



NKF Client News

12 JANUARY 2022

Specific Amendments and Measures under the revised FADP - Risk-based-Approach in Light of the new Criminal Offences

The revised Swiss Federal Act on Data Protection ("revFADP") is expected to enter into force in the course of 2022. The revFADP has been adapted to the EU General Data Protection Regulation ("GDPR"). Companies that are GDPR-compliant therefore have less need to adapt. However, there are some "Swiss Finishes" that must be observed and implemented. Since no transition periods are provided, it is advisable to start as soon as possible with the specific amendments of the existing data protection-relevant documents and processes and to take appropriate measures or introduce respective mechanisms.

The revFADP provides for fines of up to CHF 250,000, which are not imposed on the company, but on the relevant decision-makers and/or the management / board of directors (depending on the internal set-up of the company). When implementing the necessary measures, it may be expedient, in the sense of a risk-based approach, to focus in a first step on those provisions of the revFADP whose violation may result in a fine. The following overview is therefore based on the new offences of the revFADP and lists the specific measures that will be necessary to comply with these.

In order to ensure comprehensive compliance with the revFADP, additional steps are necessary. In this context, we refer to the [NKF checklists](#).

NIEDERER KRAFT FREY

Art. 60 revFADP	Infringement	Need for adaptation / measures / mechanisms
	Violation of the information obligations pursuant to Art. 19 and Art. 21 revFADP	<p>Reviewing and, if necessary, amending existing data protection policies and other data protection-relevant documents, in particular regarding information on:</p> <ul style="list-style-type: none"> ✓ identity and contact details of the controller; ✓ processing purpose; ✓ where applicable, recipients or categories of recipients to whom personal data are disclosed; ✓ receiving countries in the case of disclosure of personal data abroad and measures taken (safeguards, e.g. conclusion of standard contractual clauses); ✓ categories of personal data processed (unless the personal data is obtained from the data subject); ✓ where applicable, information on automated individual decisions. <p>Introduction of further measures / mechanisms:</p> <ul style="list-style-type: none"> ✓ ensure compliance with information obligations within one month upon receipt of the data if personal data is processed that was not obtained from the data subject (e.g. internal policy, training of staff, etc.); ✓ where appropriate, ensuring that the data subject can, upon request, express his or her point of view regarding automated individual decisions and have them reviewed by a natural person.
	Violation of the duty to provide information pursuant to Art. 25-27 revFADP	<p>Reviewing and, if necessary, amending existing data protection policies and other data protection-related documents concerning information on how and addressed to whom a data subject can assert his or her right to information.</p> <p>Possible introduction of measures / mechanisms to ensure or simplify internal processes so that requests for information from data subjects can be answered within 30 days, for example by:</p> <ul style="list-style-type: none"> ✓ maintaining a database / directory which is continuously updated and provides information on (i) the personal data processed as such, (ii) the respective purpose of the processing, (iii) the origin of the personal data, insofar as this was not obtained from the data subject himself/herself, (iv) where applicable, the existence of an automated individual decision (incl. logic on which the decision is based), and (v) where applicable, the recipients or categories of recipients to whom personal data is disclosed (this includes, for example, processors; incl. address and, in particular, country in which these recipients are located); ✓ create an internal guideline / table on the retention period ("Data Retention Schedule"), which provides information on the retention period for <u>each category of personal data or on the criteria for determining the retention period.</u>

Art. 61 revFADP	Infringement	Need for adaptation / measures / mechanisms
	Violation of due diligence obligations when disclosing abroad (Art. 16 para. 1 and 2 as well as Art. 17 revFADP)	<p>Introduction of measures / mechanisms (e.g. internal guidelines, training etc.) to ensure that personal data is only disclosed abroad in accordance with the law, namely through:</p> <ul style="list-style-type: none"> ✓ a standard check of the current list of states, which is published by the Federal Data Protection and Information Officer ("FDPIC") and will be published by the Federal Council in the future, before personal data is disclosed abroad, in order to ensure that the state in question guarantees adequate data protection; ✓ if necessary, taking measures to ensure data protection, e.g. by concluding the new standard contractual clauses ("SCC") approved by the FDPIC or by replacing the existing standard contractual clauses by the end of 2022 at the latest. <p>Conclusion of written contracts with processors in accordance with Art. 9 revFADP, in particular with the provisions that</p> <ul style="list-style-type: none"> ✓ the processor only processes personal data in the same way as the transferring controller would be permitted to do; ✓ the processor guarantees data security; ✓ the processor only transfers the processing to a third party with the prior consent of the controller. <p>Review and possible amendment of existing contracts with processors in accordance with the new minimum data security requirements (as soon as these have been defined more precisely in the revised FADP-Ordinance).</p> <p>Introduce measures and mechanisms (e.g. internal guidelines, training, etc.) to ensure that</p> <ul style="list-style-type: none"> ✓ the processing of personal data is only transferred to a processor if no legal or contractual confidentiality obligations prohibit the transfer; ✓ only processors are selected who guarantee the required data security and can prove this (e.g. verification of an ISO certification, etc.).

NIEDERER KRAFT FREY

	Violation of due diligence obligations regarding minimum data security requirements (Art. 8 para. 3 revFADP)	Take measures and introduce mechanisms to ensure that the minimum data security requirements to be issued by the Federal Council (see revised FDPA Ordinance) are complied with. Documentation of the technical and organisational measures ("TOMs") taken and implemented to ensure data security.
Art. 62 revFADP	Infringement	Need for adaptation / measures / mechanisms
	Breach of professional secrecy	Introduction of internal guidelines and mechanisms that prevent the intentional disclosure of secret personal data by persons who work in a profession requiring knowledge of such data or who have acquired knowledge of the data while working for a person required to maintain secrecy or during training. Awareness raising and training of affected staff.
Art. 63 revFADP	Infringement	Need for adaptation / measures / mechanisms
	Disregarding orders	Introduce control mechanisms to ensure that orders of the FDPIC or decisions of the appeal authorities are complied with.



NIEDERER KRAFT FREY

If you have any further questions or suggestions on this topic, please do not hesitate to contact your regular NKF contact.

Authors/Contact



Dr András Gurovits
Partner, Technology
andras.gurovits@nkf.ch



Clara-Ann Gordon
Partner, Technology
clara-ann.gordon@nkf.ch



Janine Reudt-Demont
Counsel, Technology
janine.reudt-demont@nkf.ch

This publication does not necessarily cover every important topic or cover every aspect of the issues it deals with. It is not intended to provide legal or other advice.

