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# Disruptive Technologies – Legal and Regulatory Aspects

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NKF

# Legal and Regulatory Framework in Switzerland

## ■ Legal and regulatory Framework:

- no laws or provisions relating specifically to disruptive technologies
- statutory provisions in general formulated in a technology-neutral manner
- some Circulars from some supervisory authorities: e.g. Swiss DPA, FINMA, etc. relating to topics such as digitalization and cloud

## ■ But a lot in the pipeline:

- Federal Council Strategy for a digital Switzerland
- Smart Switzerland Initiative
- Consultation on new Fintech Regulations

# Data and Technologies

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- (raw) data
- devices (sensors, gateways, ...)
- software
- telecommunications
- encryption / security services
- data warehouse / analytics platform services (cloud)
- ...

# Common Legal and Regulatory Risks

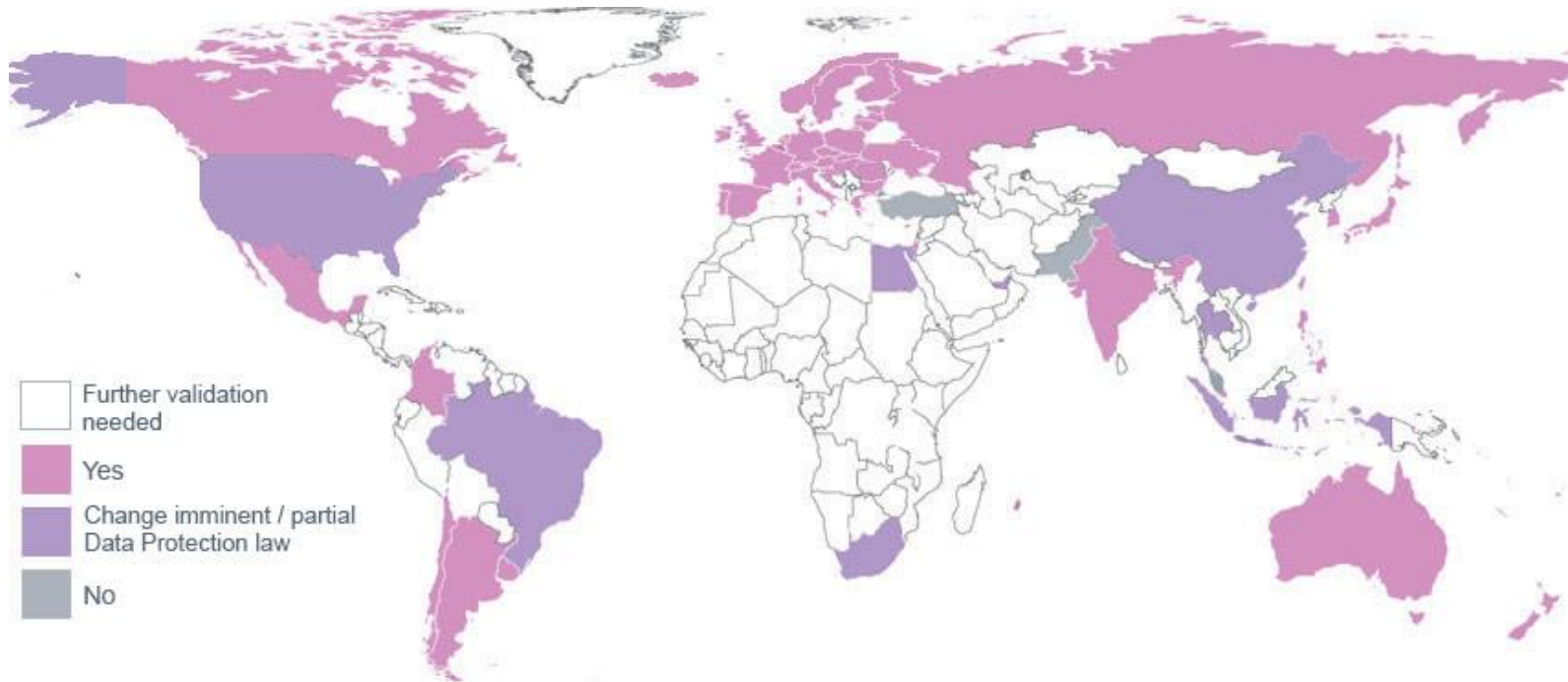
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- **data breach**
- **data privacy laws**
- data quality / errors
- **liability**
- device malfunctions / product liability
- IP / proprietary rights (data as an asset?)
- **regulatory hurdles**
- processing errors
- service quality
- software errors...

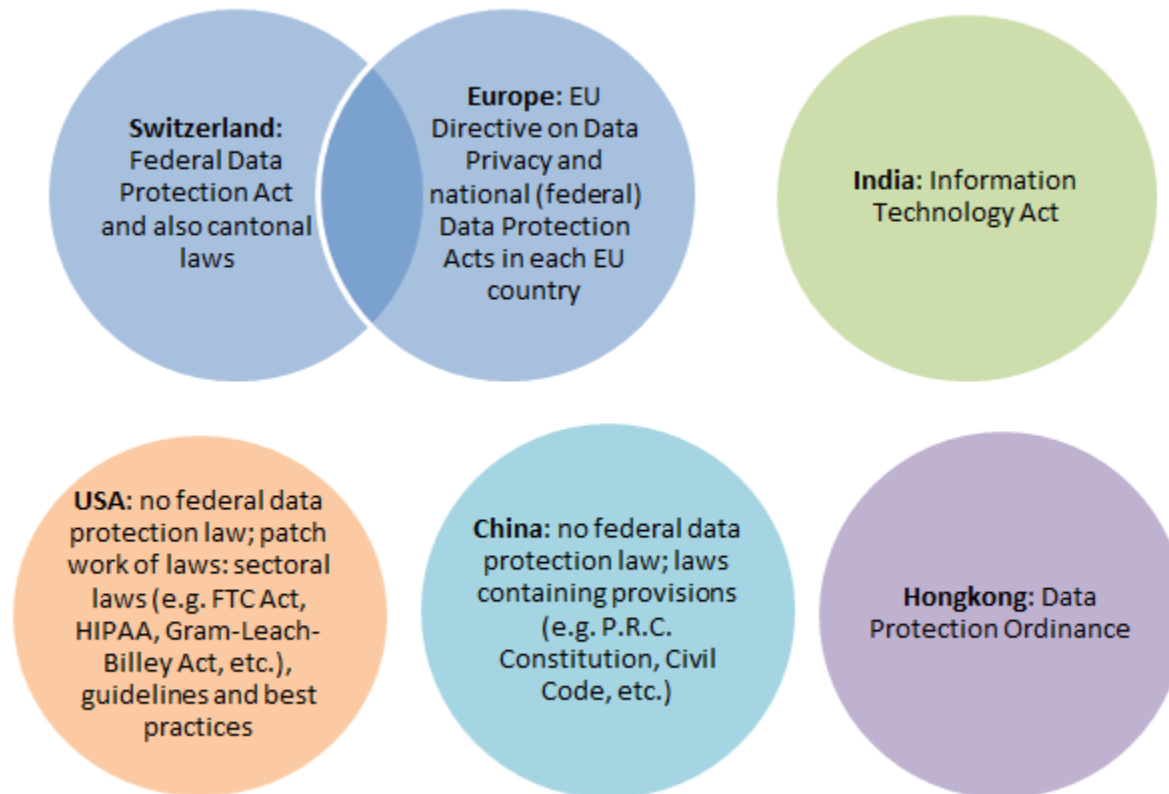
# Data Protection I

- What is data?
  - any kind of information
  - created by human or machine
  - no statutory protection per se for only data
- What is personal data?
  - Personal data is any data relating to an **identified** or **identifiable** person
  - Protection of personality rights and not of the data itself
  - Accordingly anonymous data is not considered personal data
  - Federal Act on Data Protection dated 19 June 1992 (DPA)
- Questions:
  - personal data or just any kind of other data (e.g. machine data)?
  - how can data be protected?
  - strict requirements relating to personal data

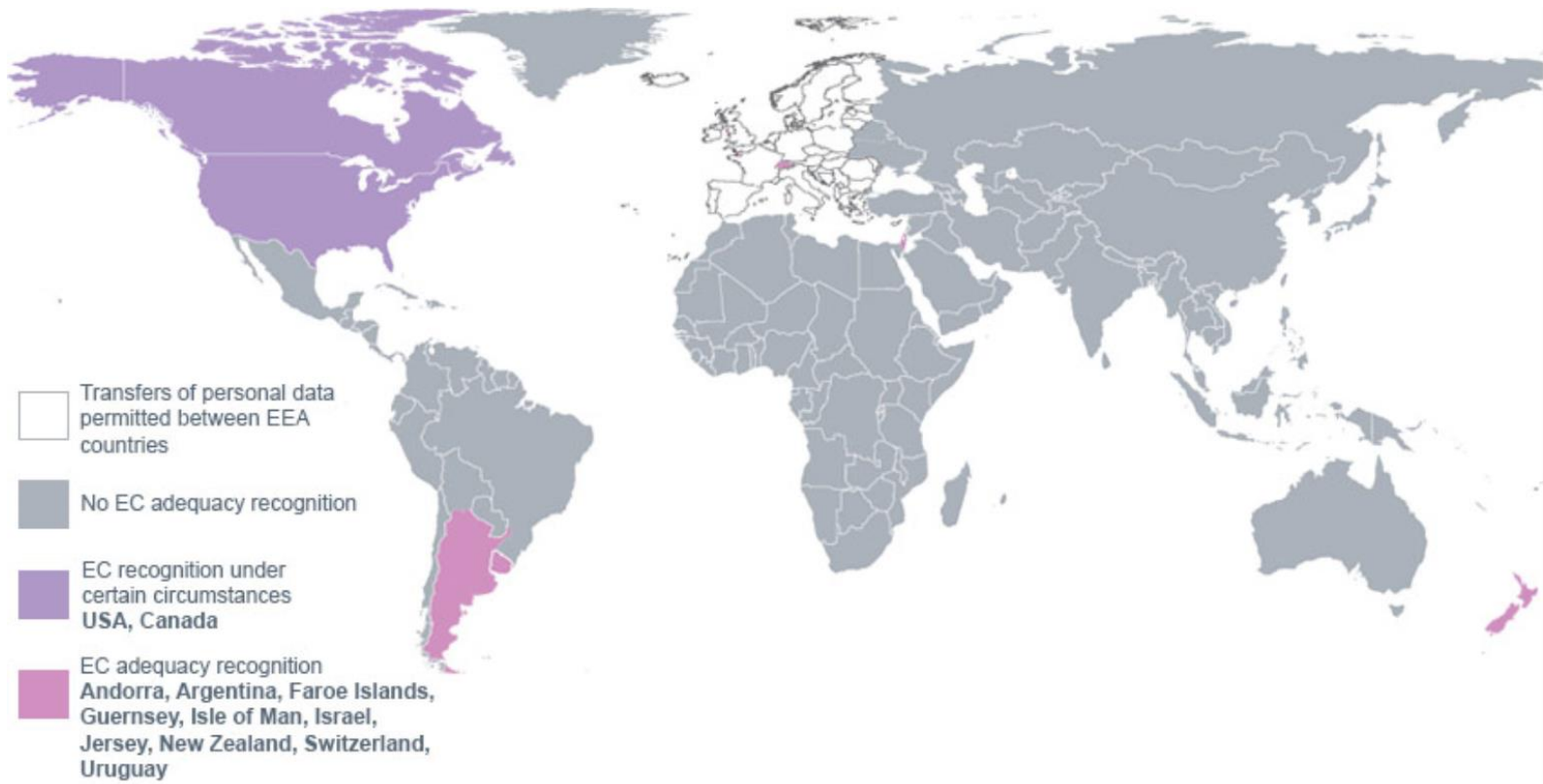
# Which Countries have Data Protection Laws?



# Different Data Protection Regimes Worldwide



# Countries with Appropriate Data Protection Level





# GDPR and Revision of Swiss Data Protection Act

- Stricter Rules and massively higher fines as from 25 May 2018:
  - Extraterritorial reach of the GDPR
  - Stronger enforcement powers
  - Transparency rules extended
  - New accountability obligations
  - Data protection by design and default
  - Stricter consent rules
  - Right of access, right to data portability, right on automated processing
  - Right to be forgotten
  - Data security measures
  - Massive fines: up to 20 million Euro or up to 4% of worldwide annual turnover
  - Swiss Data Protection Act in revision in order to achieve adequacy level of GDPR
  - In general importance of data protection compliance has massively increased

# Data Security – Data Breaches

- DDos Attacks and the like
- Predicted market growth will accentuate the issue
- Financial liability for lack of security
- What is appropriate level of data security?
  - no specific act
  - state of the art / appropriateness of data security systems
  - ISO / IEC 27k family of standards
  - other useful guidelines
- Data Breaches
  - new and stricter rules under the GDPR and Swiss law
  - ongoing confidentiality, integrity, availability and resilience
  - ability to restore
  - process for regular testing
  - data breach notification (72 hours)
  - also under new Swiss Data Protection duty to inform
  - massive fines if no notification

# Special Regulatory Questions

## ■ Hurdles for regulated sectors

- Finance (banks, insurances), Telecom, Pharma
- Audit Right
- Location of storage of data

## ■ Banking Sector

- Protection of Banking Secrecy
- FINMA Circular 2008/7 «Outsourcing Banks»
- FINMA Circular 2008/21 «Operational Risks – Banks»

## ■ Telecom Sector

- Ban for foreign providers to provide telco services in Switzerland
  - > Duty to comply with employment legislation and related standards/customs
  - > Duty to comply with lawful intercept and surveillance legislation

# Liability I

- Issues:
  - delegation of task from operators to technology
  - humans as controllers and supervisors
  - machine intelligence and autonomy
  - challenge of complexity
  - how to maintain control, prevent and mitigate failures
- Who is responsible in case something goes wrong?
  - Providers (software, hardware, services)?
  - Users?
  - Organisations (companies, agencies)?
- Who is liable to compensate for damages to persons and goods?
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  - Providers (software, hardware, services)?
  - Organisations (companies, agencies)?

# Liability II

- Legal framework:
  - Statutory provisions:
    - Product Safety Act and Product Liability Act
    - Code of Obligations – tort
  - Act on Technical Barriers on Trade
  - Standards and State of the Art
  - Criminal liability
  - Contractual liability:
    - Exclusion of liability?
    - Back-to-back liability provisions
    - Expand force majeure provisions: for hacking incidents etc.

# Conclusions

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- No specific law relating to disruptive technologies as such – but a lot of initiatives in the pipeline
- Swiss authorities are open minded
- Increase of investment in disruptive technologies by Swiss companies – e.g. Switzerland ranked no. 1 by EPO in filing for computer technology patents
- Data protection compliance – massively increased importance
- Decisive to remain competitive – implementation of cyber security response plan
- Regulatory compliance – close cooperation with Swiss supervisory authorities
- Implementation of contracts dealing with back to back liability
- The future is bright for Disruptive Technologies in Switzerland!