Foreign Countries II

- Countries with **adequate level** of protection:
  - 28 EU countries
  - 3 EEA member countries (Norway, Liechtenstein and Iceland)
  - Andorra, Argentina, Canada (commercial organisations), Faeroe Islands, Guernsey, Israel, Isle of Man, Jersey, New Zealand, Uruguay
  - the US Department of Commerce's **Safe Harbor Privacy Principles**
- Problematic is a transfer of personal data from CH/Europe to the USA
- Not: Transfer from USA to CH/Europe

# End of Safe Harbor I

- ECJ – C-362/14 – Schrems / Data Protection Commissioner
  - Context: Austrian student Maximilian Schrems opposes transfer of his personal data from Facebook's Irish subsidiary to servers located in the United States, where such data is processed.



# End of Safe Harbor II

- ECJ: United States do not afford an adequate level of protection of personal data
  - “[L]egislation permitting the public authorities to have access on a generalized basis to the content of electronic communications must be regarded as compromising the essence of the fundamental right to respect for private life.”
  - “Likewise, legislation not providing for any possibility for an individual to pursue legal remedies in order to have access to personal data relating to him, or to obtain the rectification or erasure of such data, does not respect the essence of the fundamental right to effective judicial protection.”
  - Safe Harbor Principle does not provide adequate protection

# End of Safe Harbor III

- Consequences?
  - 4480 US organizations on the US DoC list (after a respective self certification) can no longer rely on automatic legalization.
  - National Data Regulators can investigate each single data transfer into the USA
  - Comments by EU Data Regulators
  - Comment by Swiss FDPIC: Swiss Safe Harbor agreement between Swiss and the US is not sufficient anymore

# End of Safe Harbor IV

- Future data transfer to the US – other instruments to secure compliant data transfer?
  - Standard contractual clauses?
  - Binding corporate rules?
  - Individual agreement/consent?
- Grace period until January 2016
- Individual check for each company (no NSA access?)
- New negotiations between USA / EU

# Outlook

- Safe Harbor developments to be watched
- New EU Data Protection Framework to introduce high fines
- Importance of data protection will increase
- Costs for compliance in data protection matters will also increase
- Two data protection worlds? CH and EU vs. rest of the world?