
CHAMBERS GLOBAL PRACTICE GUIDES

Cybersecurity 2023

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Switzerland: Law & Practice

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Switzerland: Trends & Developments

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SWITZERLAND

Law and Practice

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Contents

1. Basic National Regime	p.4	4. Key Affirmative Security Requirements	p.12
1.1 Laws	p.4	4.1 Personal Data	p.12
1.2 Regulators	p.5	4.2 Material Business Data and Material Non-public Information	p.13
1.3 Administration and Enforcement Process	p.6	4.3 Critical Infrastructure, Networks, Systems	p.13
1.4 Multilateral and Subnational Issues	p.7	4.4 Denial of Service Attacks	p.13
1.5 Information Sharing Organisations and Government Cybersecurity Assistance	p.7	4.5 Internet of Things (IoT), Software, Supply Chain, Other Data or Systems	p.13
1.6 System Characteristics	p.8	4.6 Ransomware	p.13
1.7 Key Developments	p.8	5. Data Breach or Cybersecurity Event Reporting and Notification	p.14
1.8 Significant Pending Changes, Hot Topics and Issues	p.9	5.1 Definition of Data Security Incident, Breach or Cybersecurity Event	p.14
2. Key Laws and Regulators at National and Subnational Levels	p.9	5.2 Data Elements Covered	p.14
2.1 Key Laws	p.9	5.3 Systems Covered	p.14
2.2 Regulators	p.10	5.4 Security Requirements for Medical Devices	p.14
2.3 Over-Arching Cybersecurity Agency	p.10	5.5 Security Requirements for Industrial Control Systems (and SCADA)	p.14
2.4 Data Protection Authorities or Privacy Regulators	p.10	5.6 Security Requirements for IoT	p.14
2.5 Financial or Other Sectoral Regulators	p.10	5.7 Requirements for Secure Software Development	p.15
2.6 Other Relevant Regulators and Agencies	p.11	5.8 Reporting Triggers	p.15
3. Key Frameworks	p.11	5.9 "Risk of Harm" Thresholds or Standards	p.15
3.1 De Jure or De Facto Standards	p.11	6. Ability to Monitor Networks for Cybersecurity	p.15
3.2 Consensus or Commonly Applied Framework	p.11	6.1 Cybersecurity Defensive Measures	p.15
3.3 Legal Requirements and Specific Required Security Practices	p.11	6.2 Intersection of Cybersecurity and Privacy or Data Protection	p.15
3.4 Key Multinational Relationships	p.12		

7. Cyberthreat Information Sharing Arrangements	p.16
7.1 Required or Authorised Sharing of Cybersecurity Information	p.16
7.2 Voluntary Information Sharing Opportunities	p.16
8. Significant Cybersecurity and Data Breach Regulatory Enforcement and Litigation	p.16
8.1 Regulatory Enforcement or Litigation	p.16
8.2 Significant Audits, Investigations or Penalties	p.16
8.3 Applicable Legal Standards	p.16
8.4 Significant Private Litigation	p.16
8.5 Class Actions	p.16
9. Cybersecurity Governance, Assessment and Resiliency	p.17
9.1 Corporate Governance Requirements	p.17
10. Due Diligence	p.17
10.1 Processes and Issues	p.17
10.2 Public Disclosure	p.17
11. Insurance and Other Cybersecurity Issues	p.17
11.1 Further Considerations Regarding Cybersecurity Regulation	p.17

1. Basic National Regime

1.1 Laws

Switzerland is a federation comprising 26 federated states (cantons) as well as a federal government. This leads to a layered body of laws as well as, at times, a decentralised official cybersecurity approach. Cybersecurity in Switzerland remains closely tied to the area of data protection. Cybersecurity is frequently perceived as an off-shoot – or even a synonym – of data security, which, as the name suggests, targets the security and resilience of data processing and storage activities.

On a federal level, the Swiss Constitution of 18 April 1999 protects the right to privacy, in particular the right to be protected against misuse of personal data (Article 13). The collection and use of personal data by private bodies are regulated on a federal level and are mainly governed by the Federal Data Protection Act of 19 June 1992 (FDPA) and its ordinances, including the Ordinance to the Federal Act on Data Protection (FDPO). The revised FDPA and FDPO will be implemented on 1 September 2023. For the purposes of this Guide and in anticipation of this near-term entry into force, the revised FDPA and FDPO will already be referred to as the FDPA and FDPO.

Data processing by public bodies is governed by the FDPA for federal bodies and by cantonal (for example, the Information and Data Protection Act of the Canton of Zurich) and communal laws for cantonal and communal bodies.

The FDPA was revised in order to implement the revised Council of Europe's Convention 108 and to more closely align with the EU General Data Protection Regulation (GDPR). The revised FDPA and FDPO are scheduled to enter into force on

1 September 2023 as mentioned above. Importantly, these texts will not only bring about more impactful enforcement powers but will also impose on controllers and on processors, on certain conditions, a duty to notify data security breaches. Additional compliance and documentary measures, such as data protection impact assessments and inventories of data processing activities will also be introduced.

The Information Security Act of 18 December 2020 (ISA), which is expected to enter into force in the course of 2023, will govern information security practices within the federal government and its administrative bodies. Under the ISA, several ordinances will further specify and implement information security requirements and also repeal (inter alia) the Ordinance on the Protection against Cyber Risks in the Federal Administration (CyRV), which entered into force on 1 July 2020 and primarily brought about organisational changes within the federal administration to enable and bolster governmental capabilities with regard to cyberthreats. Importantly, the ISA should bring about an obligation of operators of critical infrastructures to report certain cyberattacks to the National Cyber Security Centre (NCSC).

Apart from the upcoming ISA, cybersecurity remains mostly regulated by a patchwork of various acts and regulatory guidance, which deal explicitly or implicitly with cybersecurity in the private sector. These laws include:

- the Budapest Convention on Cybercrime (CCC), which entered into force in Switzerland on 1 January 2012, and imposes a harmonisation of Switzerland's criminal legislation as well as speedy international co-operation mechanisms;
- the FDPA;

- the Federal Telecommunications Act of 30 April 1997 (TCA), including its ordinances which – as of 1 January 2023 – contain specific information security and network threat resilience requirements; and
- the Federal Act on Financial Market Infrastructures and Market Conduct in Securities and Derivatives Trading of 19 June 2015 (FinMia). The banking and financial markets legislation also leads to the financial markets regulator's named Swiss Financial Market Supervisory Authority (FINMA) issuance of various circulars and regulatory notices.

However, the Swiss government has given cybersecurity increasing attention in the past few years and the absence of an overarching ad hoc law on cybersecurity may appear misleading, given the importance and national relevance of this topic. Nonetheless, this conclusion is unlikely to lead the Swiss legislator (Parliament) to issue any topical legislation on cybersecurity in the near future. On the contrary, the federal government has been following a national strategy against cyber-risks (NCS).

The NCS is organised around reaching 247 milestones. The NCS purports to strengthen cybersecurity in Switzerland and combat cybercrime. It does not foresee the implementation of a dedicated cybersecurity legislation, rather focusing on modernising various pre-existing laws. The NCS is a testimonial to the growing relevance of cybersecurity in Switzerland, as well as perhaps the increased global threat posed by cyber-risks. In its final report dated 28 March 2022 on the evaluation of the effectiveness of the NCS for the years 2018 to 2022, the NCSC notes that the NCS is a coherent strategy, the implementation of the NCS is on schedule and leads to relevant results.

A further manifestation of the government's interest in cybersecurity is another governmental venture, the Digital Switzerland Strategy. The first take on this was published in 2016 and its replacement arrived in autumn 2018; a further update arrived in September 2020, and emphasised in particular environmental protection, digitalisation and data-related policy. For 2023, the strategy has been streamlined and includes priority themes that are modified each year. The priority themes are: legislation to support digitalisation; digitalisation of the health sector; and digital sovereignty.

1.2 Regulators

The Federal Data Protection and Information Commissioner (FDPIC) is a body established on a federal level under the FDPA. The FDPIC supervises compliance with the FDPA and other federal data protection legislation by federal bodies, and advises private bodies. On its own initiative, or at the request of a third party, the FDPIC may carry out investigations into data processing by private bodies if their data processing is capable of affecting a large number of persons. In addition, each canton has its own data protection authority, which is generally competent to supervise cantonal and communal bodies (but not private parties, which are subject to the FDPIC's authority). Other regulators – for example, the FINMA – may play a role in the enforcement of data protection (see below).

It is also worth mentioning here that the key official actor in the cybersecurity area is the National Cyber Security Centre (NCSC) within the Federal Department of Defence, Civil Protection and Sport (DDPS) since 2023. Indeed, in an effort to centralise the administrative activities in this area, other actors (such as MELANI, GovCert and CYCO) became an integral part of the NCSC. In particular, MELANI, which used to

be the federal reporting and analysis centre for information assurance, and CYCO (cybercrime co-ordination unit) have been merged into the NCSC. These bodies served (and still serve, within the NCSC) early threat detection and management purposes as well as information sharing and co-ordination functions.

1.3 Administration and Enforcement Process

The FDPA sets out basic rules applicable to investigations carried out by the FDPIC. The FDPIC has no direct enforcement powers against private bodies processing personal data. However, on its own initiative or at the request of a third party, it can carry out investigations if a suspected breach of data protection law is capable of affecting a large number of persons (ie, a system error) and in limited additional cases. In the course of an investigation, the FDPIC has the right to demand the production of documents, make inquiries and ask for a demonstration of a particular processing of personal data. However, under the current FDPA, the FDPIC cannot issue binding instructions to the controller, though this is due to change under the revised FDPA.

The FDPIC's only instrument at this stage is issuing a non-binding recommendation to change or terminate a processing activity. If the recommendation is not followed, the FDPIC may refer the matter to the Federal Administrative Court for a decision on the subject matter of the recommendation. This Federal Administrative Court's decision is binding but can be appealed before the Federal Supreme Court. Neither these courts nor the FDPIC can impose monetary sanctions, but they can refer the matter for criminal prosecution, which may lead to a fine of up to CHF10,000 in very limited scenarios.

Under the FDPA, however, the FDPIC has direct enforcement powers, including the right to direct the controller to change, suspend or cease processing activities. Failure to comply with a binding instruction will, if referred to criminal prosecution, be liable to a fine against the responsible individuals of up to CHF250,000. Such fines can in particular be levied by the criminal courts against the responsible individual(s) in cases of non-compliance with the minimum legal data security requirements. The FDPIC's increased (compared to the prior version of the FDPA in effect until 1 September 2023) powers and the more dissuasive criminal sanctions are seen as one of the most significant novelties in Swiss data protection legislation. Indeed, it could be argued that the former FDPA did not confer sufficient enforcement abilities upon the FDPIC and that this, combined with the largely symbolic fines, has somewhat marginalised the impact of the (current) FDPA across the board.

The investigation by the FDPIC is subject to the Federal Act on Administrative Procedure (APA), which provides for due process rights for the investigated party and third parties – for example, rights to refuse to testify. The procedure before the Federal Supreme Court is regulated by the Federal Act on the Supreme Court.

There is a general view that enforcement of the former FDPA was insufficient. This was one of the drivers of the revision of the FDPA. This perceived lack of enforcement was due to several factors, including the following.

- The FDPIC had no direct enforcement powers against private bodies processing personal data and, with limited resources, typically concentrated on data processing by federal bodies and, in the private sector, on significant or high-profile cases.

- There was no risk of criminal sanctions for a breach of data protection laws, except in very limited scenarios.
- In the event of a breach of data protection law, there was a risk of civil liability claims from the concerned data subjects and, depending on the circumstances, a risk of negative publicity. However, there was normally no financial risk as claims for compensation necessitated establishing a financial loss. There was no claim for compensation of non-material damage, in contrast to the GDPR, or any form of statutory damages.

In the banking and financial markets sector, the regulator, FINMA, supervises the relevant actors (namely banks, insurance companies, financial institutions, collective investment schemes and fund management companies) and plays a role in the cybersecurity realm. Indeed, given the importance of the financial industry in Switzerland, data security and cybersecurity are core concerns.

In case of a breach of the sectoral rules, FINMA has a varied toolbox of enforcement means. These include the revocation of licences to practise, fines or even custodial sentences. FINMA also occasionally and for preventive purposes relies on a “name and shame” strategy, meaning that the author of any offence against the regulatory rules is publicly named.

1.4 Multilateral and Subnational Issues

Switzerland has implemented the Council of Europe’s Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data (Convention 108) through the FDPA, and, upon entry into force of the revised FDPA, will have finalised its implementation.

In addition, Switzerland is not a member of the EU or of the EEA and is under no obligation to implement the EU General Data Protection Regulation (GDPR), but the EU is Switzerland’s most important partner, and ensuring a level playing field for Swiss and EU-based companies is an important policy objective. The (revised) FDPA largely aligns with the GDPR, such that a company that complies with the GDPR should generally be in compliance with the FDPA. Moreover, it is expected that the European Commission will not revoke its finding that Switzerland’s data protection legislation provides an adequate level of data protection under the GDPR.

For data processing in relation to criminal prosecution, and in the framework of police and judicial co-operation, Switzerland transposed, on 30 January 2019, EU Directive 2016/680 into domestic Swiss legislation through the FDPA. It expedited the adoption of this piece of legislation, with the relevant changes having entered into force on 1 March 2019.

1.5 Information Sharing Organisations and Government Cybersecurity Assistance

Firstly, the FDPA does not provide an official role for NGOs and SROs. Such organisations would not, for example, have a right to bring a civil claim against a company perceived to be in breach of privacy laws. However, there are a number of organisations that promote privacy, including several consumer protection organisations, though they do not perform these tasks on the basis of a legal mandate. Furthermore, NGOs and SROs may request the FDPIC to open investigations if a suspected privacy breach is capable of affecting a large number of persons (ie, a system error) and in limited additional cases.

The NCSC is the key official actor in the cybersecurity area (see **1.2 Regulators**). GovCERT.ch, whose parent organisation is the NCSC, is the Computer Emergency Response Team (CERT) for Switzerland. Its tasks comprise the support of the critical IT infrastructure in Switzerland in dealing with cyberthreats. It maintains close relationships with other CERT organisations, thereby seeking to promote the exchange of cyberthreat-related information. Furthermore, the FDPIC retains strong prerogatives given the absence of stand-alone cybersecurity legislation.

Given the federal system in Switzerland, it should also be borne in mind that other cantonal or inter-cantonal bodies serve a purpose of information sharing. This is notably the case of the inter-cantonal Swiss Criminality Prevention Service (or SKP PSC, under its German or French and Italian-language acronym). This service seeks to facilitate inter-cantonal police coordination as well as crime prevention measures.

As mentioned above, the FDPIC retains a central role in the area of cybersecurity. The FDPA grants the FDPIC certain enforcement powers (see **1.3 Administration and Enforcement Process**).

FINMA is the competent authority in the banking and financial sectors. As part of its statutory mission and in the course of supervising regulated financial entities, FINMA may also request compliance with applicable data protection and data security regulations.

OFCOM is the responsible federal office for the proper implementation of the legal and technical requirements in the communications realm and plays a particularly important role in the area of telecommunications. In the area of unfair

competition, the State Secretariat for Economic Affairs (SECO) acts for the Swiss Confederation in civil and criminal proceedings if matters of public interest are at stake.

1.6 System Characteristics

The prior version of the FDPA (still in effect until entry into force of the revised FDPA on 1 September 2023) qualified legal and natural persons as data subjects, thereby protecting the personal data of legal entities. This specificity was (and remains, until 1 September 2023) at odds with the GDPR and numerous other foreign laws.

Moreover, Switzerland has avoided any ad hoc cybersecurity legislation, rather following sector-specific legislating efforts, and cybersecurity remains fundamentally closely tied to the area of data protection. Lastly, the Swiss legislator has historically defended a so-called “technologically neutral” approach. This means that Swiss laws only seldom address a specific technology. This avoids any lag between technological evolution and the legal landscape and makes Swiss legislation more resilient over time. However, it does come with the drawback that the legislation is not always sufficiently precise, thus resulting in enforcement uncertainty.

1.7 Key Developments

The most important development is the entry into force of the FDPA on 1 September 2023.

The Swiss government’s efforts to bolster and centralise cybersecurity and cyberdefence activities are also a promising and ongoing development (see **1.5 Information Sharing Organisations and Government Cybersecurity Assistance** concerning the National Cyber Security Centre). In that respect, many commentators, including the NCSC itself, have been sounding the alarm as it appears that Swiss companies as well as

public bodies (often on the municipal level) have not been taking cyberthreats seriously enough.

In addition, in December 2019, the government announced that it was considering introducing a general duty on operators of critical infrastructures to notify cyber-attacks. After various parliamentary discussions, this reporting obligation should be included in the Information Security Act (ISA; see **1.1 Laws**).

Public attention remains high. This stems from the stream of data breaches locally and internationally, the increased awareness around data protection worldwide, but also results from some cybersecurity considerations affecting national security. In this latter category, the war in Ukraine and the international geo-political situation, combined with the roll-out of next generation technologies, especially 5G networks, have led to a heightened awareness of cyberthreats.

It is still too early to foresee any long-term consequences of this for the Swiss legal and regulatory landscape, though it will likely lead to questioning Switzerland's international policy in regard to cybersecurity, cyber-espionage and international co-operation.

1.8 Significant Pending Changes, Hot Topics and Issues

See **1.7 Key Developments**.

2. Key Laws and Regulators at National and Subnational Levels

2.1 Key Laws

See **1.1 Laws**. The only truly overarching body of laws is the federal legislation on data protection, namely the FDPA and its implementing ordinances, in particular the FDPO. The FDPA and

the FDPO contain provisions on data security. The Swiss legislator relies on a technologically neutral approach, with the result that these rules on data security remain rather abstract and do not refer to any specific technology, or any specific standard or technical requirement.

So far, and in the foreseeable future, Parliament will not be removing data security from the data protection legislation and will not draft any standalone cybersecurity act. Consequently, data protection legislation should remain at the centre of everyone's cybersecurity considerations and the FDPIC will play an important role going forward (which role is upheld and bolstered with the revised FDPA discussed herein – see **1.3 Administration and Enforcement Process**). Moreover, under the FDPA, an intentional failure to implement technical and organisational measures determined as a minimum standard by the Swiss Federal Council in the FDPO will be liable to a fine against the responsible individuals of up to CHF250,000.

The TCA, and its surrounding ordinances and technical guidelines, includes a notification duty to OFCOM in case of security incidents and, more generally, contains requirements governing the security and the availability of telecommunications services and networks.

The FinMia is a modern law regulating the operation of the financial market infrastructures. It is notable as it takes into account the dependency of said infrastructures on information technology and the ensuing cyber-risks. It seeks to ensure that all relevant actors have robust and resilient systems that permit business continuity and data integrity. As mentioned above, FINMA is essential to the proper implementation of the FinMia.

2.2 Regulators

For the data protection regulator, the FDPIC, see **2.4 Data Protection Authorities or Privacy Regulators**. In addition, the Federal Office of Communications (OFCOM), acting under the supervisory oversight of the Federal Communications Commission (ComCom), is the regulator in charge of the telecommunications and information society sectors. OFCOM plays a role in the area of cybersecurity as telecommunications legislation contains rules on telecommunications network security and availability and telecommunications secrecy, both of which may be a concern from a cyber-risk standpoint. OFCOM issues intermittent technical regulations relating to the security and availability of telecommunications services and infrastructures.

Moreover, there is a duty to notify OFCOM regarding issues with telecommunications networks that affect a significant number of users.

In addition, the following authorities may also be competent, albeit indirectly, in the cybersecurity area:

- FINMA, in the financial sector;
- the Federal Office of Civil Aviation is competent in the case of safety-related data breaches in the aviation sector;
- the Federal Nuclear Safety Inspectorate, whose competence is given in case of sector-related data breaches;
- the Federal Department of the Environment, Transport, Energy and Communications, especially in regard to the national railway industry.

2.3 Over-Archiving Cybersecurity Agency

See **1.5 Information Sharing Organisations and Government Cybersecurity Assistance**.

The National Cyber Security Centre's (NCSC) predecessor, MELANI, played a helpful role as an information sharing platform and demonstrated the need for an increased governmental support to the area of cybersecurity. The NCSC is also competent to request the blocking of “.ch” and “.swiss” top-level domains if these are suspected of being used for cybercrime purposes (such as malware distribution and phishing activities).

Given the ongoing focus surrounding digitalisation, the protection of privacy and cybersecurity concerns, Switzerland is currently at a promising turning point in its cybersecurity practice on a federal level. This strengthening of the federal government's cybersecurity activities also meets a growing public need for more potent cyber-risk mitigation measures.

2.4 Data Protection Authorities or Privacy Regulators

The FDPIC, as mentioned in **1.2 Regulators**, plays a key role in the area of cybersecurity. As of 1 September 2023, the FDPIC will be able to investigate virtually any breach of data protection regulations, including if a mandatory notification to the FDPIC has not been made.

2.5 Financial or Other Sectoral Regulators

FINMA, as the financial markets supervisory authority, frequently adopts and adapts various circulars and notices. In particular, FINMA Circular 2008/21 and its upcoming replacement (entry into effect on 1 January 2024) Circular 2023/01 on the Operational Risks (and Resilience) at Banks is central to all banks' cybersecurity practices as it lays out principles and guidelines on proper risk management surrounding client-identifying data (CID). FINMA Circular 2018/3 on Outsourcing by Banks and Insurers is another essential text as it contains rules on the security

of data in an outsourcing context. Both these FINMA documents were recently lightly revised (taking into account the needs and limitations of small banks), the latest versions having entered into force on 1 January 2020.

2.6 Other Relevant Regulators and Agencies

See 2.2 Regulators.

3. Key Frameworks

3.1 De Jure or De Facto Standards

De jure, there is no obligation to abide by any particular technical standards. This is in no small part the result of Switzerland's technologically neutral approach. In practice, however, companies regularly look to the international standards as a benchmark or as a best practice requirement. This is common in the financial sector, for instance, and is also in line with the requirements of the FDPA as one can presume – as a rule of thumb – that compliance with the international standards, such as the ISO 27001 standards, would provide shelter from data security concerns under the FDPA. Moreover, the revised FDPO will likely introduce minimum standards for technical and organisational measures.

In addition, the FDPA allows the certification of data processing systems or programs as well as private persons or federal bodies that process personal data. This certification, though extremely rare in practice, in effect requires compliance with ISO 27001 as a prerequisite. The reliance on certification mechanisms is expected to gain more traction with the advent of the revised FDPA, which looks to promote such approaches.

3.2 Consensus or Commonly Applied Framework

There is no “reasonable security” test in Switzerland, nor any framework applied in that respect.

3.3 Legal Requirements and Specific Required Security Practices

The FDPA contain a reference to “adequate technical and organisational measures” to protect personal data, though this is generally understood as a reference to the use of state-of-the-art technologies, as further detailed in the FDPO. These measures must moreover “enable the avoidance of data security breaches”.

The FDPO sets out base technical and organisational measures as follows:

- general measures imposed on anyone processing personal data – these measures include protection against accidental or unauthorised destruction, accidental loss, technical faults, forgery, unlawful copying or alteration;
- special measures such as entrance control (to premises containing personal data), personal data carrier control, control of transport, disclosure, storage, usage, access and input;
- the maintenance of records of any automated processing of sensitive personal data or personality profiles (with a one-year retention period);
- a processing policy in certain cases of automated data files, namely when the processing concerns sensitive personal data or high-risk personality profiles.

In the financial sector, FINMA Circular 2018/3 on Outsourcing and FINMA Circular 2023/01 Operational Risks (and Resilience) – Banks (entry into force on 1 January 2024, until which date the previous version Circular 2008/21 remains

in effect), call for the targeted undertakings to ensure proper resilience and business continuity, as well as adequate incident management plans.

Outsourcing, as well as the use of cloud services, is broadly permitted, though the provider must ensure adequate data security. To that effect, many cloud service providers have sought data security and cybersecurity certifications, though whether they in practice implement proper cybersecurity practices is often difficult for the clients of such services to ascertain. In addition, the parties involved in outsourcing or cloud services may have to implement additional safeguards in case of cross-border disclosures of personal data.

3.4 Key Multinational Relationships

In its 2018–22 national strategy for the protection of Switzerland against cyber-risks, the government stressed the value of effective international co-operation and networking. This strengthening of the international co-operation remains a work in progress and a strategic priority for the government.

That said, Switzerland has been involved with or appears to closely follow the standardisation work internationally, among others with the UN World Summit on the Information Society (WSIS), the International Telecommunications Union (ITU), plus the OECD's and the WEF's work on improving digital security.

As a side note, Geneva has been emerging as a hub for internet governance. For instance, the Geneva Internet Platform, which is an initiative of the Swiss authorities, positions itself as a centre for digital policy debates around many ICT topics, including cybersecurity. It serves permanent missions based in Geneva and supports

Geneva-based institutions in their digital policy activities.

4. Key Affirmative Security Requirements

4.1 Personal Data

Under the FDPA and FDPO, there is no general reporting obligation, nor is there an affirmative security requirement. In addition, there is no obligation to notify the data subjects themselves, though arguably controllers would have to do this based on the principles of good faith and transparency, if not under any contractual obligation to do so. There may nonetheless be a public reporting duty, also arising from such principles of good faith and transparency, if it appears unfeasible or unreasonable to reach out to each data subject individually.

In any case, reporting of cyber incidents to the NCSC is well-advised and helps disseminate information about potential cyber-risks across the industry.

The FDPA imposes reporting requirements on controllers and processors. Controllers will have to report to the FDPIC any data breaches resulting in high risks for the rights and freedoms of the data subjects. Controllers will also inform the data subject if this is necessary for the protection of the data subject or if the FDPIC so requests (some limitations do, however, apply). A processor shall notify the controller as soon as possible of any data security breach. In addition, the Swiss Federal Council (the federal executive arm) initiated, in December 2020, steps towards introducing a breach notification obligation in cases of cybersecurity incidents affecting critical infrastructures, which are expected to enter

into force in the course of 2023 (see **1.7 Key Developments**).

4.2 Material Business Data and Material Non-public Information

At the time of writing, there are no specific affirmative security requirements for material business data and material non-public information. In any case, as noted in **4.1 Personal Data**, reporting of cyber incidents to the NCSC is well-advised and helps disseminate information about potential cyber-risks across the industry.

4.3 Critical Infrastructure, Networks, Systems

As mentioned in **4.1 Personal Data**, in December 2020 the government initiated steps that may lead to a breach notification obligation in cases of cybersecurity incidents affecting critical infrastructures. Moreover, the Federal Office for National Economic Supply (FONES) published a minimum ICT standard document as well as an ICT self-assessment tool directed at operators of critical infrastructures. This document rests, in part, on the requirements of the quite ubiquitous NIST Framework to which it refers.

4.4 Denial of Service Attacks

Denial of service (or DoS) attacks remain an ongoing threat, often leading – especially in the form of so-called “distributed DoS, DDoS” – to the total incapacitation of the victim’s IT systems and network. The NCSC issued guidelines on recommended preventive measures and countermeasures to address DDoS attacks. The NCSC is a good first contact point in case of DoS attacks.

4.5 Internet of Things (IoT), Software, Supply Chain, Other Data or Systems

In the financial and banking sector, FINMA Circular 2008/21 Operational Risks at Banks and its

replacement Circular 2023/01 contain a notification duty in certain cases of data breach. This Circular provides that the banks must have a clear communication strategy in case of serious incidents pertaining to client-identifying data (CID); this communication strategy must specify when it is necessary to notify FINMA, criminal prosecution authorities, the clients concerned and the media.

There has been little specific legislative effort directed at IoT and supply chain actors. This mostly relates to Switzerland’s technologically neutral approach to legislative action. Therefore, the general requirements under the FDPA in terms of data security play a predominant role, though sector-specific rules may come into play as well. That said, 1 January 2023 updates to telecommunications legislation brought about, in particular, increased network security requirements, especially in the form of reinforced anti-piracy and anti-tampering mechanisms to handle malicious activities; in addition, operators of 5G networks and services that operate on these networks have to implement an information security management system.

4.6 Ransomware

According to the National Cyber Security Centre’s (NCSC) semi-annual report 2022/I, all industries are affected by ransomware, which continues to be the greatest cyberthreat in Switzerland. For instance, one of the more significant cases in 2022 occurred in the education sector where the University of Neuchâtel was the target of a ransomware attack. Some municipalities were also victims of cyber-attacks.

Currently, there are no payment prohibitions, though victims of ransomware are as a general practical rule well-advised not to pay out any ransom money. Moreover, the FDPA provides an

obligation to report data security breaches to the FDPIC, which can be relevant in the ransomware field.

Reporting and liaising with the NCSC, as well as the filing of a criminal complaint, are highly recommended but not mandatory.

5. Data Breach or Cybersecurity Event Reporting and Notification

5.1 Definition of Data Security Incident, Breach or Cybersecurity Event

The FDPA imposes breach notification duties, when the breach is likely to result in a high risk to the personality or fundamental rights of the data subject. The communication must be addressed to the FDPIC as soon as feasible. The communication must contain an indication of the nature of the breach, the consequences and the measures taken or envisaged.

As previously mentioned, a reporting obligation in case of data security incidents affecting critical infrastructures is also expected (in the ISA) in the course of 2023.

Sectoral rules and regulations may still come into play. This is notably the case in the banking sector, where FINMA Circular 2008/21 (and its replacement, Circular 2023/01) contains wording on reporting and external communication of data security incidents.

5.2 Data Elements Covered

See **5.1 Definition of Data Security Incident, Breach or Cybersecurity Event**. In the banking sector, the data covered is CID (client-identifying data).

5.3 Systems Covered

There are no specific systems covered given the fact that the Swiss legislator typically opts for a technologically neutral approach thereby eschewing any discussion around a specific technology (although exceptions exist).

5.4 Security Requirements for Medical Devices

There are no specific cybersecurity and data breach notification rules pertaining to medical devices. However, Swissmedic, the competent sectorial authority, ensures that it makes the general public aware of health risks arising from medical devices.

5.5 Security Requirements for Industrial Control Systems (and SCADA)

There are no specific cybersecurity and data breach notification rules pertaining to industrial control systems and SCADA.

5.6 Security Requirements for IoT

There are no specific cybersecurity and data breach notification rules pertaining to IoT. However, various authorities serve as valuable contact points. In particular, the FDPIC and the NCSC play an important role – the former for matters pertaining to data protection and data security, the latter for any voluntary notification of a cyber incident.

Security requirements around IoT are also a priority for the government, which mentioned in its Digital Switzerland Strategy (see **1.1 Laws**) the need for the industry to implement state-of-the-art cybersecurity measures to accompany the growth of IoT on the Swiss market.

5.7 Requirements for Secure Software Development

There are no specific mandatory requirements pertaining to security software life cycle, certifications, patching or the disclosure of vulnerabilities. This is mainly due to the technologically neutral approach of Swiss legislation. However, duties to patch faulty security software or disclosure vulnerabilities may arise from the general principles of data protection legislation and such topics could therefore call for a case-specific assessment. In addition, certifications may start to play a bigger role under the revised FDPA.

5.8 Reporting Triggers

See 5.1 Definition of Data Security Incident, Breach or Cybersecurity Event.

5.9 “Risk of Harm” Thresholds or Standards

There is currently no “risk of harm” or similar threshold applicable in Switzerland.

6. Ability to Monitor Networks for Cybersecurity

6.1 Cybersecurity Defensive Measures

Swiss law offers the competent authorities certain means to monitor telecommunications, including emails and other information. From a cybersecurity standpoint, the Federal Act on the Intelligence Services (IntelSA) of 25 September 2015 gives the Swiss Federal Intelligence Services (FIS) broad powers to intercept and monitor communications and networks on grounds of national interests, including safeguarding democratic and constitutional principles as well as national and international security.

The IntelSA gives broad powers to the FIS, such as:

- covert surveillance of telecommunications, including telecommunications monitoring, recording and localisation of the targeted person;
- covert intrusion into computer systems and computer networks, even when located abroad; and
- recording of cross-border cable-based networks.

6.2 Intersection of Cybersecurity and Privacy or Data Protection

Unlike the USA, Switzerland protects personal information not (predominantly) as a privacy right, but rather as a matter of data protection. In other words, it is the (personal) data and not the individual that is the subject matter of Swiss data protection legislation.

It is a logical next step to treat cybersecurity as a subset of data protection. Indeed, as things currently stand, Swiss law assimilates cybersecurity and data security, which is a core principle of data protection (see above 1.1 Laws and 2.1 Key Laws). There is, therefore, a clear intersection between cybersecurity and data protection.

Going forward, despite the low likelihood of any ad hoc cybersecurity legislation, it is probable that the legislator and the authorities will progressively dissociate the notion of cybersecurity from the area of data protection. Indeed, the protection of personal data is only one among many concerns that cybersecurity must address. For instance, the need, for national security reasons, to protect critical infrastructures may be properly addressed through cybersecurity, though there is arguably little relevance of data protection leg-

isolation in that respect (ie, only to the extent that personal data comes into play).

Moreover, the report of the Swiss national strategy on the protection of Switzerland from cyber-risks (in both its 2012 and 2018 versions) considers that cybersecurity concerns the protection of information and communication infrastructures against attacks and disruptions, thereby showing a move away from a data protection environment to a more transversal understanding of the notion of cybersecurity.

7. Cyberthreat Information Sharing Arrangements

7.1 Required or Authorised Sharing of Cybersecurity Information

There is no general obligation to disclose cybersecurity information with the government. However, sharing of information is generally encouraged and the companies wishing to share the information can approach the bodies mentioned above (see **1.5 Information Sharing Organisations and Government Cybersecurity Assistance**) or their sectoral regulators, if any.

7.2 Voluntary Information Sharing Opportunities

See **1.5 Information Sharing Organisations and Government Cybersecurity Assistance**.

8. Significant Cybersecurity and Data Breach Regulatory Enforcement and Litigation

8.1 Regulatory Enforcement or Litigation

To date, there have been no leading or seminal decisions on the specific matter of cybersecurity.

8.2 Significant Audits, Investigations or Penalties

The most significant regulatory intervention came after several leaks in the banking sector during the post-2008 financial crisis. These data leaks were typically not the result of cyber-attacks, but they did lead to a reinforcement of the regulatory landscape; at that time, FINMA revised its Circular 2008/21 to bring increased attention to matters of data security and risk management.

8.3 Applicable Legal Standards

See **8.1 Regulatory Enforcement or Litigation**.

8.4 Significant Private Litigation

The matter is not relevant in this jurisdiction.

8.5 Class Actions

Though some basic collective action schemes do exist (with no immediate possibility for the claimants to move for damages), class actions are not permitted in Switzerland. There is some ongoing discussion to provide for class actions in civil proceedings. Proponents to such class actions received a setback in 2020, with the Swiss government deciding against including class actions in the revision of the Swiss Civil Procedure Code. However, in December 2021, the Federal Council launched a new process towards the introduction of class actions into the Swiss Civil Procedure Code which was subject to further parliamentary discussions in 2022 but which is now largely side-tracked. Class actions are a hotly debated topic, both as a matter of principle and regarding the specificities of such legal instrument, and it is uncertain whether, or in what form, they will make it into the law.

9. Cybersecurity Governance, Assessment and Resiliency

9.1 Corporate Governance Requirements

As already discussed, the Swiss legislator has a “technologically neutral” approach. This approach has several consequences: first, the FDPA does not provide for a specific obligation for the board of directors or any required certifications. Nonetheless, legal entities and their board of directors are responsible for compliance with the FDPA (eg, mandatory reporting) and the requirements of their specific sector if regulated, such as banking, insurance, and healthcare, to name a few.

10. Due Diligence

10.1 Processes and Issues

The legal due diligence exercise from a cybersecurity perspective should firstly address any general data protection law considerations, being specified that data security forms an integral part thereof. As a second step, it is necessary to ascertain whether the target of the due diligence process performed any IT systems resilience testing, such as penetration testing. The results of such testing should be disclosed and analysed. In addition, the target of the due diligence should properly document any data breach, and this should include any remedial steps taken and their outcome.

Given the eminently technical nature of cybersecurity measures, a technical due diligence, performed by IT cybersecurity auditors, is recommended. In any case, the contractual documentation around corporate transactions tends to be qualified regarding any cyber-risks.

10.2 Public Disclosure

There is no public disclosure obligation upon organisations to publish their cybersecurity risk profile or experience.

11. Insurance and Other Cybersecurity Issues

11.1 Further Considerations Regarding Cybersecurity Regulation

As a more general consideration, the policy discussions in Switzerland in recent years have shown that cybersecurity is progressively evolving from what once was a purely technical consideration into a mainstream legal topic. Cybersecurity is now not only part of the legal discussions surrounding data protection and data security (in various areas, such as finance and telecommunications), but is also a focus of other branches of the law, such as insurance law.

Moreover, the policy discussions on the federal level are not expected to lead, in the short term, to any overarching cybersecurity law. However, the topic remains highly dynamic and strongly dependent on international developments. Given Switzerland’s size and geographical location, prompt legal developments in the area of cybersecurity are a real possibility.

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Trends and Developments

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Swiss Stability and Innovation

Having avoided active participation in armed conflicts for more than 500 years, and having opted for neutrality, which was officially and internationally recognised in 1851, Switzerland has been able to provide its residents with strong and lasting security.

In addition, the international reputation of the country's polytechnic schools and universities have played a key role in creating and attracting world-leading innovators. In this context, it is no surprise that the First International Conference on the World-Wide Web in 1994 was held in Geneva; indeed, Tim Berners-Lee effectively invented the WWW in 1989 when working at CERN in Geneva.

In spite of a comparatively slow-moving legislative process – often involving rounds of parliamentary discussions and popular referendums – Switzerland was one of the early movers in the data protection realm, passing a forward-thinking law in the early 1990s which not only underlined the importance of personal data to the protection of individual personality rights, but also included data security considerations as an essential element of proper data protection. This has had a significant impact on cybersecurity matters in Switzerland, as data protection, and data security provisions more specifically, help to address many of today's cybersecurity legal concerns.

Given that Switzerland follows a technology-neutral legislative policy, Swiss data protection legislation has generally stood the test of time.

This is all the more impressive given the dizzying speed of technological evolution and the fact that this law does not simply provide a minimum guarantee of protection but indeed implements a holistic data protection approach. Nevertheless, the legislator overhauled data protection legislation, bringing many aspects closer in line with the EU's GDPR, as this will thereby facilitate international interactions and a more seamless implementation of homogeneous data protection practices for companies with cross-border activities. Entry into force of this revised legislation is scheduled for 1 September 2023.

Cybersecurity Initiatives

The above elements provided a fertile soil for Switzerland to become a hub of sorts in terms of cybersecurity and other related topics, such as internet governance. Indeed, some noteworthy actors include the following:

- Trust Valley – a private-public initiative looking to further enhance Switzerland's (and in particular the Lake Geneva region's) position as a hub for matters of digital trust and cybersecurity;
- the Geneva Internet Platform – operated by the DiploFoundation and the result of joint efforts of the Federal Department of Foreign Affairs (FDFA) and the Federal Office of Communications (OFCOM), this is a discussion centre for digital policy matters, including those pertaining to cybersecurity;
- the Geneva Dialogue on Responsible Behaviour in Cyberspace – also operated by the DiploFoundation – aims to be a platform for all relevant actors to discuss digital policy

towards an increase in security and stability in cyberspace.

In addition, higher education institutions often have specialised centres focusing, inter alia, on cybersecurity. This is, for instance, the case of the ETH Zurich with the Center for Security Studies and of the EPFL in Lausanne with the Center for Digital Trust (also known under the moniker C4DT). Under federal direction, there has been an alignment between academia, on the one hand, and national defence and the Swiss army, on the other, with the creation of the so-called Cyber-Defense Campus. Starting operations in 2019, this campus is present at the ETH Zurich and the EPFL in Lausanne and focuses on matters of national defence; it interacts with governmental, academic and industrial actors.

All the above initiatives are a testimony to the country's commitment to promoting good cybersecurity practices, and will likely ensure Switzerland's continued high international reputation in the years to come.

An Evolving National Strategy

The country has, however, struggled to keep up with the pace of technological evolution. In many cases, the same can be said of Swiss-based businesses, many of which are SMEs that, for a long time, tended to underestimate or mismanage – either through lack of clear information or of proper legal incentives – the risks posed by creeping cybersecurity threats. While, from a legal standpoint, cybersecurity has long been governed satisfactorily under data protection legislation (mainly), the federal government came to realise that there were several shortfalls. Firstly, the country was arguably lacking a clear policy in respect of cybersecurity and a discussion on the federal level appeared opportune. Secondly, the practical implementation

of adequate responses to cyber incidents and cyberthreats suffered from a kaleidoscope of federal and cantonal bodies, which hampered SMEs in their IT security processes.

The government responded to the above concerns in its 2018–22 national strategy for the protection of Switzerland against cyber-risks (NCS). This NCS looks to implement a wide set of measures during its four-year time span. A direct result of the NCS was the creation of a centralised cybersecurity body on the federal level, the National Cyber Security Centre, which not only centralises key tasks in the nationwide cybersecurity response, but also serves as a unified contact point for the various market actors (eg, SMEs).

The NCS has also had an impact on federal laws, particularly in bolstering governmental powers in respect of intelligence services. However, there is no overarching and interdisciplinary cybersecurity act and currently this is not on the government's agenda. Therefore, data protection legislation (as well as its sectoral ramifications, such as in the financial sector) often remains the starting point for any assessment of cybersecurity practices under Swiss law.

As mentioned above, Swiss data protection law has been revised and the new legislation enters into force on 1 September 2023. In terms of cybersecurity, the Federal Data Protection Act (FDPA), calls for state-of-the-art data security measures, without specifying specific technical standards. This is a deliberate approach from the legislator, who chose to maintain a future-proof technologically neutral philosophy. That being said, the implementing ordinances of the FDPA contain some more details on the subject of data security. Without setting out specific technical requirements, they do nevertheless

provide more detail as to proper data security practices.

The FDPA also brings about a duty to report data breaches. Indeed, data controllers will have to promptly notify the data protection authority of the more serious cases of data breaches (ie, those with a high risk for the data subjects' personality or fundamental rights). Data processors also have reporting obligations and therefore need to notify any data breaches to the controller. In certain cases, the controller needs to notify the affected data subjects themselves.

The government will also – in all likelihood – introduce a notification obligation for operators of critical infrastructures who are victims of a cyber-attack, in the course of 2023. In this area, there are currently no overarching rules imposing notification obligations on operators of critical infrastructures and, with the increase in the amount and the impact of cyber-attacks, a notification duty appears well-advised.

Importantly, the (revised) FDPA provides that individuals (not the legal entities, in contrast to the GDPR) who breached data security provisions and thereby failed to comply with the minimum requirements in that respect will face criminal law fines of up to CHF250,000. Given the potential risks for business managers, who will have a personal exposure, these fines are expected to work as a strong incentive for businesses to ensure state-of-the-art cybersecurity practices.

The Freedom/Security Equation

If the government and the private and institutional actors all participate in cultivating a dynamic and strong cybersecurity landscape, there have also been carve-outs. The typical example in this respect is the governmental powers in telecom-

munications surveillance legislation and intelligence services legislation. Indeed, under these laws, governmental authorities have powerful prerogatives to penetrate protected systems for national security purposes. This has led to some push-back as, in such cases, national security is weighed against individual freedom in a zero-sum equation.

Indeed, Swiss criminal prosecution authorities, as well as the Federal Intelligence Service, have extensive legal mandates when it comes to telecommunications surveillance. They can ask for live intercepts of telecommunications, obtain information, such as user identity and co-ordinates and communication metadata, and access the contents of a broad range of means of telecommunications, such as messaging apps. In certain cases, the telecoms services provider must remove the encryption (if any) that it put in place. The extensive governmental prerogatives under surveillance legislation leads to regular push-back and complaints from the general population and various privacy-minded groups.

Conclusion

The various trends described above can be summarised as follows.

Switzerland has long been an attractive centre for cybersecurity. It has, so far, successfully profited from its acquired knowledge in matters of security and technology, as well as its international role, to become an important player on the international level.

Due in part to its national cybersecurity strategy, the federal government has been strongly focused on practical implementations of its policy considerations. As these developments are relatively recent, or simply ongoing or upcoming, extrapolating any trend remains a difficult exer-

cise; however, most commentators see these developments as highly positive and a signal that the federal government is fully dedicated to reinforcing national cybersecurity practices.

Legislative action is not a major focus. It is expected that cybersecurity will progressively become a more common topic in various sectoral laws, but the general feeling remains that many considerations remain adequately addressed under data protection legislation.

There is tension between governmental powers in terms of national security and individual freedoms. The various laws in this respect were hotly debated (or subject to referendum) in the public space, which appears consistent with the situation in other countries. This also fits into the bigger debate about the processing of personal data, not only by private companies but also by governmental bodies, often unbeknownst to or not adequately understood by the individuals themselves. This was the case, for instance, with COVID-19-related mobile applications, such as digital COVID-19 vaccination passes and contact tracing applications. The data protection authority had to intervene on several occasions to ensure that these applications and their operators always met the requirements of data protection legislation. Such cases proved particularly important, and the authority's intervention most opportune, given the urgent demand for these applications, on the one hand, and the sensitive nature of the health information at stake, on the other.

These trends serve to underscore the multi-faceted nature of cybersecurity and its increasing relevance in all areas of society. Cybersecurity is likely to further gain in visibility at all levels over the coming years and remain an important and interesting topic of policy discussions, legislative action and practical implementation.

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