



Schweizerische Eidgenossenschaft  
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Préposé fédéral à la protection des données et à la transparence  
PFPDT

# **FDPIC and Transborder data flows**

**IAPP, Switzerland KnowledgeNet  
Chapter – CERN, Monday 4 November  
2019**

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# Summary

- I. Introduction
- II. Transborder data flows (Art. 6 FADP)
- III. Swiss-US Privacy Shield
- IV. Adequacy Decision
- V. Schrems II case



# I. Introduction

- We are more connected than ever!
- Authorized by international data protection legislation but the rules are different.
- Compatibility between different data protection systems would facilitate international flows of personal data, whether for commercial purposes or cooperation between public authorities.



## II. Transborder data flow (art. 6 FADP)

### ➤ Core provision = article 6 FADP:

- § 1: Personal data may not be transferred abroad if to do so might seriously jeopardise the personality rights of the data subject, in particular in cases when there is no legislation that can guarantee an appropriate level of protection.
- §2: If there is no legislation that can guarantee an appropriate (sufficient) protection, personal data can only be transferred abroad, if sufficient guarantees are provided.
- §3 the FPDIC must be kept informed about the level of guarantees provided in accordance with paragraph 2 a)



# Duty of care of the data controller

- Respect the **general principles** of data protection as defined in the FADP (general duty of care)
  - justify the data disclosure
  - make the planned data transfer known to the data subject in advance
  - ensure the proportionality and appropriateness of the data transfer
  - take the appropriate technical and organisational measures
- **Guarantee the adequacy of data protection** in the target country for each individual disclosure (special duty of care);
- **Inform the FDPIC** in accordance with Art. 6 para. 3 of the FADP (special duty of care).



# Appropriateness of protection in the target country ?

The data controller must verify that:

- the principles set out in EST108 and in the additional Protocol are reflected in both general and specific legal provisions, as well as in the legal practice of the host country.
  - In particular, care must be taken to ensure:
    - Compliance with the principles of the FADP
    - The preservation of the data subject's interests
    - That the right to information is respected,
    - The existence of an independent supervisory body.



# FDPIC's non-binding list of states

- The data controller may rely on the list of states published by the FDPIC (Art. 7 OFADP). It includes:
  - contracting parties to Convention ETS 108 and the additional Protocol, provided that they have complied with their obligations and are recognized adequate by the EU, or
  - according to the FDPIC, provide an adequate level of data protection.
- The list is kept constantly up to date and is **not definitive**.
- The FDPIC must take into account the adequacy decision taken by the EU COM:
  - Japan (additional safeguards for EU)?
  - Brexit?



# Brexit

- What is relevant is the level of protection offered by the UK data protection law.
- From a Swiss perspective, no indications that the UK will lose its status as a country with an adequate level of data protection as a result of the Brexit.
- UK has already announced that it will incorporate the GDPR into its domestic law.





# List

Etat: 1<sup>er</sup> mars 2019

## Océanie

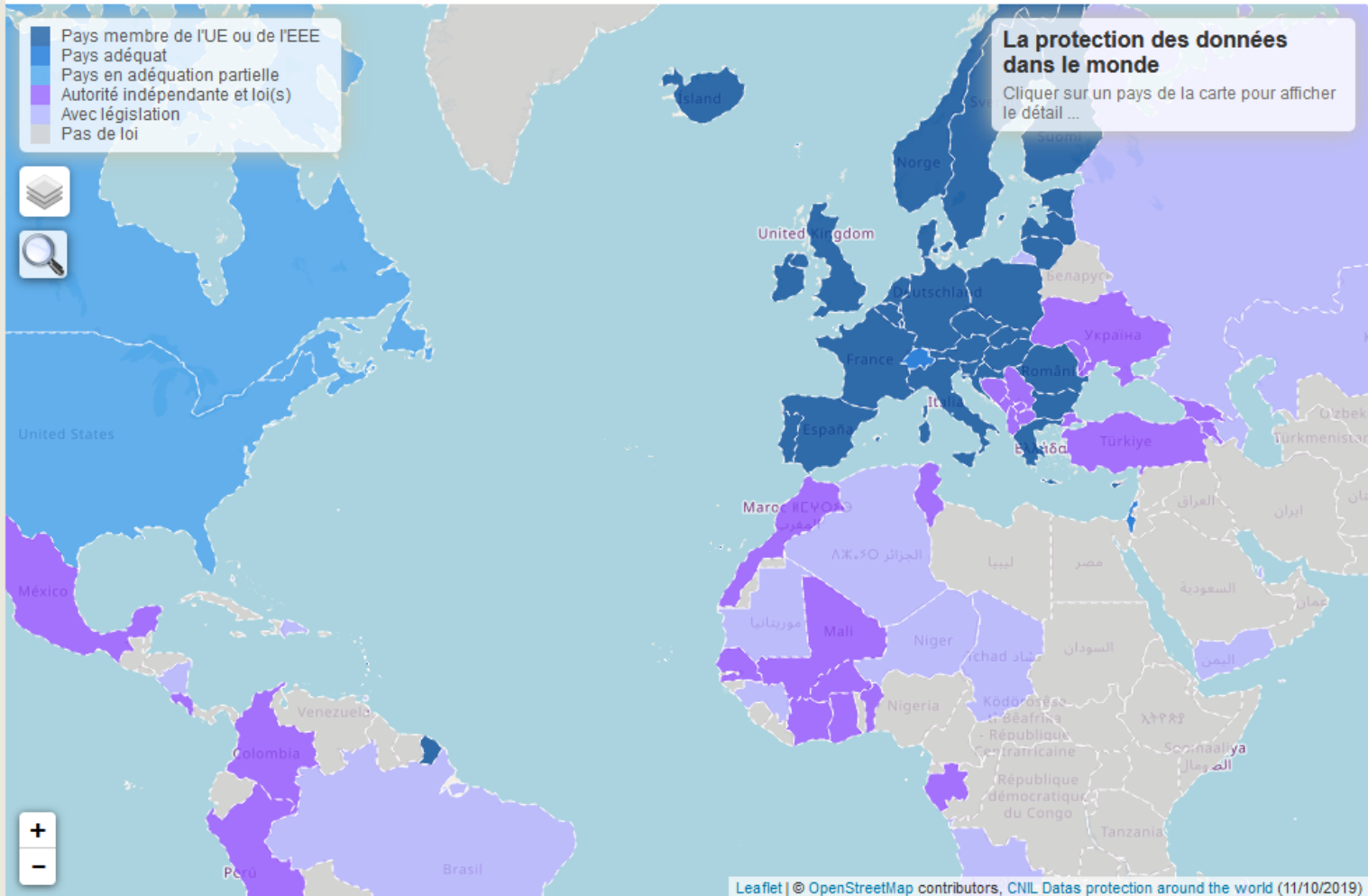
Australie		X	Avant de transférer des données, il convient de vérifier si le secteur concerné est couvert par la législation australienne régissant le droit à la vie	Federal Privacy Commissioner GPO Box 5218 Sydney NSW 2001 <a href="http://www.privacy.gov.au">www.privacy.gov.au</a>
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				privée, notamment si elle couvre les données des étrangers.	
Fidji		X			

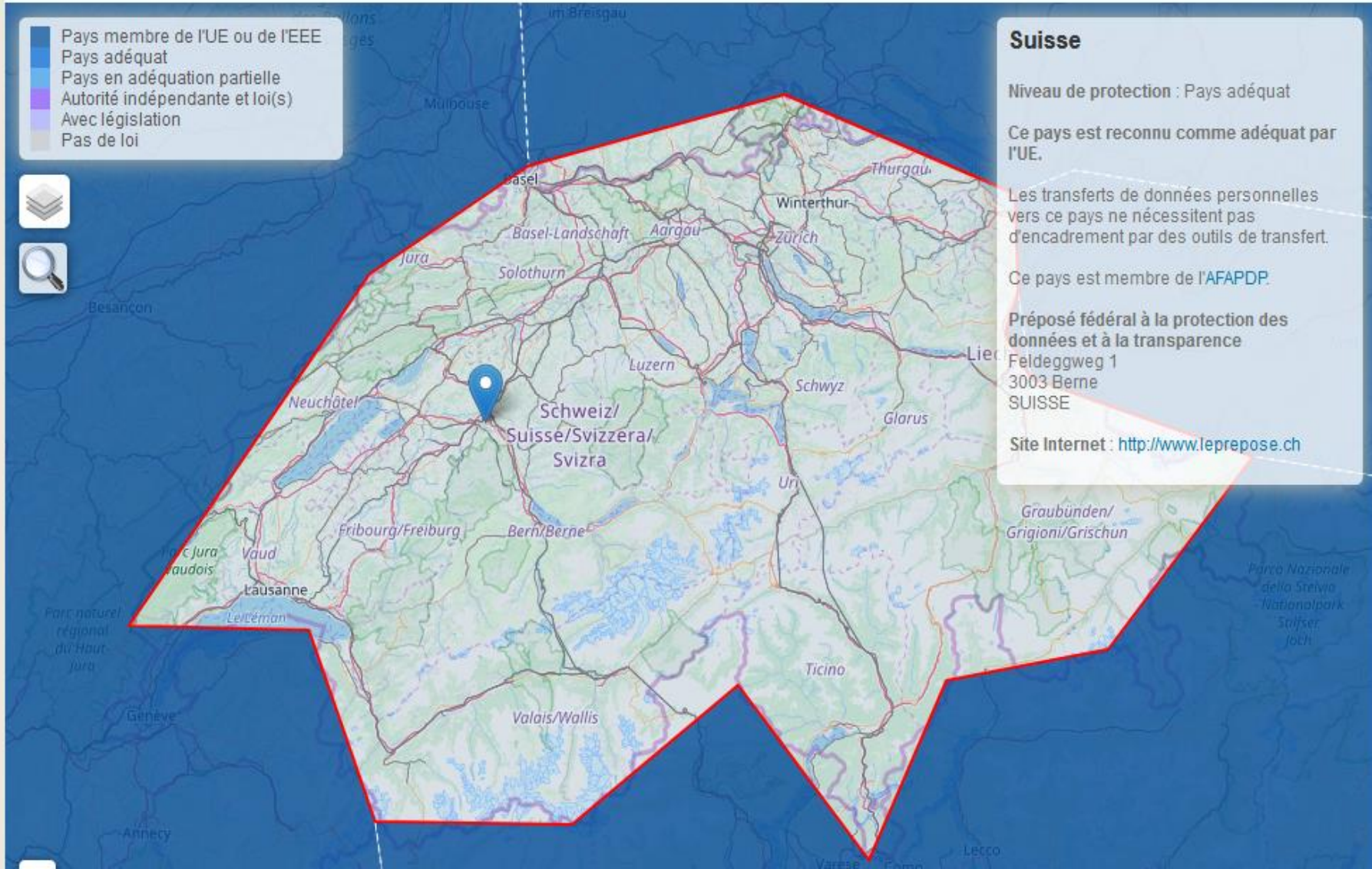


Cette carte vous permet de visualiser les différents niveaux de protection des données des pays dans le monde. Vous pouvez afficher les autorités de protection des données à l'aide de l'icône « calque » située en haut à gauche de la carte.

L'icône « loupe » vous permet de rechercher un pays et de le positionner sur la carte.



- Pays membre de l'UE ou de l'EEE
- Pays adéquat
- Pays en adéquation partielle
- Autorité indépendante et loi(s)
- Avec législation
- Pas de loi



**Suisse**

Niveau de protection : Pays adéquat

Ce pays est reconnu comme adéquat par l'UE.

Les transferts de données personnelles vers ce pays ne nécessitent pas d'encadrement par des outils de transfert.

Ce pays est membre de l'AFAPDP.

**Préposé fédéral à la protection des données et à la transparence**  
 Feldeggweg 1  
 3003 Berne  
 SUISSE

Site Internet : <http://www.leprepose.ch>



# What if the level is not appropriate? (I)

- “Non-adequate” country? **Appropriate safeguards!**
  
- Art. 6 a. **sufficient guarantees** are provided, particularly in the form of a **contractual agreement**:
  - Standard contractual clauses of the EU
  - Council of Europe’s model contract
  - FDPIC’s model contract
  
- Private persons or federal bodies may also apply other contractual agreements or guarantees.



# What if the level is not appropriate? (II)

- Art. 6 b: consent:
  - Limited to individual cases, i.e. a specific situation.
  - Voluntary
  - accepted only after the data subject has been provided with the appropriate information
  - explicit, if the disclosure concerns particularly sensitive personal data;
  - liable to immediate withdrawal at any time for any future data processing or transfer.



# What if the level is not appropriate? (III)

- Art. 6 c: for the conclusion or implementation of a contract;
- Art. 6 d: essential in the specific circumstances:
  - be justified by an overriding public interest or the requirements of legal proceedings
  - be essential for the purpose of satisfying that interest,
  - be rendered necessary by the specific case, i.e. only in a particular situation
- Art. 6 e: in order to protect the life or physical integrity ;
- Art. 6 f: the data subject has made the data freely available and has not expressly forbidden their processing;



# What if the level is not appropriate? (IV)

- Art. 6 g: the disclosure takes place within the same legal entity or company
  - Binding corporate rules (BCR)
  - FDPIC cannot approve BCR but...
  - If the BCRs are approved by an EU DPA, the FDPIC recognize them.



# When must the FDPIC be informed ?

- Data transfers covered by a contract or by internal company data protection rules;
- In the form of a copy of the guarantees agreed with the recipient;
- Before the data are transferred abroad;
- Non-compliance with the duty to inform is a criminal offence!





## III. CH-US Privacy Shield

- USA do not have an adequate data protection level  
→ Safe Harbor (ruled invalid 2015 by ECJ).
- **Self-certification mechanism** for companies established in the United States:
  - Must be subject to the control and enforcement FTC or DoT
  - ≠ No profit, banks, insurance companies...
- Swiss-US Privacy Shield went into effect in **April 2017**.
- About 3000 certified companies.



# III. CH-US Privacy Shield

- The Framework includes:
  - **strong data protection obligations on companies receiving personal data from the CH;**
  - safeguards on US government access to data;
  - effective protection and redress for individuals;
  - an annual joint review by CH and US to monitor the correct application of the arrangement:
    - 2nd review in September 2019 in Washington

[ACTIVE](#) [INACTIVE](#)[Advanced](#)**10000ft**

Seattle, Washington

● Active

Framework

EU-U.S. Privacy Shield  
Swiss-U.S. Privacy Shield

Covered Data ⓘ

HR, Non-HR

[🔗 Questions or Complaints](#)**1010data**

New York, New York

● Active**+ 7 Covered Entities**

Framework

EU-U.S. Privacy Shield  
Swiss-U.S. Privacy Shield

Covered Data ⓘ

Non-HR

[🔗 Questions or Complaints](#)



# III. CH-US PS in practice?

For US companies	For CH citizens
<ul style="list-style-type: none"><li>• Self-certify <b>annually</b> that they meet the requirements</li></ul>	<ul style="list-style-type: none"><li>• More transparency about transfers of personal data to the US</li></ul>
<ul style="list-style-type: none"><li>• Display privacy policy on their website</li></ul>	<ul style="list-style-type: none"><li>• stronger protection of personal data</li></ul>
<ul style="list-style-type: none"><li>• Reply promptly to any complaints</li></ul>	<ul style="list-style-type: none"><li>• Easier and cheaper redress possibilities in case of complaints</li></ul>
<ul style="list-style-type: none"><li>• If handling <b>human resources</b> data cooperate and comply with FDPIC</li></ul>	



## IV. Adequacy Decision

- Any controller wishing to transfer personal data outside the European Union must first ensure that the country of final destination offers an adequate level of protection.
  - Transfers based on an **adequacy decision**:
    - Based on the standard of "essential equivalence" CH has one
    - “transfers as if they took place within the EU itself.
    - without any further safeguard being necessary
    - Does not require prior approval from a supervisory authority



## IV. Adequacy Decision

- The European Commission has the power to determine, on the basis of article 45 GDPR whether a country outside the EU offers an adequate level of data protection.
- So far there are 13 «adequate» countries.
- Swiss adequacy decision = **26 July 2000.**
- Decisions adopted by the Commission on the basis of [Directive 95/46/EC](#) **shall remain in force** until amended, replaced or repealed .
- Adequacy decisions are **living documents!**
- Periodic review, at least every four year: **May 2020**



## IV. Adequacy Decision

- Recitals 103-105 GDPR:
  - The third country should offer guarantees ensuring an adequate level of protection **essentially equivalent** to that ensured within the Union.
- Art. 45 § 2 GDPR
  - a) the rule of law, respect for human rights and fundamental freedoms, relevant legislation;
  - b) the existence and effective functioning of one or more independent supervisory authorities;
  - c) the international commitments.
- WP 29: «**Adequacy Referential**» last revised 6 February 2018.



## IV. Swiss Adequacy Decision

- **Ongoing** review.
- **Problematic issues:**
  - Ongoing FADP revision = temporal gap;
  - ~~Convention 108: not yet signed;~~ :
    - 30 October 2019: FC (finally) signed the Protocol of Amendment
  - **Effective and dissuasive sanctions;**
  - Lack of response to individual requests.
- May 2020 the Com will have to amend, replace or repeal its decision.





# Revision of the Swiss Federal Act on Data Protection

- In September 2017 the Swiss Federal Council presented its total revision draft .
- March 2019: Schengen Federal Data Protection Act entered into force
- End of September 2019 the Swiss National Council has deliberated on the affair.
- Will now be discussed by the Political Commission of the Council of States in November 2019
- The Council of States will deliberate on the further adjustments either in the winter session 2019 or in the spring session 2020



# Schrems II case

- On July 9, 2019, the hearing in the so-called Schrems II case ([case C-311/18](#)):
- Sequel of the Schrems I case ([C-362/14](#)) which led to the invalidation of safe harbor ;
- May result in the invalidation of the SCC ;
- Advocate General's opinion scheduled to take place on 12 December 2019 ;
- Judgement early 2020.



# Thank you for your attention!

Questions?



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