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Investigations by the FDPIC into violations of data protection regulations

Application of Articles 49-53 of the revised Data Protection Act

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Article 49

Overview

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I. Purpose of the provision

- 1 The FDPIC supervises the application of the federal data protection provisions (see Art. 4 para. 1 FADP), i.e. the Federal Data Protection Act (FADP), but also the other federal data protection regulations. Its supervisory activity also includes investigating violations of data protection regulations and, if necessary, ordering administrative measures to enforce these regulations (see Art. 49 ff. FADP).
- 2 Article 49 FADP governs the conditions under which the FDPIC must or may open an investigation (see para. 1 and 2) and its obligations towards persons who file a report and who are themselves affected by the potential violation of data protection regulations (see para. 4). Article 49 para. 3 includes a provision on the duty of the party to the proceedings to cooperate after an investigation is opened. Thematically it is closely linked to the FDPIC's powers to obtain information as set out under Article 50 FADP.
- 3 Owing to its fundamental importance, Article 49 FADP is the focal point of the FDPIC's supervisory activity. The provision should be viewed in light of the legislator's overarching goal in revising the federal data protection legislation of ensuring that Switzerland continues to have an appropriate level of data protection and that it complies with the binding requirements at European level, in other words under Directive (EU) 2016/680 for the Schengen area and in future the Council of Europe's Convention 108+. The FDPIC therefore has **new and more extensive investigation powers**, which he can exercise in relation to both federal bodies and private persons. Under Article 49 FADP, the FDPIC is **required** to open an investigation if there are sufficient indications that a data processing activity could violate data protection regulations,

unless the violation is of minor importance. Under Article 49 para. 4 FADP, the FDPIC has a duty to provide information about the steps taken in response and the result of any investigation to persons who file a report and who are themselves affected by the potential violation of data protection regulations (data subjects).

II. Opening an investigation (para. 1)

1. Reason for and purpose of the investigation¹

- 4 Under Article 49 para. 1 FADP, the FDPIC must open an investigation if there are sufficient indications that a data processing activity could violate data protection regulations. This may be done *ex officio* or in response to a report. The initial indications of a potential violation that may require a more in-depth investigation may therefore come from observations made by the FDPIC in the course of its statutory supervisory or advisory activity, or they may be completely or partially based on accounts from data subjects or third parties.
- 5 The investigation serves to **ascertain and establish the legally relevant facts of the case** and allows a legal assessment of whether the established facts do in fact constitute a violation of federal data protection regulations. If the investigation concludes that a violation of data protection regulations has occurred, the FDPIC has the power to order administrative measures under the conditions set out under Article 51 FADP (see also Art. 52 N 18).

2. Addressees and subject matter of the investigation

- 6 The addressees of the investigation may be federal bodies (see Art. 5 let. i FADP) or private persons (natural persons or legal entities). The investigation covers all subject matters to which the FADP or other (sector-specific) federal data protection regulations apply (see Art. 4 para. 1 FADP and the dispatch on the new FADP, p. 7017; re. Art. 27 old FADP BSK DSG-HUBER, Art. 27 N 5).
- 7 While the wording of Article 49 para. 1 FADP requires there to be a 'data processing activity' (see Art. 5 let. d FADP), this term should be understood in a broad sense. In this sense, an investigation can always be opened if administrative measures in accordance with Article 51 FADP may be ordered (see Art. 51 N 3 f on the individual categories of administrative measures). An investigation is therefore also permitted if there are sufficient indications that data controllers are failing to comply with the legal provisions or their obligations towards data subjects (see also ROSENTHAL, *Datenschutzgesetz*, p. 67), for example if the data controller does not notify the FDPIC or, if applicable, the data subjects in the event of a breach of data security as set out in Article 24 FADP (see Art. 51 para. 3 let. f FADP).

¹ See also LOBSIGER, p. 314.

3. *Timing and scope of the investigation*²

- 8 If there are sufficient indications of a violation of data protection regulations (see Art. 49 para. 1 FADP) and the other conditions for an investigation are met (see details below Art. 49 N 13), the FDPIC will open investigation proceedings. In order to prioritise its supervisory activities, the FDPIC has discretion as to when the investigation is opened and with regard to the scope and depth of the investigation to be conducted. As an independent supervisory authority, the FDPIC must exercise this free from outside influences. Consequently, the FDPIC it must not allow itself to be pressured into opening investigations either by authorities or by civil society organisations such as the media or interest groups.

4. *'Sufficient indications' of a violation of data protection regulations*

- 9 The conditions for opening an investigation are the same for both a federal body and a private person: there must merely be sufficient indications that a data processing activity could constitute a violation of data protection regulations (Art. 49 para. 1 FADP). The 'system error' threshold, whereby it was only possible to open an investigation in the private sector if the methods of processing were capable of breaching the privacy of larger numbers of persons (see Art. 29 para. 1 let. a old FADP and BSK DSG-HUBER, Art. 29 N 6 ff.), no longer applies under the revised FADP as it is not compatible with the requirements at European level (see KERN/EPINEY, p. 30). Convention 108+, which will become binding on Switzerland, and Directive (EU) 2016/280, which Switzerland implemented with the Schengen Data Protection Act (SDPA), do not provide for **any limitations on investigative powers** with respect to data controllers (see Art. 15 no. 2 let. a Convention 108+ and also dispatch on the new FADP, p. 7090; Art. 46 para. 1 let. i Directive (EU) 2016/680, implemented through Art. 22 SDPA, and also FOJ, Explanatory report on SDPA, p. 26).
- 10 While the draft revision of the FADP required the FDPIC to open an investigation if there are "indications" that a data processing activity could violate the data protection regulations (see Art. 43 para. 1 draft FADP), Article 49 para. 1 FADP now requires **'sufficient indications'** of such a violation. The National Council rejected a minority proposal whereby the FDPIC would only be allowed to open investigations on the basis of justified suspicion or a justified complaint and if there are clear indications that a data processing activity violates data protection regulations. Such a limitation of investigative powers would conflict with Article 15 para. 2 letter a of Convention 108+ (see National Council, 2019 autumn session, thirteenth meeting, 25.09.19, 9am, 17.059, AB 2019 N 1824). As already set out under the old FADP, the FDPIC may also investigate a case if there are only some indications that data protection regulations have been violated. In principle, however, the FDPIC is under no obligation to open an investigation if – on the basis of his own observations or information that he has received – he cannot rule out the possibility that a data processing activity has violated data protection regulations, but considers it unlikely.
- 11 There are thus 'sufficient indications' if there are grounds to assume firstly that there is a data processing activity and secondly that it could violate data protection regulations. It must be possible to assume with a **certain degree of probability** that there is a data processing activity that violates data protection regulations. In other words, not every vague hint that a breach may

² See also LOBSIGER, p. 314.

have occurred can justify a right or duty to investigate. State action must be in the public interest and must be proportionate (see Art. 5 para. 2 and Art. 36 para. 2 and 3 Cst.).

5. Informal preliminary enquiries³

- 12 The preliminary draft of the FADP made express provision in Article 41 para. 4 for the FDPIC to be able to make enquiries outside of investigation proceedings as to whether a private person or federal body is complying with the federal data protection regulations. If these enquiries resulted in indications of a violation of data protection regulations, the FDPIC could open an investigation (FOJ, Explanatory report preliminary draft, p. 79). However, the FADP that has come into force on 1 September 2023 does not contain an express provision for preliminary enquiries – like the FINMASA but in contrast to Article 26 CartA (see with regard to preliminary enquiries FINMA BSK FINMAG-ROTH PELLANDA/KOPP, Art. 30 N 4 ff.; BSK FINMAG-LEBRECHT, Art. 53 N 5 ff.).
- 13 However, the power to conduct preliminary enquiries already arises from the requirement to open an investigation if, and only if, there are sufficient indications of a violation of data protection regulations (see Art. 49 para. 1 FADP). Only if **all the conditions for an investigation** are met may an investigation be opened (see regarding preliminary enquiries under the old FADP Rosenthal/Jöhri-ROSENTHAL, Art. 29 N 13; BSK DSG-HUBER, Art. 29 N 20a). So preliminary enquiries are needed, for example, because it may be unclear whether the FDPIC is the competent body or who the subject of the investigation should be. It is also conceivable that during the preliminary enquiries, it becomes clear that an investigation is not needed, in particular because certain aspects of a potential violation can be rapidly resolved, or because, following an initial informal contact by the FDPIC, the person or body concerned has voluntarily put measures in place to ensure compliance with data protection regulations, or has requested advice on how to comply with these regulations (see Art. 58 para. 1 let. a FADP). In addition, it may be that, despite sufficient indications of a violation of data protection regulations, an investigation is not appropriate in a specific case because the violation is of minor importance (see Art. 49 para. 2 FADP and Art. 49 N 28 f.). Finally, in cases in which it is anticipated that it will require disproportionate administrative effort to prove a suspected violation and to restore legal compliance, the FDPIC will decide not to conduct or will have to prematurely abandon investigations, even in cases that are not of minor importance. In the digital sphere, data processing activities and projects to be assessed (e.g. apps) may be highly transient. In certain scenarios, it may therefore make more sense for the FDPIC to work initially with informal recommendations rather than opening a time-consuming administrative procedure to restore legal compliance.
- 14 The preliminary enquiry stage is characterised by its **informal nature**. Legal doctrine and case law classify preliminary enquiries as 'informal administrative actions' (see in connection with FINMAG BSK FINMAG-ROTH PELLANDA/KOPP, Art. 30 N 5; BSK FINMAG-LEBRECHT, Art. 53 N 7; Federal Supreme Court, 2C_1184/2013, 17.07.2014, E. 3.3; Federal Administrative Court, B-3844/2013, 7.11.2013, E. 1.4.2.3.1). Informal administrative actions are informal dealings between administrative authorities and private individuals, e.g. to establish mutual contact, and discuss matters and make preliminary enquiries (Federal Administrative Court, B-3844/2013, 7.11.2013, E. 1.4.2.3.1). However, as soon as the activities of an authority involve issuing a ruling, the

³ On the explanations below, see also LOBSIGER, p. 314.

objective of the activity is to bindingly modify the legal position of the person concerned (BVGer, B-3844/2013, 7.11.2013, E. 1.4.2.3.2).

- 15 According to UHLMANN, a procedure is not deemed administrative proceedings "if there is no glimmer of a ruling on the horizon" (UHLMANN, p. 4). The APA does not apply to the preliminary stages of an administrative procedure such as informal enquiries and similar because the objective is not to issue a ruling (Federal Supreme Court decision 146 V 38 E. 4.1; see KIENER/RÜTSCHKE/KUHN, margin no. 464). If the FDPIC starts with preliminary enquiries, it cannot yet assess whether an administrative measure in accordance with Article 51 FADP may need to be imposed on a private person or federal body. The enquiries merely serve to determine whether a specific situation needs to be looked at in more detail by means of an investigation, which may ultimately lead to an administrative measure and therefore to a ruling as defined under Article 5 APA. Consequently, **no administrative procedure** takes place in the case of preliminary enquiries and the APA in principle does not apply (see Art. 52 para. 1 FADP a contrario; Art. 52 N 3 f).
- 16 Preliminary enquiries involve obtaining more detailed information related to a potential violation of data protection regulations, not only from publicly-accessible sources, but also from the data controller itself, from data subjects or from third parties, such as consumer protection organisations (see with regard to Art. 53 FINMAG BSK FINMAG-LEBRECHT, Art. 53 N 5). At this stage, parties answer the FDPIC's questions on a voluntary basis. Unlike during an investigation (see Art. 49 para. 3 FADP), data controllers do not have a duty to cooperate and the criminal provisions in Article 60 para. 2 FADP do not apply (see also ROSENTHAL, Datenschutzgesetz, p. 67; in relation to the old FADP Rosenthal/Jöhri-ROSENTHAL, Art. 29 N 13). However, a refusal to cooperate voluntarily may prompt the FDPIC to require the data controller to cooperate by opening an investigation. If, during the preliminary enquiries, the data controller voluntarily produces convincing arguments that no violation of data protection regulations has occurred, an investigation will not generally be necessary. If, on the other hand, there are sufficient indications of a violation (see Art. 49 para. 1 FADP) and the other conditions for an investigation are met (see in detail Art. 49 N 13), the FDPIC will open one (see Art. 49 para. 1 and 2 FADP).

III. Report to the FDPIC (para. 1 and 4)

1. Reporting party and modalities of the report

- 17 The report to the FDPIC may either be filed by the data subject, i.e. a natural person whose personal data is being processed (see Art. 5 let. b FADP) or whose rights are violated, or by a third party (see also dispatch on new FADP, p. 7090). Third parties are typically the media, consumer protection organisations or lawyers, who in the course of their work become aware of a data processing activity that violates or may violate data protection regulations. If the reporting party does not wish to reveal their identity to the FDPIC, the report may be filed anonymously (see also dispatch on new FADP, p. 7179). However, in this case, the data subject who filed the report will not be informed about the steps taken in response and the result of any investigation in accordance with Article 49 para. 4 FADP.
- 18 The report should ideally be made via the FDPIC's online form, but can in principle be submitted in any form. There is no deadline for the report to be submitted. The reported facts should,

however, have occurred recently so that the FDPIC can impose appropriate administrative measures under Article 51 FADP if a violation of data protection regulations has indeed occurred. No fees are charged for handling a report (see Art. 59 FADP *a contrario*).

2. Legal nature of the report and legal status of the reporting party in general

- 19 According to the wording of the FADP and the materials, the reporting party does not have the rights of a party in the investigation proceedings; Article 52 para. 2 FADP states that only the federal body or private person against which or whom the investigation has been opened is a party (see dispatch on new FADP, p. 7090 and 7093). In this respect, the report to the FDPIC is similar to a **complaint to a supervisory authority** (for complaints to a supervisory authority in the federal government, see the general rules under Article 71 APA). Under the latter, the person filing the report merely initiates action to be taken against an authority, but it does not participate in these proceedings and thus does not have the status of a party, even if directly affected. A complaint to a supervisory authority is an informal legal remedy and a sub-category of the right of petition guaranteed under Article 33 Cst. It is designed to prompt the supervisory authority to take action which it would have had to take *ex officio* had it become aware of the suspected violation on its own (see in detail VOGEL, in: Auer et al., Art. 71 N 1, 3 and 5). The report to the FDPIC as defined under Article 49 FADP in principle has the same objective: to bring a situation to the FDPIC's attention, which may require an investigation to be opened, and therefore to support the FDPIC in its statutory supervisory activity (see Art. 4 para. 1 FADP).
- 20 In a complaint to a supervisory authority, the person filing the report has no right to have the merits of the complaint considered or to have the complaint dealt with (see CHAKSAD, p. 112, with further references). In accordance with established practice, and subject to any alternative legal regulations, the supervisory authority is not required to inform the reporting party as to whether the report is being considered or has been dealt with (see citation ZIBUNG, in: Waldmann/Weissenberger, Art. 71 N 33; regarding more recent opinions, according to which the reporting party – regardless of whether or not it was a data subject – is entitled to a response, see CHAKSAD, p. 112 f. and p. 137, and VOGEL, in: Auer et al., Art. 71 N 38). It is similar when a report is filed with the FDPIC: the law requires the FDPIC to open an investigation under certain conditions (see Art. 49 para. 1 and 2 FADP and in detail Art. 49 N 13); consequently, the FDPIC must examine the report concerned and check whether an investigation needs to be initiated. The lawmaker's intention is, however, that reporting parties who are **not** themselves **affected** by a violation of data protection regulations are not entitled to have the report handled, and the FDPIC is not required to notify them about the steps taken and the outcome of any investigation (see Art. 49 para. 4 FADP on the rights of data subjects; on the legal status of reporting parties who are data subjects, see Art. 49 N 21 ff.). In cases of general interest, the FDPIC will inform the public about its findings and rulings, based on Article 57 para. 2 FADP.

3. Legal status of a reporting party who is a data subject

- 21 Article 49 para. 4 FADP deals with the scenario in which a **data subject** submits a report to the FDPIC, i.e. a natural person whose personal data is being processed (Art. 5 let. b FADP) or whose rights are being violated. In this regard, Article 49 para. 4 stipulates that the FDPIC must notify the data subject about the steps taken in response to the report and the outcome of any investigation (see previously Art. 22 para. 4 SDPA). Similarly worded regulations are found in the

GDPR and Convention 108+ (for the Schengen area, see Directive (EU) 2016/680 and Art. 49 N 26):

- 22 Article 77 para. 1 of the **GDPR**, the General Data Protection Regulation, which is binding on EU countries, provides for a "right to lodge a complaint with a supervisory authority". Article 77 para. 2 of the GDPR sets out a duty to provide information, in other words an obligation on the part of the supervisory authority to inform the complainant on the progress and outcome of the complaint, including the possibility of a judicial remedy pursuant to Article 78 GDPR. Accordingly, the tasks of the supervisory authority include handling complaints, investigating the subject matter of complaints to the extent appropriate, and informing complainants of the progress and outcome of the investigation within a reasonable period (see Art. 57 para. 1 let. f GDPR).
- 23 **Convention 108+** of the Council of Europe, which Switzerland is set to ratify when the revised Data Protection Act comes into force, stipulates under Article 9 para. 1 letter g that every individual has the right to benefit from the assistance of a supervisory authority in exercising their rights under the Convention. In addition, Article 15 para. 4 of Convention 108+ states: "*Each competent supervisory authority shall deal with requests and complaints lodged by data subjects concerning their data protection rights and shall keep data subjects informed of progress.*" On the other hand, the Additional Protocol to the Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data regarding supervisory activity and transborder data flows of 8 November 2001 (SR 0.235.11) merely stipulates under Article 1 para. 2 letter b that each supervisory authority must hear claims lodged by any person concerning the protection of his/her rights and fundamental freedoms with regard to the processing of personal data.
- 24 Article 49 para. 4 FADP therefore gives rise to an **obligation prescribed by convention to deal with a report from a data subject** that goes beyond that of a usual complaint to a supervisory authority (see Art. 49 N 20 above). The FDPIC must therefore look into the report and consider the next steps to be taken in order to respond to a potential violation of data protection regulations. If he concludes that the facts of the case need to be examined in more detail by means of an investigation (see Art. 49 para. 1 and 2 FADP and for Art. 49 in detail, N 13 above), he conducts an investigation which – if he establishes that data protection regulations have been violated – may result in an administrative measure being imposed in terms of Article 51 FADP. Finally, there is an **obligation prescribed by convention to notify** the data subject who has filed the report about the steps taken and the outcome of any investigation.
- 25 However, the data subject who files a report with the FDPIC has no entitlement to have an investigation opened; an investigation is only opened if the FDPIC concludes in its preliminary enquiry that an investigation needs to be opened (see for more detail on Art. 49, N 13 above). In addition, the legislator assumes that the data subjects who filed the report have to exercise their rights by using the available legal remedies (dispatch on new FADP, p. 7090; see also the dispatch on the approval of the Protocol of 10 October 2018 on the amendment of the Convention for the Protection of Individuals with Regard to Automatic Processing of Personal Data, dated 6 December 2019, BBl 2020 565 ff., p. 591). According to the legal wording and the materials, data subjects do not have the status of parties in the investigation proceedings (see Art. 52 para. 2 FADP a contrario and dispatch on the new FADP, p. 7093; FOJ, Explanatory report SDPA, p. 28; FOJ, Explanatory report preliminary draft, p. 80). As they do not have party status, they do not have an interest worthy of protection in the opening of an investigation.

26 However, an exception to the above applies in the case of **administrative assistance between police authorities in the Schengen area**: under Article 349h para. 1 of the Swiss Criminal Code (SCC), if a data subject credibly demonstrates that an exchange of personal data concerning him or her could violate the provisions on the protection of personal data, he or she may request the FDPIC to open an investigation pursuant to Article 49 FADP. In accordance with para. 3 of this provision, the parties are the data subject and the federal body against which the investigation has been opened (see previously Art. 25 para. 2 SDPA and FOJ, Explanatory report SDPA, p. 28). According to the dispatch on the revised Data Protection Act, Articles 52 and 53 of Directive (EU) 2016/680, under which Schengen states have to provide for the right to lodge a complaint with a supervisory authority for data protection and for the right to an effective judicial remedy against any decision by this authority, are implemented through Article 349h SCC (see dispatch on new FADP, p. 7159; see again FOJ, Explanatory report preliminary draft, p. 103).

IV. The FDPIC's duty to investigate (para. 1 and para. 2)

27 The question arises as to when the FDPIC is required to ascertain the facts of the case by means of an investigation (see again Art. 49 N 13 above). In this regard, Art. 49 para. 1 FADP must be read in conjunction with para. 2, which allows the FDPIC to refrain from opening an investigation if the violation of data protection regulations is of minor importance.

1. No duty to investigate violations of minor importance

28 Article 49 para. 2 FADP grants the FDPIC the discretion to dispense with an investigation in the case of violations of minor importance. It is not clear from the legislative materials when a violation of data protection regulations is of minor importance. The dispatch cites the example of a sports club or cultural association sending out an email to all its members without concealing the identities of the recipients (see dispatch on new FADP, p. 7090). In the parliamentary consultations, it was mentioned that Article 49 para. 2 FADP is designed to allow the FDPIC to prioritise its resources (see vote by Federal Councillor Karin Keller-Suter, National Council 2019 autumn session, thirteenth meeting, 25.09.2019, 9am 17.059, AB 2019 N 1824).

29 The duty to open an investigation does not apply in cases where the severity of the possible infringement of the privacy or informational self-determination of the potentially affected persons is so low that an investigation is not mandatory. The vague nature of the expressions 'minor importance' or 'importance' of the violation leaves a certain amount of leeway in further interpreting this rule. In practice, interpretation should be guided by the legislator's intention that the FDPIC's duty to investigate complies with the requirements at European level that are binding on Switzerland and guarantees an appropriate level of data protection for Switzerland (see Art. 49 N 3). Furthermore, the FDPIC will seek to utilise its investigative powers beyond the legally required minimum by proceeding to conduct investigations – resources permitting – when it has the power but is not required to do so.

2. Duty to investigate significant violations

30 The previous law provided for an obligation to open investigations in the event of violations by federal bodies (see Art. 27 old FADP) or by private persons if a larger number of persons was affected (see the wording of Art. 29 para. 1 let. a old FADP). Now the FDPIC will investigate

every case where the violation of data protection regulations is not of minor importance and is thus significant (see Art. 49 para.2 FADP a contrario; Art. 49 N 29 above). The criterion of a **significant violation** can therefore also be met where private persons process the data of a small number of persons or indeed only one individual. If the FDPIC discovers a potential violation **ex officio** or through a **report by a third party**, he may, for example, be required to investigate despite there only being a small group of data subjects if the violation could have a highly intrusive effect on their privacy.

- 31 If a **data subject** files the report with the FDPIC, Article 49 para. 4 FADP should be borne in mind. This provision implements Article 15 number 4 of Convention 108+, which imposes an obligation on supervisory authorities to deal with requests and complaints lodged by data subjects concerning their data protection rights and to keep data subjects informed of progress (see for the Schengen area the right to lodge a complaint in Art. 52 of the Directive (EU) 2016/680). This is designed to help individuals protect their data protection rights and freedoms (see with regard to Art. 15 para. 4 Convention 108+ Council of Europe, Explanatory Report to the Protocol amending the Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data, 10.X.2018, CETS 223, margin number 122: *“Moreover, according to paragraph 4 every data subject should have the possibility to request the supervisory authority to investigate a claim concerning his or her rights and liberties in respect of personal data processing. This helps to guarantee the right to an appropriate remedy, in keeping with Articles 9 and 12. [...]”*). This entitlement exists regardless of whether the reported violation concerns a large number of persons or just the reporting party. The FDPIC will look into the report and consider the next steps in order to respond to a potential violation of data protection regulations (see Art. 49 N 24). If the reported violation turns out to be significant, the FDPIC is obliged to open an investigation and to inform the data subject of its outcome. Before initiating time-consuming administrative proceedings, the FDPIC can try to achieve a lawful state of affairs in an initial phase through informal contacts (see also Art. 49 N 13 above).

V. Party's duty to provide information and documents (para. 3)

- 32 In investigation proceedings under the APA, the FDPIC establishes the facts of the case **ex officio** (see Art. 52 para. 1 FADP in conjunction with Art. 12 APA). The **principle of ex officio investigation** applies, whereby it is the responsibility of the authority and not the parties to the proceedings to establish the legally relevant facts of the case (see AUER/BINDER, in: Auer et al., Art. 12 N 7).
- 33 The principle of ex officio investigation is supplemented and qualified by the **duty of the parties to proceedings to cooperate**, in other words the obligation to cooperate in establishing the facts of the case (see Art. 13 APA); AUER/BINDER, in: Auer et al., Art. 12 N 1). The FADP contains special legal provisions on the duty to cooperate under Article 49 para. 3 and Article 50 FADP. Cooperation is regulated in two stages (see also ROSENTHAL, Datenschutzgesetz, p. 67): First of all, Article 49 para. 3 FADP stipulates that the federal body or private person must provide the FDPIC with all the information and documents that are needed for the investigation, thereby setting out a duty to provide information and documents. Article 50 FADP then sets out the consequences in the event that a party fails to fulfil the duties to cooperate, and grants the powers to obtain information that only come into effect if the FDPIC has not been able to sufficiently clarify the facts of the case through the least severe measures of requesting the parties to provide

information and documents. These include ordering access to information (see Art. 50 para. 1 let. a) and questioning of third-party witnesses (see Art. 50 para. 1 let. c).

- 34 The party's duty to provide information and documents extends to all information that **"is needed for the investigation"** (Art. 49 para. 3 sentence 1 FADP), subject to the right to refuse to provide information (Art. 49 para. 3 sentence 2 FADP). Under the Federal Constitution, the FDPIC may only collect personal and non-personal data if this is proportionate, in other words if it is appropriate and necessary to achieve the purpose of the investigation and is acceptable to the data subject (see Art. 5 para. 2 and Art. 36 para. 3 Cst.). It may only investigate matters that appear essential to the outcome of the investigation (see AUER/BINDER, in: Auer et al., Art. 12 N 2).
- 35 Under the previous legislation, the FDPIC sent out written notification that an investigation was being opened together with a set of questions which, if necessary, could also be used to request certain documents. Asking questions and requesting documents is in principle still possible in the same form under the revised law.
- 36 A detailed description of the individual documents is not absolutely necessary; a general description of the information needed will suffice, from which the addressee can identify what is needed to clarify the facts of the case and which documents the FDPIC is requesting (with reference to Art. 58 para. 1 let. a GDPR POLENZ, in: Simitis/Hornung/Spiecker, Art. 58 N 10). The old DPO contained a list in Article 34 of specific items of information that the FDPIC could request from the data file controller. Based on Article 49 para. 3, the following could be requested, for example: relevant contractual agreements; internal directives and guidelines; relevant documentation regarding procedures, programmes and systems; but also documents on personnel, technical and organisational measures (see BSK DSG-HUBER, Art. 27 N 8; with reference to Art. 58 para. 1 let. a GDPR POLENZ, in: Simitis/Hornung/Spiecker, Art. 58 N 10). If the information and documents obtained are not sufficient to establish the legally relevant facts of the case, or if they raise additional questions, the FDPIC is free to request other information and documents by asking additional questions. The FDPIC also has the option of asking a party to provide information verbally. This may be appropriate, for example, if the party has difficulty expressing themselves accurately in writing.
- 37 The party's duty to provide information and documents is subject to the **right to refuse to provide information**. In accordance with Article 49 para. 3 FADP, this is based on Articles 16 and 17 APA, unless Article 50 para. 2 FADP provides otherwise. Article 16 para. 1 APA refers to the right to refuse to testify in accordance with Article 42 para. 1 and 3 Federal Act on Federal Civil Procedure (FCPA). Under Article 42 para. 1 letter b FCPA, the persons mentioned in Article 321 number 1 SCC may refuse to testify about facts that according to this provision are subject to professional confidentiality if the person entitled to do so has not consented to the disclosure of the confidential information. Although the professional confidentiality of, for example, lawyers is already protected, the Council of States decided to add an express professional confidentiality caveat in Article 50 para. 2 FADP (Council of States 2019 winter session, tenth meeting, 18.12.2019 9am 17.059, AB 2019 p. 1247). However, official secrecy cannot be invoked against the FDPIC (see dispatch on old FADP, p. 480; Rosenthal/Jöhri-JÖHRI, Art. 27 N 11).

Article 50

Overview

- I. Purpose of the provision
- II. Scope of application
- III. Investigative measures (para. 1)
 1. Access to information and personal data
 2. Access to premises and installations
 3. Questioning of witnesses
 4. Appraisals by experts
- IV. Professional secrecy provision (para. 2)
- V. Enforcement of measures (para. 3)

I. Purpose of the provision

- 1 Under the old FADP, the FDPIC did not have the power to issue rulings. As a result, it was unable to make binding decisions on procedural matters by means of rulings. While Article 27 para. 3 and Article 29 para. 2 of the old FADP already granted the FDPIC extensive investigative powers (see also KERN/EPINEY, p. 29); certain methods of obtaining information, particularly questioning witnesses and obtaining appraisals from experts, were not permitted under the old FADP.
- 2 This has changed in the revised FADP. Article 50 para. 1 FADP gives the FDPIC the power to issue **orders** to obtain the information needed for the investigation in the event that the federal body or private person concerned fails to fulfil their duty to cooperate in establishing the facts of the case. Orders based on Article 50 FADP may be issued as simple orders directing proceedings or – if unilateral administrative obligations of addresses are established in the specific case – in the form of an (interim) ruling (according to the wording of Art. 52 para. 1 FADP, which says "rulings under Articles 50 [...]"; see also Art. 52 N 10). The aforementioned orders may be issued to both private persons or federal bodies. If proportionate in the case in question (see Art. 5 para. 2 and Art. 36 para. 3 Cst.), the questioning of witnesses and appraisals by experts are also possible (see Art. 50 para. 1 let. c and d FADP). Article 50 para. 3 FADP governs enforcement with the support of the police.
- 3 Through Article 50 FADP, Switzerland meets the requirements set out in Convention 108+ that it must comply with, which under Article 15 para. 2 letter a stipulates that the supervisory authority must have "powers of investigation and intervention" (see dispatch on new FADP, p. 7091). In addition, Switzerland meets the requirements set out in Article 47 para. 1 of Directive (EU) 2016/680, whereby Schengen countries must provide by law for each supervisory authority to have effective investigative powers, and at least the power to obtain from the controller and the processor access to all personal data that are being processed and to all information necessary for the performance of its tasks (see in reference to Art. 23 SDPA FOJ, Explanatory report SDPA, p. 27).

II. Scope of application

- 4 The orders set out under Article 50 FADP may be issued but as part of an investigation by the FDPIC (dispatch on new FADP, p. 7091). According to its legal wording, the provision governs orders in the event that the federal body or private person **fails to fulfil the duties to cooperate**. In the dispatch on this point, it simply states that the FDPIC may only order the measures set out under Article 50 para. 1 letters a-d if it has tried without success to get the data controller to cooperate (see dispatch on the new FADP, p. 7091). The provision therefore deals with the consequences of a failure to provide information or documents in accordance with Article 49 para. 3 FADP (on the duty to provide information and documents in accordance with Art. 49 para. 3 FADP, see Art. 49 N 33 ff.). Article 50 FADP therefore also sets out powers to obtain information that only arise if the **facts of the case could not be sufficiently clarified** despite cooperation by the parties as set out under Article 49 para. 3 FADP. The orders by the FDPIC entail duties to cooperate, such as the obligation to grant access to certain information (para. 1 let. a), or to allow access to premises and installations (para. 1 let. b).
- 5 Orders under Article 50 FADP may be issued against a **party to the proceedings**, for example an order to provide access in accordance with Article 50 para. 1 letters a or b FADP (regarding Art. 41 para. 3 let. b of the preliminary draft of the FADP, see FOJ, Explanatory report preliminary draft, p. 79: "It [the FDPIC] has the right [...] to inspect the premises of the private person or federal body."). In the case of questioning witnesses, which is mentioned in Article 50 para. 1 letter c FADP, the order is inevitably addressed to uninvolved third parties, in other words persons who do not have the status of a party to the proceedings (see Art. 6 APA) (see Art. 12 let. c APA and AUER/BINDER, in: Auer et al., Art. 12 N 35; see also e.g. FAC, A-6567/2008, 7.4.2009, E. 5.3).
- 6 Article 50 FADP is in itself too vague to serve as a legal basis for additional **orders vis à vis third parties to provide evidence**. However, Article 52 para. 1 FADP stipulates that the investigation is governed by the APA. This and the provisions of the FCPA that apply by analogy in accordance with Article 19 APA provide for a duty for third parties to testify (see Art. 12 let. c and Art. 15 APA), a duty to provide information (see Art. 12 let. c APA, Art. 19 APA in conjunction with Art. 49 FCPA), a duty to provide documents in their possession (see Art. 19 APA in conjunction with Art. 51 para. 1 FCPA) and an obligation to allow items in their possession to be inspected (see Art. 19 APA in conjunction with Art. 55 para. 2 FCPA). In addition, Article 17 APA sets out a general obligation for third parties to cooperate in the gathering of evidence – subject to the rights to refuse to testify under Article 16 APA (see GÜNGERICH/BICKEL, in: Waldmann/Weissenberger, Art. 15 N 1; RÜTSCHÉ BERNHARD/SCHNEIDER DANIELLE, Die Sachverhaltsfeststellung als arbeitsteiliger Prozess: Ein neuer Blick auf den Untersuchungsgrundsatz im öffentlichen Verfahren, in: Bommer Felix/Berti Stephen V. (Ed.), Verfahrensrecht am Beginn einer neuen Epoche, Zurich/Basel/Geneva 2011, p. 67 ff., p. 77). It is to be assumed then that the legislator wished to the FDPIC to continue to have powers to obtain information from third parties under the revised Act (on the legal situation under the old FADP, see Rosenthal/Jöhri-ROSENTHAL, Art. 29 N 14). The duties of third parties to cooperate that are set out in the APA and FCPA will therefore also exist under the FADP and serve as a basis for orders relating to evidence issued by the FDPIC (as a result similar to ROSENTHAL, Datenschutzgesetz, p. 67).

III. Investigative measures (para. 1)

7 The list of measures featured under Article 50 para. 1 FADP is, as the wording indicates, exemplative. It is reminiscent of the list of permissible evidence cited under Article 12 APA (see dispatch on the new FADP, p. 7091), and in some cases supplements this list. Contrary to its wording, the latter is not an exhaustive list according to case law and legal doctrine (see e.g. FAC B-1113/2021, 10.8.2021, E. 2.4; FAC, B-880/2012, 25.6.2018, E. 8.4.2; AUER/BINDER, in: Auer et al., Art. 12 N 20; a.M. MARC ALEXANDER NIGGLI, Die Verfügung als Falschbeurkundung, *ContraLegem* 2021/1, p. 7 ff., p. 31). However, the question of an exhaustive list of permissible evidence in administrative proceedings under the APA is of a theoretical nature because the need for evidence that is not covered by Article 12 APA should in practice only arise rarely (AUER/BINDER, in: Auer et al., Art. 12 N 20). It remains unclear to what extent other evidence in addition to that expressly named in Article 50 may be necessary in the FDPIC's investigation proceedings (for evidence-related orders to third parties, see Art. 50 N 6).

1. Access to information and personal data

8 If a federal body or private person fails to comply with the duty to cooperate set out in Article 49 para. 3 FADP, or if the facts of the case cannot be sufficiently established despite the information and documents provided, the FDPIC may, under Article 50 para. 1 letter a FADP, order that access be granted to all information, documents, records of processing activities and personal data that are required for the investigation. Although only mentioned under Article 50 para. 1 letter a FADP, the records of processing activities (see Art. 12 FADP) and the personal data required for the investigation are among the documents that must be provided where applicable as part of the duty to cooperate under Article 49 para. 3 FADP.

9 The right to access under Article 50 para. 1 letter a FADP may have been borrowed from European law. So, for example, Article 58 para. 1 letter e GDPR stipulates that the supervisory authority must have investigative powers to obtain access from the controller and the processor to all personal data and to all information necessary for the performance of its tasks. The materials do not address how the right to access under Article 50 para. 1 letter a FADP should be distinguished from the duty to provide information and documents under Article 49 para. 3 FADP.

10 The difference between the duty to provide information and documents in accordance with Article 49 para. 3 FADP and the duty to provide access to the relevant information in accordance with Article 50 para. 1 letter a FADP – by analogy with the legal situation under the GDPR (see Art. 58 para. 1 let. a and Art. 58 para. 1 let. e GDPR) – is that in the duty to provide information and documents, the FDPIC demands that the party participate actively in the proceedings by providing the information, whereas the right to access information under Article 50 para. 1 letter a FADP involves the FDPIC actively procuring the necessary information itself, while the party to the proceedings only has to grant or allow the FDPIC access (see in reference to Art. 58 para. 1 let. e GDPR POLENZ, in: Simitis/Hornung/Spiecker, Art. 58 N 18; KÖRFFER, in: Paal/Pauly, Art. 58 N 13).

11 Access within the meaning of Article 50 para. 1 letter a FADP allows the FDPIC to carry out an **inspection**, which is limited to the information listed in the provision. This inspection is often not possible without access to premises and installations in accordance with Article 50 para. 1 letter b FADP (see in reference to Art. 58 para. 1 let. e GDPR KÖRFFER, in: Paal/Pauly, Art. 58 N 13).

Inspection is also listed as a means of establishing the facts of the case under Article 12 APA (see Art. 12 let. d APA; see also Art. 19 APA in conjunction with Art. 55 para. 1 FCPA).

2. Access to premises and installations

- 12 If the party refuses to provide the information or documents in accordance with Article 49 para. 3 FADP, or if the information and documents are not sufficient to establish the facts of the case, the FDPIC has the option of requesting access to premises and installations and conducting an on-site inspection (see Art. 50 para. 1 let. b FADP; see also Art. 12 let. d APA). The old FADP already authorised the FDPIC to have data processing demonstrated on the spot in order to establish which processing activities are actually taking place (see Art. 27 para. 3 and Art. 29 para. 2 old FADP; dispatch on old FADP, p. 479). In practice, the inspection constitutes a key element in the investigation procedure as it is often impossible to sufficiently establish the facts of the case solely on the basis of documents provided by the data controller (FDPIC, 18th activity report 2010/2011, p. 95). An on-site inspection can therefore provide more details on exactly how a data processing installation functions or, for example in the case of camera installations, indicate what the camera can film.

3. Questioning of witnesses

- 13 Under Article 14 para. 1 APA, the questioning of witnesses may only be ordered by one of the authorities listed in this provision; other authorities are only authorised to do so if this is stipulated in specific legislation (see e.g. Art. 42 para. 1 CartA concerning the questioning of witnesses by the competition authorities). On the basis of Article 50 para. 1 letter c FADP, the FDPIC is also authorised to order the questioning of witnesses.
- 14 Perjury is a criminal offence (see Art. 307 and 309 SCC). The questioning of witnesses in terms of Article 52 para. 1 FADP in conjunction with Article 14 para. 1 APA may only be ordered if the facts of the case cannot be established in any other way; it is thus only permitted if the other means of gathering evidence that are less burdensome for the data subject are not effective (see Art. 14 para. 1 APA AUER/BINDER, in: Auer et al., Art. 14 N 2). Under Article 15 APA, everyone is obliged to testify. Only a third party can be a witness, however, (see Art. 12 let. c APA), in other words a person who is not involved in the investigation and not a party within the meaning of Article 6 APA (see AUER/BINDER, in: Auer et al., Art. 12 N 39; see also Art. 50 N 5).

4. Appraisals by experts

- 15 Expert opinions are also mentioned as a means of obtaining evidence in Article 12 letter e APA. An appraisal by an expert is required if specific specialist knowledge is needed to establish the facts of the case. The expert must be independent, so there must not be any grounds for recusal (see Art. 19 APA in conjunction with Art. 58 para. 2 FCPA). Under the APA and FCPA, an expert is not obliged to accept a mandate to provide an expert opinion (AUER, in: Auer et. al., Art. 12 N 70). Only questions that seek to establish and appraise the facts should be submitted to the expert, not legal questions (see decision of the Federal Supreme Court 132 II 257 E. 4.4.1). For example, it may be that exceptional technical expertise is needed to understand a specific data processing activity, which IT specialists working at the FDPIC cannot provide.

IV. Professional secrecy provision (para. 2)

- 16 Article 50 para. 2 FADP was added to the Act during the parliamentary deliberations. The provision is intended to expressly state that the FDPIC's power to compel a party to the proceedings to provide information in accordance with Article 50 FADP – like the duty to cooperate as set out under Article 49 para. 3 FADP – is in general subject to professional secrecy (see Council of States, 2019 winter session, tenth meeting 18.12.2019 9am 17.059, AB 2019 p. 1247; see also Art. 49 N 37 above).

V. Execution of measures (para. 3)

- 17 Under Article 50 para. 3 FADP, the FDPIC may request support in enforcing the measures under paragraph 1 from other federal authorities and from the cantonal or communal police. The current wording of the provision arose from the parliamentary deliberations; the Federal Council's draft regulated the execution of precautionary measures which the FDPIC ordered for the duration of the investigation (see Art. 44 para. 2 draft FADP).
- 18 The APA, to which Article 52 para. 1 FADP refers, provides in Article 41 for possible **enforcement measures** with which rulings not concerning the payment of money or the provision of security may be enforced. These include direct enforcement against the party liable in person or against his property (see Art. 41 para. 1 let. b APA). Regarding the APA, it is debatable whether the duties to cooperate of parties to the proceedings are enforceable obligations or merely non-material responsibilities which result in legal disadvantages if they are not complied with. Accordingly, it is also debatable whether and to what extent application of the enforcement measures under Article 41 APA is permissible in the event of a failure to cooperate (see KIENER/RÜTSCHÉ/KUHN, margin no. 700-714; AUER, in: Auer et al., Art. 13 N 9 f. and N 41; KRAUSKOPF/EMMENEGGER/BA-BEY, in: Waldmann/Weissenberger, Art. 13 N 70 f.; KÖLZ ALFRED/HÄNER ISABELLE/BERTSCHI MARTIN, *Verwaltungsverfahren und Verwaltungsrechtspflege des Bundes*, 3rd edition, Zurich/Basel/Geneva 2013, N 467). For example, in the event that a party to the proceedings refuses to cooperate with an inspection, reference is made to Article 19 APA in conjunction with Article 55 para. 1 FCPA, whereby the refusal must be considered in the assessment of the evidence (see AUER, in Auer et al., Art. 13 N 41).
- 19 In derogation from the APA, the FADP in Article 60 para. 2 makes wilful failure to cooperate a criminal offence when it concerns private persons (see Art. 34 para. 2 let. b in conjunction with

Art. 29 old FADP). Cooperation of the party to the proceedings is therefore indirectly enforceable under Article 60 FADP. Article 50 para. 3 FADP also sets out a *lex specialis*: this provision states that other federal authorities and the cantonal or communal police must provide administrative assistance or enforcement assistance to the FDPIC in enforcing the measures ordered under Article 50 para. 1 FADP (see with regard to Art. 43 APA GÄCHTER/EGLI, in: Auer et al., Art. 43 N 1 ff.; WIEDERKEHR RENÉ/MEYER CHRISTIAN/BÖHME ANNA, Kommentar VwVG, Zurich 2022, Art. 43 N 1). As Article 50 para. 3 FADP expressly mentions the involvement of the police, direct enforcement vis-à-vis a party to the proceedings (see Art. 41 para. 1 let. b APA), should – if proportionate – constitute a permissible enforcement measure. Direct enforcement with the aid of police powers is primarily conceivable if a party refuses to provide the FDPIC with physical access to information (see Art. 50 para. 1 let. a FADP) or to premises and installations (see Art. 50 para. 1 let. b FADP). The FDPIC may also call on the police to compel a witness who fails to appear without an adequate excuse to give evidence (see also Art. 52 para. 1 FADP in conjunction with Art. 19 APA and Art. 44 para. 2 FCPA; gl. M. BAERISWYL, in: Baeriswyl/Pärli/Blonski, Art. 50 N 17). What is unclear and difficult to gauge from the materials is to what extent the FDPIC may call on "other federal authorities" to enforce the measures under Article 50 FADP.

- 20 According to Article 54 para. 2 letter c FADP, in order to enforce the measures under Article 50 para. 3 and Article 51 FADP, the FDPIC must provide the federal authorities and the cantonal and communal police with the information and personal data needed to fulfil their statutory duties.

Article 51

Overview

- I. Purpose of the provision
- II. Categories of administrative measures
- III. Applicability of Article 51 FADP
- IV. The FDPIC's scope of action
- V. Procedure when administrative measures are imposed
- VI. Enforcement of administrative measures

I. Purpose of the provision

- 1 One of the key new points in the revised FADP is the power of the FDPIC as set out in Article 51 to order administrative measures in the event of violations of data protection regulations. Switzerland is therefore largely complying with the requirements of Convention 108+, which under Article 15 para. 2 letter c calls for supervisory authorities to have powers to issue decisions with respect to violations of the Convention and to be able to impose administrative sanctions (see dispatch on new FADP, p. 7092). In relation to data protection, the FDPIC has already had the power to issue rulings since 1 January 2019 within the framework of application of the Schengen acquis in criminal matters; in Article 24 SDPA, the legislator implemented Article 47 para. 2 of Directive (EU) 2016/680 and complied with the recommendations of the Schengen evaluators to grant the FDPIC the powers to issue rulings (see dispatch on new FADP, p. 7092; Normkonzept (drafting scheme), p. 10). Article 51 FADP includes an extensive list of administrative measures that may be ordered. Despite the expansion of its powers, the FDPIC – unlike data protection authorities in EU countries – still cannot impose administrative sanctions in the event of violations of data protection regulations (see dispatch on the new FADP, particularly p. 6944, p. 6971 f. and p. 6973; contrast with Art. 58 para. 2 let. i GDPR regarding imposing administrative fines in accordance with Article 83 GDPR). The FADP merely sets out an extended list of criminal provisions compared with the old FADP (see Art. 60 ff. FADP). The prosecution of these criminal acts is a matter for the cantons (see Art. 65 FADP). In this context it is worth mentioning that it was decided during the readings of the FADP to clarify the issue of administrative sanctions in conjunction with the enactment of a federal act on administrative sanctions. The Federal Council has since decided not to pursue the enactment of that act, however. This therefore raises the questions of whether such sanctions should be adopted in an upcoming revision of the FADP.
- 2 The power to issue rulings reinforces the status of the FDPIC. Under the old FADP, the options open to the FDPIC for making data controllers comply with the law were significantly limited. The FDPIC could only issue non-binding recommendations to federal bodies and private persons (see Art. 27 para. 4 and Art. 29 para. 3 old FADP). If they were not accepted and voluntarily implemented, when supervising federal bodies, the FDPIC had to submit a request to the competent department or the Federal Chancellery to compel the federal body in question to perform or refrain from performing an act (see Art. 27 para. 5 old FADP). If the department or the Federal Chancellery refused this request, the only option open to the FDPIC was to appeal the decision to the Federal Administrative Court (see Art. 27 para. 6 old FADP). The Federal

Administrative Court previously had to rule on cases involving the failure to adopt recommendations in the private sector in court proceedings (see Art. 29 para. 4 old FADP and old Art. 35 let. b Federal Administrative Court Act (FACA)).

II. Categories of administrative measures

- 3 Article 51 FADP provides for two categories of administrative measures. The first category concerns measures in the event that **data processing activities** violate the federal data protection regulations, in other words, the FADP or the other federal data protection regulations. In particular, this may concern a violation of the principles set out under Article 6 and Article 16 FADP and under Article 31 FADP regarding grounds for justification (for private persons) and Article 34 FADP regarding the legal basis (for federal bodies). If a violation of data protection regulations has occurred, the FDPIC may order that the data processing be modified, suspended or terminated, wholly or in part, and the personal data deleted or destroyed, wholly or in part (see Art. 51 para. 1 FADP). In the case of cross-border data transmission, it may delay or prohibit disclosure of the data abroad if this violates the requirements of Articles 16 and 17 FADP or provisions relating to the cross-border disclosure of personal data in other federal acts (see Art. 51 para. 2 FADP). If the federal body or the private person has implemented the required measures during the investigation in order to restore compliance with the data protection regulations, the FDPIC may simply issue an official warning (see Art. 51 para. 5 APA).
- 4 The second category of measures concerns cases in which **regulatory provisions** or **rights of the data subject** are not respected (see Art. 51 para. 3 and 4 FADP and the dispatch on the new FADP, p. 7093). They were not mentioned in the preliminary draft of the FADP or the SDPA; however, according to the dispatch on the new FADP, they do not constitute an extension of the FDPIC's power to issue rulings, but are merely a detailed definition of such powers (see dispatch on new FADP, p. 6980). The list in Article 51 para. 3 FADP is not exhaustive. In accordance with Article 51 para. 3 FADP, for example, the FDPIC may order that the federal body or private person take the measures under Articles 7 and 8 FADP (let. b). The FDPIC also has the power to order that a data protection impact assessment is conducted in accordance with Article 22 FADP (let. d), for example if the federal body or private person presents the FDPIC with a code of conduct in accordance with Article 11 FADP which does not fulfil the conditions under which a data protection impact assessment may be dispensed with (see Art. 22 para. 5 FADP; Art. 43 DPO), and is not willing to voluntarily modify it (see FOJ, Explanatory report draft OFADP, p. 48; FOJ, Explanatory report on DPO, p. 59). If a private person or federal body refuses to provide the data subject with the information to which they are entitled under Article 25 FADP, the FDPIC may order that the information be provided to the data subject (let. g).

III. Applicability of Article 51 FADP

- 5 Article 51 FADP features under Section 2, which deals with 'Investigations of violations of data protection regulations'. However, the applicability of Article 51 FADP does not necessarily require that an investigation has taken place in accordance with Article 49 FADP before administrative measures can be ordered. If the FDPIC is asked to provide **advice** (see Art. 58 para. 1 let. a FADP), it usually has sufficient knowledge of the facts of the case to be able to assess whether data protection regulations have been violated. For example, it is conceivable that a private company could ask the FDPIC for advice regarding a planned data processing project but is

not willing to follow the FDPIC's advice based on the submitted documents to carry out a data protection impact assessment in accordance with Article 22 FADP. If in such a case the factual elements are sufficiently clear and not disputed, the FDPIC does not need to take investigative steps. After the proceedings have been opened, it can therefore directly record the legally-relevant facts of the case, grant a hearing in accordance with Article 30 APA and then order a data protection impact assessment to be carried out (see Art. 51 para. 3 let. d FADP and Art. 52 para. 1 FADP, whereby rulings under Article 51 FADP are governed by the APA; on the procedure to order administrative measures, see also Art. 51 N 9 and Art. 52 N 18 ff.).

- 6 As part of its advisory and supervisory activity, the FDPIC is frequently faced with **planned, future data processing activities** in connection with digital projects carried out by the Federal Administration and private persons. Article 51 para. 2 FADP regarding the order to postpone or prohibit cross-border data disclosure shows that administrative measures can relate to upcoming data processing activities. On a teleological basis, the same must apply to measures under Article 51 para. 1 FADP; it must therefore be possible to order the modification of a future data processing activity.

IV. The FDPIC's scope of action

- 7 Article 51 FADP is a **discretionary provision**. It grants the FDPIC a degree of leeway regarding whether and which administrative measures it orders (dispatch on the new FADP, p. 7092). If the FDPIC does order a measure, it must be proportionate (see Art. 5 para. 2 Cst.). Therefore, instead of ordering the data processing to be stopped, where possible the measure should be limited to the problematic part of the processing (see dispatch on new FADP, p. 7093; FOJ, Explanatory report SDPA, p. 28).
- 8 If, however, during the course of an investigation in accordance with Article 49, it is confirmed that a violation of data protection regulations has occurred, the FDPIC is likely to have no other choice but to order an administrative measure. An exception is possible if the data controller takes the required measures during the investigation in order to restore compliance with the data protection regulations. In such case, Article 51 para. 5 FADP provides for the possibility of the FDPIC merely issuing an **official warning**. However, a warning may only be issued if it is proportionate in the specific case. Other than that, a decision not to impose an administrative measure may be conceivable if the FDPIC establishes in the course of its investigation that the suspected serious violation is merely a **trivial violation**. In a trivial case, the FDPIC can use its discretion to choose not to open an investigation (see Art. 49 para. 2 FADP and Art. 49 N 28 f.).

V. Procedure when administrative measures are imposed

- 9 The measures under Article 51 FADP are issued as rulings (see Art. 52 para. 1 FADP). Orders are issued – and investigation proceedings under Article 49 FADP conducted – as **administrative proceedings in accordance with the APA** (see Art. 52 para. 1 FADP). Among other things, this means hearing the federal body or private person before issuing a ruling (see Art. 29 para. 2 Cst. and Art. 30 APA) and stating the grounds for the measure ordered (see Art. 35 APA and FOJ, Explanatory report SDPA, p. 28; for further detail on conducting administrative proceedings, see Art. 52 N 2 ff.).
- 10 The FDPIC may be required to **coordinate** with other bodies. So, for example, under Article 41 para. 2 DPO, it invites the National Cyber Security Centre (NCSC) to comment before issuing a ruling to a federal body in accordance with Article 51 para. 3 letter b FADP compelling it to take the measures under Article 8 FADP regarding data security (see FOJ, Explanatory report draft DPO; FOJ, Explanatory report DPO, p. 58).

VI. Enforcement of administrative measures

- 11 In order not only to enforce the measures under Article 50 para. 1 FADP, but also to enforce the administrative measures under Article 51 FADP (see Art. 54 para. 2 let. c FADP), the FDPIC can involve other federal authorities and the cantonal or communal police (see Art. 50 para. 3 FADP and Art. 50 N 17 ff.).

Article 52

Overview

- I. General information
- II. Applicability of the APA (para. 1)
 - 1. Informal preliminary enquiries
 - 2. Opening of proceedings
 - 3. Further course of the proceedings
 - 4. In particular: Precautionary measures during the investigation proceedings
 - 5. Conclusion of proceedings
- III. Party status (para. 2)
- IV. The FDPIC's right of appeal (para. 3)

I. General information

- 1 Article 52 FADP states that the investigation proceedings and rulings under Articles 50 and 51 are governed by the APA (para. 1). The provision also states that the only party to the proceedings is the federal body or the private person against which or whom an investigation has been opened (para. 2). Finally, the FDPIC is granted the power to contest appeal decisions of the Federal Administrative Court (para. 3).

II. Applicability of the APA (para. 1)

- 2 In accordance with Article 50 para. 1 FADP, the investigation proceedings and orders under Articles 50 and 51 FADP are governed by the APA. The procedure before the FDPIC can in principle be broken down into three phases (see on the following by analogy with the BSK FINMAG, LEBRECHT, Art. 53 N 4 ff., regarding FINMA's administrative procedure):

(1) The proceedings always start with initial indications of a violation of data protection regulations which have arisen in the course of the FDPIC's ongoing supervisory and advisory activity or on the basis of a report to the FDPIC (see Art. 49 para. 1 FADP). The FDPIC regularly investigates as part of an informal **preliminary enquiry** whether these indications are confirmed and therefore whether there are sufficient indications that a data protection regulation could have been violated (see 1 below).

(2) If there are sufficient indications of a violation and all the other conditions for an investigation are met, the FDPIC opens **investigation proceedings**, in accordance with Article 49 para. 1 FADP, which are governed by the APA, as set out under Article 52 para. 1 FADP (see 2 below). In these proceedings the FDPIC obtains further information and examines the facts of the case (see 3 below). During the investigation proceedings, the FDPIC has the option of ordering precautionary measures (see 4 below).

(3) If the assessment of the facts of the case indicates that data protection regulations have been violated, the FDPIC can order **administrative measures under Article 51 FADP** subject to the provisions of the APA (see 5 below).

1. Informal preliminary enquiries⁴

- 3 If the FDPIC becomes aware of potential violations of data protection regulations, it must form an opinion as to whether the conditions for opening an investigation are met. In particular it must examine whether the FDPIC is the competent authority and whether there are sufficient indications that a data processing activity could violate data protection regulations (see Art. 49 para. 1 and 2 FADP; see more details under Art. 49 N 13 above). It may conduct preliminary enquiries for this purpose. The preliminary enquiry stage is characterised by its informal nature and should be regarded as '**informal administrative action**'. The APA only applies once the investigation proceedings are opened (see Art. 52 para. 1 FADP and Art. 49 N 14 ff. above).
- 4 The Federal Supreme Court has ruled that in principle the APA does not apply before the opening of administrative proceedings, but that the constitutional requirements for state action (such as compliance with the principles of legality and proportionality) must be met (see decision of the Federal Supreme Court 136 II 304 E. 6.3). The FDPIC is therefore also bound by these constitutional principles (see Art. 5 Cst.) in its informal preliminary enquiries and may not act arbitrarily or unfairly (see UHLMANN, p. 8 f.). After the investigation has been opened, the parties concerned must be granted the party rights in full. In particular this includes the right to comment on the investigations already conducted (see decision of the Federal Supreme Court 136 II 304 E. 6.3).
- 5 As part of the preliminary enquiries, the FDPIC can obtain more detailed information about a potential violation of data protection regulations not only from publicly accessible sources, but also from the data controller itself, and from data subjects or third parties, such as consumer organisations. At this stage, the data controller concerned answers the FDPIC's questions on a voluntary basis; data controllers do not have a duty to cooperate, unlike during a formal investigation (see Art. 49 para. 3 FADP) and the criminal provision under Article 60 para. 2 FADP does not apply. If, during the preliminary enquiries, the data controller voluntarily produces convincing arguments that no violation has occurred, an investigation will not generally be necessary. If, on the other hand, there are sufficient indications of a violation of data protection regulations and the other conditions for an investigation are met, the FDPIC will open one (see in detail Art. 49 N 16 above).

2. Opening of proceedings

- 6 Once the FDPIC opens investigation proceedings, the APA applies (see Art. 52 para. 1 FADP). Administrative proceedings are in principle opened without any formalities (see e.g. UHLMANN, p. 2 f.). Specific legislation may provide for the parties being notified of the opening of the proceedings (see Art. 30 FINMASA) or the official publication of a procedure (see Art. 28 para. 1 CartA). The FADP does not contain any corresponding provision, but the FDPIC typically notifies the party about the opening of the investigation by means of a letter with which – on the basis of

⁴ On the explanations below, see LOBSIGER, p. 314.

Article 49 para. 3 FADP – it encloses a set of questions to request the information and documents needed to establish the facts of the case (see Art. 49 N 35 above).

- 7 As the opening of administrative proceedings such as an investigation does not alter the legal status of the data subject, it constitutes an internal administrative action and is not a contestable ruling (see Federal Supreme Court, 2C_167/2016, 17.3.2017, E. 3.3.1 ff., and with reference to Article 30 FINMASA BSK FINMASA-ROTH PELLANDA/KOPP, Art. 30 N 17; see also SEILER, in: Waldmann/Weissenberger, Art. 56 N 22; UHLMANN, p. 3). In relation to administrative proceedings before the FINMA, the dispatch on the Financial Market Supervision Act (FINMASA) assumes that the opening decision or notice is not contestable (see dispatch to the Federal Act on the Swiss Financial Market Supervisory Authority (Financial Market Supervision Act; FINMASA), of 1 February 2006, BBI 2006 2829 ff., p. 2881; in reference to BSK FINMAG-LEBRECHT, Art. 53 N 10). The same applies to the opening of investigation proceedings in accordance with Article 49 FADP, so it is not contestable either.
- 8 In its previous decisions, the Federal Supreme Court has in some cases classified the opening of proceedings as an interim order in accordance with Article 46 APA (see Federal Supreme Court, 1P.555/2001, 3.1.2002, E. 5.1.1; Federal Supreme Court decision 124 II 215 E. 2), and some of the doctrine supports this view (see JÜRIG BICKEL, *Auslegung von Verwaltungsrechtsakten*, Dissertation Fribourg, Bern 2014, § 13 margin no. 44, with further references). Under Article 46 para. 1 letter a APA, an appeal is only permitted against an interim order if it may cause a non-redressable prejudice. According to the case-law there is no such prejudice provided the appellant can exercise all rights in full in the further course of the proceedings and has the possibility of contesting the measures in question by appeal against the final ruling. The mere fact that proceedings or an investigation is pending therefore does not justify assuming a non-redressable prejudice (see Federal Supreme Court, 2C_167/2016, 17.3.2017, E. 3.3.3; Federal Supreme Court decision 131 II 587 E. 4.1.2; referring to BSK FINMAG-ROTH PELLANDA/KOPP, Art. 30 N 17. See also WALDMANN/BICKEL, in: Waldmann/Weissenberger, Art. 29 N 42).

3. Further course of the proceedings

- 9 In the investigation proceedings, the FDPIC examines the indications that a data processing activity could violate data protection regulations (see Art. 49 para. 1 FADP). It therefore establishes the legally relevant facts of the case *ex officio* and obtains evidence where necessary; the **principle of ex officio investigation** applies (see Art. 52 para. 1 FADP in conjunction with Art. 12 APA). The APA governs the permissible evidence under Article 12 and the duty to cooperate under Article 13. However, the FADP sets out special provisions in this regard under Article 49 para. 3 and Article 50 (see details under Art. 49 N 33 above; see also Art. 50 N 4).
- 10 **Orders under Article 50 FADP** serve to establish the legally relevant facts of the case. On the one hand these may be simple orders directing proceedings that are not rulings in accordance with Article 5 APA. On the other hand, (interim) orders are also possible, which, if they are issued independently, may be appealed under Article 46 APA (see Art. 52 para. 1 FADP and by analogy AUER/BINDER, in: Auer et al., Art. 13 N 8 f. and Art. 12 N 24 f.). The assessment of whether the conditions under Article 46 APA are fulfilled in the case in question is a matter for the competent appeal authority, in the present case the Federal Administrative Court (see Art. 52 para. 1 FADP in conjunction with Art. 47 para. 1 let. b APA). As the (interim) orders under Article 50 FADP do not relate to the payment of money, the suspensive effect of the appeal can be revoked (see

Art. 52 para. 1 FADP in conjunction with Art. 55 para. 2 APA). However, any decision to revoke suspensive effect must be proportionate (see Art. 5 para. 2 Cst.) and must also be justified by convincing grounds (see KIENER, in: Auer et al., Art. 55 N 16; Federal Supreme Court decision 129 II 286 E. 3 and E. 3.1.).

- 11 If it emerges during the investigation proceedings that other authorities have information and documents needed for the investigation, the FDPIC has the possibility of obtaining them by means of **administrative assistance** (see Art. 54 para. 1 and Art. 55 para. 1 and 2 FADP; see regarding APA KRAUSKOPF/EMMENEGGER/BABEY, in: Waldmann/Weissenberger, Art. 12 N 179; with reference to the administrative procedure of the FINMA BSK FINMAG-LEBRECHT, Art. 53 N 45).
- 12 As the investigation proceedings are governed by the APA, a party to the proceedings has all the **rights of a party** in accordance with the APA from when the proceedings are opened until their conclusion. In particular, they have the right to be heard (see Art. 29 APA) and to inspect files (see Art. 26 APA) – both rights being laid down in the Constitution in Article 29 para. 2.
- 13 As an extension of the right to be heard, a party has a constitutional right to **participate in determining the facts of the case** (see MÜLLER JÖRG PAUL/SCHEFER MARKUS, Grundrechte in der Schweiz, 4th edition. Bern 2008, p. 863 ff.). The constitutional right to be heard also includes the right to present relevant evidence, to be involved in the collection of evidence, or at least to be able to comment on the results of said collection (see Federal Supreme Court decision 124 I 49 E. 3a). The party therefore has the right to be heard with requests for evidence and submissions that are offered in due time and form, provided they concern relevant facts and are not obviously inadmissible as evidence (Federal Supreme Court decision 138 V 125 E. 2.1; see Art. 33 APA). They also have the right to be present at an inspection in accordance with Article 50 para. 1 letters a and b FADP (see regarding Art. 12 let. d APA AUER/BINDER, in: Auer et al., Art. 12 N 54), or they can be heard on appointing an expert and on the expert appraisal in accordance with Article 50 para. 1 letter d FADP and can ask the expert additional questions (see Art. 19 APA in conjunction with Art. 57 para. 2 FCPA; see with reference to Art. 53 FINMASA BSK FINMASA-LEBRECHT, Art. 53 N 43). When witnesses are questioned under Article 50 para. 1 letter c FADP, the party has a right to be present and to ask witnesses additional questions (see Art. 18 para. 1 APA and Art. 19 APA in conjunction with Art. 46 FCPA).

4. In particular: precautionary measures during investigation proceedings

- 14 Under Article 33 para. 2 old FADP, the FDPIC was authorised to request **precautionary measures** from the president of the division of the Federal Administrative Court responsible for data protection if he established during a clarification of the facts in accordance with Article 27 para. 2 or Article 29 para. 1 old FADP that the data subjects faced a prejudice that was not easily redressable. Following on from this, Article 44 para. 2 of the draft FADP mentioned the FDPIC's power to order precautionary measures himself for the duration of the investigation (see also Art. 23 para. 2 SDPA) and to have them enforced by a federal authority or the cantonal or communal police authority (see dispatch on the new FADP, p. 7092). The power to order precautionary measures was deleted from the provision in question during the parliamentary deliberations without any reasons being given (see National Council 2019 autumn session, thirteenth meeting 25.09.19 9am 17.059, AB 2019 N 1828 f). The FADP does, however, mention the ordering of precautionary measures by the FDPIC in the section on fees (see Art. 59 para. 1 let. d FADP). This makes it clear that these powers still exist. Otherwise, the APA, to which

Article 52 para. 1 FADP refers for the investigation proceedings, only provides expressly for precautionary measures in appeal procedures (see Art. 56 APA). According to legal doctrine and case law, precautionary measures are permissible in first instance administrative proceedings without any special legal basis by analogy with Article 56 APA, and before the opening of administrative proceedings, provided the main proceedings are subsequently opened in a timely manner (see Federal Administrative Court, 5242/2018, 9.3.2020, E. 1.2.1; SEILER, in: Waldmann/Weissenberger, Art. 56 N 18 and N 23). It can be assumed that the FDPIC may in exceptional cases also order precautionary measures **super-provisionally**, in other words before hearing the parties concerned (see Art. 30 para. 2 let. e APA).

- 15 The Federal Supreme Court summarises the **general rules** that apply to precautionary measures in administrative proceedings as follows (see Federal Supreme Court decision 127 II 132 E. 3 with further references; referring to BSK KG-SCHOTT, Art. 39 N 94; in more detail HÄNER ISABELLE, Vorsorgliche Massnahmen im Verwaltungsverfahren und Verwaltungsprozess, ZSR 1997 [116] II p. 253 ff., p. 322 ff.): The purpose of precautionary measures, which are taken before a ruling is issued, is to ensure the effectiveness of the ruling. Safeguarding measures are intended to ensure that the existing factual or legal situation remains unchanged pending a further decision. With establishing measures, a legal relationship is created provisionally or re-regulated pending a further decision. Precautionary measures are based on a summary examination of the factual and legal situation. Ordering precautionary measures requires there to be a certain urgency, i.e. it must be necessary to take the measures in question immediately. Furthermore, the decision not to take must result in prejudice to the data subjects that cannot be easily redressed, whereby any genuine interest, in particular an economic interest, may be sufficient. Finally, a weighing of the opposing interests should tip the scales in favour of interim protection and this must appear to be proportionate. However, the issue to be settled by the final ruling must not be prejudiced and an outcome sought must not be rendered impossible. The principles mentioned will also be relevant to investigation proceedings before the FDPIC (regarding precautionary measures based on Art. 33 para. 2 old FADP, see Federal Administrative Court, A-8028/2008, 14.1.2009, E. 2 ff.; Federal Administrative Court, A-3831/2012, 6.8.2012, E. 2).
- 16 The procedure for appeals against precautionary measures is governed by Article 44 ff. APA. Precautionary measures are issued in the form of an interim order; a separate appeal is possible if they cause non-redressable prejudice (see Art. 46 para. 1 let. a APA) This is regularly the case (see Kiener/Rütsche/Kuhn, para. 488 and 1236). While the preliminary draft of the FADP stipulated that appeals against precautionary measures do not have a suspensive effect (see Art. 44 para. 3 preliminary draft of the FADP), the provisions of the APA now apply. This regulates the suspensive effect of the appeal in Article 55 (see Dispatch to the new FADP, p. 7092).

5. Conclusion of proceedings

- 17 In the course of the investigation, the FDPIC clarifies whether certain facts exist and whether, from a legal perspective, a violation of data protection regulations has occurred. If this is not the case, the FDPIC terminates the procedure or dismisses it as redundant, particularly if the facts underlying the investigation cannot be confirmed, i.e. if it turns out, for example, that the data controller does not process personal data in the way the FDPIC initially assumed.
- 18 However, if a violation of data protection regulations has occurred, the FDPIC may impose administrative measures under Article 51 FADP. The measures under Article 51 FADP are characterised - with the exception of the official warning under Article 51 para. 5 FADP - by the fact that they create, modify or cancel rights or obligations for their addressees (see Art. 5 para. 1 let. a APA). They are also issued in the form of a ruling (see Art. 52 para. 1 FADP). According to doctrine and case law, warnings, threats or even expressions of disapproval can have the character of a ruling if they could have an adverse effect on the legal position of the data subject (see TSCHANNEN PIERRE/ZIMMERLI ULRICH/MÜLLER MARKUS, *Allgemeines Verwaltungsrecht*, 4th ed. Bern 2014, § 28 para. 27 f; MÜLLER, in: Auer et al., Art. 5 N 90). Issuing a positive or negative **declaratory ruling** is only a secondary option and only if there is an interest worthy of protection (see Art. 52 para. 1 FADP in conjunction with Art. 5 para. 1 let. b and Art. 25 APA). It is conceivable, for example, that a positive declaratory ruling could be issued to the effect that a data processor has violated data protection regulations in the past, combined with an official warning pursuant to Article 51 para. 5 FADP.
- 19 It follows from the **right to be heard** (see Art. 29 para. 2 Cst. and Art. 29 APA) that the parties must be heard before a ruling is issued (see Art. 30 para. 1 APA). The prior hearing may only be dispensed with under the conditions of Article 30 para. 2 APA, particularly when a super-provisional measure is ordered because there is imminent danger (see Art. 30 para. 2 let. e APA and Art. 52 N 14 above); and KIENER/RÜTSCHKE/KUHN, Rz. 660 ff.). In order to grant the right to be heard, the FDPIC therefore gives the party the opportunity to comment on the established facts and the applicable law before issuing a ruling. With regard to the legal assessment of the facts by an authority, on the other hand, there is only an obligation to grant the right to be heard in exceptional cases (see Federal Supreme Court decision 132 II 485 E. 3.2). The authority is only required to give the parties the opportunity to comment if it wants to base its decision on completely new legal grounds that the parties could never have expected (see Federal Supreme Court, 2C_251/2016, 30.12.2016, E. 2.3; Federal Supreme Court decision 114 Ia 97 E. 2a). This can arise if the authority has a certain leeway in how it interprets and applies the law (see SUTTER, in: Auer et al., Art. 29 N 12). However, according to the case-law of the Federal Supreme Court, the right to be heard does not require the parties to be able to comment on every possible outcome envisaged by the deciding authority. As a result, the authority does not have to submit its statement of grounds or its draft ruling to the parties in advance for their comments (see Federal Supreme Court decision 132 II 485 E. 3.4; Federal Supreme Court decision 132 II 257 E. 4.2; see also, instead of many, SUTTER, in: Auer et al., Art. 29 N 14; KIENER/RÜTSCHKE/KUHN, margin no 651).
- 20 The requirements of Articles 34-38 APA must be observed when issuing and justifying rulings. The authority must notify the parties of rulings in writing (Art. 34 para. 1 APA), and written rulings must be designated as such, state the grounds on which they are based and be accompanied by instructions on legal remedies (Art. 35 para. 1 APA). In the case of administrative measures

under Article 51 FADP, the data controller must in particular be able to determine on the basis of the statement of grounds which data processing operations are covered by the FDPIC's decision (see new FADP dispatch, p. 7093). If necessary, the FDPIC may give notice of the potential penalty under Article 63 FADP for disregarding the administrative measure (see dispatch to the new FADP, pp. 7093 and 7103).

- 21 A party to the proceedings has a right of appeal against administrative measures in terms of Article 51 FADP in accordance with the general provisions on the administration of federal justice (see Art. 52 para. 1 FADP in conjunction with Art. 44 APA); dispatch to the new FADP, p. 7093). The competent appeal authority is the Federal Administrative Court (see Art. 52 para. 3 FADP a contrario; Art. 47 para. 1 let. b APA)

III. Party status (para. 2)

- 22 Article 52 para. 2 FADP specifies that the only party to the proceedings is the federal body or the private person against which or whom the investigation was opened. Consequently, only the federal body or private person concerned may appeal against measures under Article 51 FADP. According to the dispatch, the data subject is not a party to the proceedings, even if the FDPIC has opened the investigation in response to his or her complaint. The dispatch assumes that the data subject must file his or her legal claims with the competent civil court or, in the public sector, challenge the decision of the federal body concerned before the competent appeal authority (see dispatch to the new FADP, p. 7093; see also Art. 49 N 19 and N 25 above).

IV. The FDPIC's right of appeal (para. 3)

- 23 Under Article 52 para. 3 FADP, the FDPIC may appeal decisions of the Federal Administrative Court to the Federal Supreme Court. The right to challenge decisions of the Federal Administrative Court already existed already under the previous law (see Art. 27 para. 6 and Art. 29 para. 4 old FADP). The FDPIC's appeal is an example of an authorities' appeal (see Art. 89 para. 2 let. d FSCA; on Art. 29 para. 4 old FADP SCHINDLER, in: Auer et al., Art. 48 N 35).

Article 53

Overview

- I. Purpose of the provision
- II. Scope of application
- III. Invitation to the FDPIC to comment (para. 1)
- IV. Coordination of proceedings (para. 2)

I. Purpose of the provision

- 1 Various federal bodies (Art. 53 FADP talks about 'federal administrative authorities') supervise private persons or organisations outside the Federal Administration. These include, for example, the Federal Office of Public Health (FOPH), which supervises health insurance companies, and the Swiss Financial Market Supervisory Authority (FINMA), which supervises banks and other financial service providers (see dispatch to the new FADP, p. 7094). In the course of these supervisory procedures, which may result in a decision by the competent authority, questions relating to data protection may arise (see also ROSENTHAL DAVID, in: Passadelis Nicolas/Rosenthal David/Thür Hanspeter (Ed.), *Datenschutzrecht*, Basel 2015, § 7 Sanktionierung von Wirtschaftsverstößen, margin no. 7.64 ff.). For this event, Article 53 FADP provides that the FDPIC must be invited to comment (para. 1) and for coordination with the FDPIC's proceedings against the same party (para. 2). The aim is to achieve a consistent interpretation of the federal data protection regulations and coordinated application of the law. The duty to coordinate was primarily developed in spatial planning and environmental legislation but must also be considered in other areas of law if similar situations arise (FOJ, *Gesetzgebungsleitfaden: Leitfaden für die Ausarbeitung von Erlassen des Bundes*, 4th edition. 2019, margin no. 810). In Article 53, the legislator has integrated a coordination provision in the FADP for the first time.

II. Scope of application

- 2 Article 53 FADP concerns the coordination of federal administrative authorities that supervise private persons or organisations outside of the Federal Administration in accordance with another federal act (see Art. 53 para. 1 FADP). In relation to the supervised bodies, according to the dispatch the term used in Article 53 para. 1 FADP, i.e. "organisations outside the Federal Administration" conforms to the term used in Article 1 para. 2 letter e APA ("other authorities or organisations outside the Federal Administration, provided they are issuing a ruling in fulfilment of the federal public law duties assigned to them") (dispatch on the new FADP, p. 7094). The organisations concerned include, for example, the health insurance companies that provide mandatory insurance cover (see Art. 2 HIOA and TSCHANNEN, in: Auer et al., Art. 1 N 24).

III. Invitation to the FDPIC to comment (para. 1)

- 3 If the competent federal administrative authority faces questions relating to data protection in a supervisory procedure, and the FDPIC is not conducting its own investigation into the same party, Article 53 para. 1 FADP states that the body must invite the FDPIC to comment before issuing a ruling that relates to data protection issues. It is not simply that the supervisory body has the option of inviting the FDPIC to comment; it is **required** to do this. In contrast, the Normkonzept (drafting scheme) on the revision of the FADP (see p. 34, 40 and 46) stipulated that civil courts or administrative authorities responsible for rulings in the first instance or appellate authorities should have the option of submitting data protection matters to the FDPIC for comment.
- 4 The purpose of Article 53 para. 1 FADP is to encourage the consistent application of the federal data protection regulations. As a specialist authority, the FDPIC is given the opportunity to comment on **legal matters** that arise based on facts that have already been established (see with regard to expert legal appraisal of the facts of a case AUER/BINDER, in: Auer et al., Art. 12 N 47; see also ALBERTINI MICHÈLE, Der verfassungsmässige Anspruch auf rechtliches Gehör im Verwaltungsverfahren des modernen Staates, Dissertation Bern 1999, p. 230 ff.). A similar provision exists, for example, in Article 5 para. 4 of the Price Supervision Act (PrSA), according to which the price supervisor or competent authority (Art. 15 PrSA) must consult the Competition Commission on matters relating to personal scope (Art. 2 PrSA) and effective competition (Art. 12 PrSA) before issuing a ruling. The Competition Commission complies with this duty to consult by issuing an opinion (see dispatch on Price Supervision Act (PrSA) of 30 May 1984, BBI 1984 II 755 ff., p. 784 f.; Dispatch on the popular initiative “on supervising prices and lending rates” and on the revision of the Price Supervision Act of 27 November 1989, BBI 1990 I 97 ff., p. 115).
- 5 The FDPIC's opinion is **not binding** (see in relation to this also AUER/BINDER, in Auer et al., Art. 12 N 61, regarding the question of the admissibility of legal opinions in internal administrative procedures). However, as the FDPIC is commenting as a specialist authority appointed by law, the supervisory authority responsible for handling the case must consider its conclusions carefully and provide adequate justification for any deviation from them (regarding Art. 5 para. 4 PrSA, see WEBER, Art. 5 N 19; KÜNZLER/LÖTSCHER, in: Oesch et al. (Ed.), Kommentar Wettbewerbsrecht II, 2nd edition, Zurich 2021, Art. 5 N 7; Federal Administrative Court, A-2121/2013, 27.1.2015, E. 4.2.2.1, with reference to an actual expert opinion from the Competition Commission). If the parties to the proceedings do not agree with the FDPIC's opinion, they cannot appeal against it. Objections to the FDPIC's opinion or to deviations from it must be filed as appeals against the final ruling of the relevant supervisory authority (regarding Art. 5 para. 4 PrSA, see WEBER, Art. 5 N 20).

IV. Coordination of proceedings (para. 2)

- 6 If the competent federal administrative authority faces questions relating to data protection, and if the FDPIC is already conducting its own investigation in accordance with Article 49 FADP into the same party, the two authorities must coordinate their proceedings (see Art. 53 para. 2 FADP).
- 24 According to the dispatch, the coordination provided for under Article 53 para. 2 FADP must take place in two respects: on the one hand to clarify whether the two proceedings can be conducted in parallel or whether one needs to be suspended or abandoned, and on the other with regard to

the content of the relevant decision in the event that the proceedings are conducted in parallel (dispatch on the new FADP, p. 7094). The proceedings must therefore be coordinated in both procedural and substantive respects (on procedural and substantive coordination of proceedings in general, see e.g. KARLEN PETER, *Schweizerisches Verwaltungsrecht: Gesamtdarstellung unter Einbezug des europäischen Kontextes*, Zurich 2018, p. 252). If, in a specific case, there is a jurisdictional conflict between the FDPIC and the competent federal administrative authority, the dispatch on the new FADP indicates that the Federal Council should decide pursuant to Article 9 para. 3 APA (see dispatch on new FADP, p. 7094). However, given the FDPIC's independence, this approach is not appropriate: like the Federal Administrative Court, which is exempted from the corresponding regulations in Article 9 para. 3 APA, the FDPIC is not subject to supervision by the Federal Council. It is therefore unclear how rulings by the FDPIC and by another parallel supervisory body should be coordinated with regard to the content, i.e. in substantive terms. Finally, in the event of a differing assessment by the FDPIC and the relevant federal administrative authority, where competent, the Federal Supreme Court must ensure that the law is applied consistently.