



Invalidation of the Safe Harbor Agreement – companies must act now

In its October 6, 2015 ruling, the European Court of Justice declared that data transfer with the US under the Safe Harbor Agreement is invalid. Companies that store the personal data of European users in the US have to take action.

Until a new agreement is negotiated with the US government, the Safe Harbor Framework no longer constitutes adequate legal basis for transmission of personal data to the US.

Swiss Federal Data Protection and Information Commissioner (FDPIC)

What does the invalidation of the Safe Harbor Agreement mean for your company?

In a globalized world, data traffic across borders is considered an economic engine. The phrase US-Swiss Safe Harbor Framework refers to the agreement governing data exchange with the US. But how these streams of personal data are handled is regulated differently in the various countries.

The US is a special case

The US does not have adequate data protection legislation. The previously negotiated Safe Harbor Agreement significantly eased the free flow of data between the EU and certified companies, or in reference to the US-Swiss Safe Harbor Framework, between Switzerland and the US. It was used by companies to store data originating in Europe on servers in the US or to transfer such data to third parties.

The Safe Harbor Agreement eliminated the extensive legal declarations previously required, enabling the simple and yet legally compliant data exchange with the US. In its ruling, the European Court of Justice now maintains that the US does not meet the minimum level of data protection in accordance with the European standard. Data in the US is not sufficiently protected against government access. Moreover, in the event of data misuse, EU users have no way to take legal action in the US. After the European Court of Justice ruling, the Safe Harbor Agreement is no longer valid. In the absence of further justification, the data exporter is exposed to legal sanctions if data continues to be transferred.



Ruling also affects Swiss companies

Switzerland has very strong data protection that focuses in particular on the basic rights of those affected. According to article 6(1) of the Swiss Federal Data Protection Act (DPA), cross-border transmission of personal data is permitted with destination countries able to demonstrate legislation guaranteeing the protection of those affected. If such legislation does not exist in the destination country, the cross-border transmission of personal data is not permitted. In that case, data delivery is permitted only as set forth in Article 6(2) of the DPA.



The greenDatacenter Zurich West offers discerning customers the highest level of security.

The ruling is of major significance for Swiss companies and their data exporters. For Switzerland, the phrase US-Swiss Safe Harbor Framework represents a similar agreement governing data exchange with the US. Around 4,000 US businesses were self-certified under this agreement. Since that time, they commit to guarantee a level of data protection equivalent to that in the EU. This made it possible to freely exchange data with certified companies. Now, however, the validity of this process is also called into question by the ruling. In an opinion on the judgment, the Swiss Federal Data Protection and Information Commissioner (FDPIC) writes: "Until a new agreement is negotiated with the US government, the Safe Harbor

Framework no longer constitutes adequate legal basis for transmission of personal data to the US."

What now – tight deadline by January 2016

European data protectors are calling on the US to provide greater protection of the data of European citizens. Negotiators have until the end of January 2016 to respond to the decision of the European Court of Justice on the Safe Harbor Agreement on data transmission and to develop new ideas. Switzerland

also wants to be involved in the internationally coordinated approach. If no suitable solution has been found with the US authorities by then, subsequent transfers under Safe Harbor would no longer be legally admissible.

According to the FDPIC, companies using the US-Swiss Safe Harbor Framework must agree to additional measures by January 2016.

Does Switzerland stand to profit?

Throughout all European countries, Switzerland is considered a safe data location; transmitting the personal data of EU users to Switzerland therefore does not require a Safe Harbor Agreement. After investments of more than one billion Swiss francs on modern data centers in Switzerland over the last six years, companies should take a closer look at the data center providers in this country. After all, the country offers a number of additional location benefits such as the first-rate electricity and data infrastructure, affordable energy prices, low-risk sites and the availability of skilled personnel.

Initial reactions of companies

According to various media reports, major US businesses have already begun searching for European data center locations. They plan to increase capacities significantly. This is considered to be an initial signal that even multinational corporations are concerned by the legal uncertainties and potential civil lawsuits in individual EU countries. In addition, they are now probably taking seriously the concerns of EU data protectors, which have existed for years.

What does the invalidation of the Safe Harbor Agreement mean for Green's customers?

- ▶ The European Union has confirmed that the level of data protection in Switzerland is at least equivalent to that of the EU. Therefore, a separate agreement such as the Safe Harbor Agreement applicable for US providers was and remains unnecessary. Personal data from the EU can continue to be processed in all Green data centers.
- ▶ For now, the transfer of personal data from Switzerland to the EU remains unaffected by the ruling of the European Court of Justice.
- ▶ As a Swiss IT company, Green has made a name for itself as an innovator and reliable partner for 20 years. Green operates several data centers in Switzerland which meet the highest standards of security and availability. Green also enters into partnership agreements to allow its customers easier access to additional data centers in the EU and on four continents.

What should Swiss companies do now?

- ▶ Find out what personal data is stored and how your data leaves the network.
- ▶ Research whether additional data is processed by others and third parties.
- ▶ If third parties process the data, verify where this data is stored. Specifically, this means to determine where the data centers are located.
- ▶ Ensure the legitimacy of the data transfer in the event that the data centers storing your data processed by third parties are located in the US.
- ▶ To do so, apply the high level of data protection of the local data centers in Switzerland.
- ▶ Prepare yourself thoroughly for your customers' questions.

Summary of key points

The ruling of the European Court of Justice poses a number of questions regarding data location and legal basis. In summary:

- ▶ According to the FDPIC, transfers under Swiss Safe Harbor are currently to be made only with additional guarantees.
- ▶ Nevertheless, there is no long-term legal certainty.
- ▶ We recommend that companies storing data in a foreign country – whether physically or as a virtual service – move to Switzerland as a data location. This is the only way to ensure compliance with data protection requirements.
- ▶ Switzerland is recognized by the EU as a data location, so no further agreement is required for storing personal data from the EU.
- ▶ The Swiss Data Protection Act guarantees a high level of protection of data.



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