

Paradigm

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A hand in a dark suit sleeve holds a glowing globe. The globe is covered in a network of white and blue lines, with bright points of light at the intersections. The background is dark blue with a faint world map.

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After PRISM – Switzerland as Preferred Location for Data Centers and Cloud Services

Switzerland is a top location for data centers and cloud services: In Switzerland, privacy and data protection have a longstanding tradition and are respected both by law and in practice. Judicial aid is granted restrictively. Data stored by a Swiss company in Switzerland is therefore well protected.

From a privacy point of view, U.S. providers (in the U.S. or U.S. affiliates based in Switzerland) have a disadvantage as extraterritorial U.S. law can be applicable.

Switzerland as an Attractive Location for Data Centers

Despite its small size, Switzerland is a leading host country for data centers.¹

Why?

- 1. Economic reasons:** Switzerland provides economic, political, and social stability and has one of the lowest inflation rates worldwide. A highly competitive business and tax environment², flexible employment laws, a skilled international

workforce and high quality of life are further advantages.

- 2. Geographic reasons:** Switzerland being in the heart of Europe guarantees a low latency period and excellent data and travel connections to all key European cities. Furthermore, natural catastrophes – such as earthquakes, tornadoes and hurricanes – are extremely rare.
- 3. Infrastructure reasons:** The Swiss ICT-Infrastructure is highly developed and enables the processing of high data volume.³
- 4. Energy reasons:** Energy costs are reasonable⁴ and the availability of power supply is very high. Another point is sustainability; Switzerland scores well with its renewable energies, such as hydroelectric power.

Legal Reasons

Switzerland has a longstanding privacy tradition. In the Federal Constitution, data protection is recognized as an indepen-

dent citizens' right.⁵ The Federal Act on Data Protection aims to protect the fundamental rights of natural persons and legal entities whose data is being processed.⁶

The "gold standard" for privacy and security has been the EU Data Protection Directive. While not a member of the EU, Switzerland is a member of a very small club of non-EU countries declared to be compliant with the EU's requirements for international data processing. This opens up opportunities for Swiss businesses to do cloud computing for other countries, inside and outside the U.S.

The Swiss data protection level is even higher than in EU countries. Contrary to EU-legislation, Swiss law protects not only personal data, but also data on legal entities. This is an additional advantage.⁷

And contrary to the U.S. and other European countries (England, France, Germany), as far as known in the public, Swiss authorities have not implemented surveillance like activities such as PRISM. The access of (Swiss) authorities to private data is very restricted – by law and in fact.

PRISM, U.S. Patriot Act and Swiss Data Protection

As a reaction to Edward Snowden's publications, data center customers are increasingly concerned about their privacy. U.S. and non-U.S. providers of data and cloud services are faced with many questions.

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How is the situation in Switzerland? Does the U.S. Patriot Act apply in Switzerland?

The title of the Patriot Act is actually a ten-letter acronym (USA PATRIOT) that stands for Uniting (and) Strengthening America (by) Providing Appropriate Tools Required (to) Intercept (and) Obstruct Terrorism Act of 2001. The act allows federal officers, who acquire information through electronic surveillance or physical searches, to consult with federal law enforcement officers, to coordinate efforts to investigate or to protect against potential or actual attacks, sabotage or international terrorism or clandestine intelligence activities by an intelligence service or network of a foreign country.⁸ In the U.S., investigators may easily apply for an order requiring sensitive data. An FBI officer may have direct access to the data if he sends a National Security Letter (“NSL”) to the concerned person or legal entity. U.S. investigators may obtain a so-called “gag order,” which prevents providers from informing any concerned person that his/her information is required by U.S. investigators.

In Switzerland, no Patriot Act or PRISM program⁹, or the like is in force. The access of (Swiss) authorities to private data is very limited both by law and in fact. In general, any unauthorized obtaining of data or accessing to a data processing system is a violation of the Swiss Criminal Code.¹⁰ Furthermore, any activities on behalf of a foreign state on Swiss territory are illegal¹¹ such as gathering evidence in Switzerland without a prior request for judicial aid.

The Patriot Act may not be applied on Swiss territory. Thus, neither foreign authorities nor civil parties have any direct access to personal or business data located on Swiss territory. In general, without a Swiss state order, no access is permitted.¹²

Restrictive Judicial Aid

Switzerland is a privacy fortress, but no fortress is unconquerable. Different ways of cooperation between Switzerland and foreign countries are permitted, such as in criminal matters there is police,¹³ ad-

ministrative cooperation and also mutual assistance.¹⁴

Foreign countries may apply for judicial aid to access data stored within Switzerland’s borders.

Swiss authorities grant international mutual assistance only if a formal request is substantiated and specified. Foreign authorities must explain in detail who is concerned, what is the subject of the proceeding, and, in particular, why the requested information is sought and relevant to the foreign proceedings. The Swiss authorities are restrictive; no foreign fishing expeditions are accepted.

In practice, judicial aid is difficult for practical reasons. According to the vice-director of the Federal Office of Justice, Ms. Susanne Kuster, it is almost impossible to find out where exactly the data is stored within a data center without the cooperation of the concerned owner of the data. Therefore, in Switzerland, such taking of evidence is done only in rare cases.¹⁵

U.S. Affiliates in Switzerland

It must be noted that the Patriot Act applies also to U.S. affiliates settled in Switzerland.¹⁶

U.S. affiliates located in Switzerland might get into difficult situations because they must comply not only with the local Swiss law but also with (extraterritorial) U.S. law.

If a U.S. affiliate, based in Switzerland, receives a National Security Letter, it would be against Swiss law to follow a U.S. request without approval from the competent Swiss authority.

Trends After PRISM – Recommendation

We have received many questions from worried clients, in particular related to outsourcing and cloud services.

Basically, our advice is the following:

- Make sure that your data is stored in data centers physically located in Switzerland.
- Make sure that your data does not leave Switzerland.
- Check, whether your provider is a U.S. affiliate.

- Check your contracts with the data center provider.
- For critical data such as essential technical know-how of your company or health data, negotiate special clauses with your data center provider, such as information duties of the data center for any access to the servers, anonymization of servers, physical access to servers only by the customer, etc.
- Check encryption solutions.

Data center capacities in Switzerland are being massively increased. Outsourcing, email, and cloud services are successfully marketed with a Swiss approach. New techniques, called homomorphic cryptography, are evolving, and enable the processing to occur while the data remains encrypted.¹⁷

- 1 Switzerland ranks in 10th place in the Data Centre Risk Index 2012; Hurleypalmerflatt/Cushman&Wakefield; Data Centre Risk Index 2012; Informing global investment decisions, p. 7.
- 2 Cf. Asut/economiesuisse; Datentresor: So bleibt die Schweiz ein Topstandort für Data Center, dossierpolitik, 19. November 2012, Nummer 22, p. 3 et seq.
- 3 Switzerland belongs to the leaders of ICT infrastructure (rank 3 worldwide in ITU top broadband economies; Broadband Commission, The State of Broadband 2012, September 2012, Annex 3).
- 4 The Swiss price per kWh ranked 4th after Russia, Iceland and Finland; Hurleypalmerflatt/Cushman&Wakefield; Data Centre Risk Index 2012; Informing global investment decisions, p. 7.
- 5 Art. 13 of the Federal Constitution of the Swiss Confederation of 18 April 1999 (SR Nr. 101).
- 6 Federal Act on Data Protection [DPA] of 19 June 1992 (SR Nr. 235.1).
- 7 Cf. Asut/economiesuisse; Datentresor: So bleibt die Schweiz ein Topstandort für Data Center, dossierpolitik, 19. November 2012, Nummer 22, p. 3 et seq.
- 8 Cf. Section 215 of the USA Patriot Act.
- 9 So far, there is no PRISM or similar program known in Switzerland.
- 10 Art. 143 et seq. of the Swiss Criminal Code of 21 December 1937 (SR Nr. 311.0).
- 11 Art. 271 of the Swiss Criminal Code.
- 12 See section III of this article for more details on Swiss Mutual Assistance.
- 13 Art. 75a of the Federal Act of International Mutual Assistance in Criminal Matters (IMAC); Police cooperation covers measures that can be undertaken without the use of compulsory procedures. The communications between police authorities generally happens via their national Interpol bureaux. Especially the Schengen Agreement has affected the rules for police cooperation within the EU; Guidelines of the Federal Office of Justice, International Mutual Assistance in Criminal Matters, 9th edition 2009, p. 6.
- 14 The distinction between police cooperation and mutual assistance varies from international conventions and countries concerned, Guidelines of the Federal Office of Justice, International Mutual Assistance in Criminal Matters, 9th edition 2009, p. 6.
- 15 NZZ, Datengeheimnis wird zum neuen Schweizer Standortvorteil, 14th June 2013.
- 16 Such as it is the case with stored data by Microsoft, Google or Amazon.