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A local trustee is not immunity

Why a local partner and a local data centre are no shield from US law

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In a trustee-model cloud offer, a local operator runs a US vendor's software in a local data centre. That does not put your systems out of reach of US law, which follows control of the software wherever the servers sit. The model fixes where the data sits and who operates the building, which settles residency; keys held locally also raise the bar on silent access, for data the vendor never needs in the clear. The software, the update channel and the vendor's support access stay where they were.

Three instruments, one hook. The CLOUD Act (2018) reaches data in a US provider's "possession, custody, or control … regardless of whether … located within or outside the United States". The hook is control, so a US parent's European subsidiary and a trustee the vendor can still reach both sit inside it. Microsoft France could not guarantee to the Senate in June 2025 that French data would never be handed over (Sénat 2025). Section 702 of FISA (2008) is the sharper instrument. It permits only "the targeting of non-U.S. persons reasonably believed to be located outside the United States", 291,824 of them in 2024 (ODNI 2025). Collection is programmatic and provider-compelled, with no individual warrant and no redress for the target, which the Court of Justice condemned (CJEU 2020). The 2024 reauthorisation (RISAA 2024) extended the providers that can be compelled to any with "access to equipment that is being or may be used to transmit or store wire or electronic communications" (50 U.S.C. 1881(b)(4)(E); CRS 2025), a description a vendor's maintenance access satisfies. Executive Order 12333 (1981) covers collection abroad under executive authority alone. The documented tap on the links between Google's and Yahoo's own data centres (Gellman and Soltani 2013) ran under that order, with no request to either company.

Why the model does not close the gap. The software stays foreign. Bleu runs Microsoft's stack and S3NS runs Google's: the trustee operates the facility and holds the keys, while the vendor writes the code and ships the patches. Where the vendor needs the data in the clear, no contractual measure is effective against Section 702 (EDPB 2021, use case 6). Cut-off is the other half of the risk. A licence withdrawn, an export control or a sanction stops a service the trustee cannot maintain alone. Control is a flow: the contract and the cap table behind a trustee can change after signature, so a European label at signature is a photograph of a liquid arrangement. The certain cost is economic: on the vendor's proprietary interfaces the cost of leaving is unchanged, so the price you can be charged is unchanged, whether or not any authority ever asks for anything (Fermigier 2026a, 2026b).

What to require instead. Ask who controls the software your business runs on and what leaving it would cost. A supplier passes the first question only if its ultimate parent's home law cannot compel it, the contract states what happens under a foreign order and the keys stay outside the vendor's reach. It passes the second only if the core runs on interfaces a second supplier serves, so that it can be re-pointed without a rewrite. Residency, local staff and certification requirements do not discriminate: a foreign-controlled vendor meets them at the same cost. France's SecNumCloud already encodes the first test as immunity

from non-EU law (ANSSI 2022, §19.6); the lab's brief gives the checklist and the break-even device for the second (Fermigier 2026a, section 4, Annex B and Annex C).

Status of the law, September 2026. Section 702 lapsed on 12 June 2026 after the House rejected an extension. Collection continues under certifications the FISA Court approved in March 2026, valid to about March 2027, while reauthorisation is negotiated (NPR 2026; EFF 2026). The EU-US Data Privacy Framework stands at first instance (General Court 2025), under appeal before the Court of Justice (C-703/25 P). Adequacy makes transfers lawful and leaves compelled access where it was. A protection that depends on the state of a foreign statute is not a protection.

References

- ANSSI (2022). *SecNumCloud, référentiel d'exigences*, version 3.2, §19.6. https://cyber.gouv.fr/sites/default/files/document/secnumcloud-referentiel-exigences-v3.2.pdf
- CJEU (2020). Case C-311/18, *Data Protection Commissioner v Facebook Ireland Ltd and Maximillian Schrems*, judgment of 16 July 2020. https://curia.europa.eu/juris/liste.jsf?num=C-311/18
- CLOUD Act (2018). Clarifying Lawful Overseas Use of Data Act, Pub. L. 115-141, div. V, 23 March 2018; 18 U.S.C. §2713. https://www.law.cornell.edu/uscode/text/18/2713
- CRS (2025). *FISA Section 702 and the 2024 Reforming Intelligence and Securing America Act*, Congressional Research Service report R48592, 8 July 2025. https://www.congress.gov/crs-product/R48592
- EDPB (2021). *Recommendations 01/2020 on measures that supplement transfer tools*, version 2.0, 18 June 2021. https://www.edpb.europa.eu/our-work-tools/our-documents/recommendations/recommendations-012020-measures-supplement-transfer_en
- EFF (2026). Victory! 702 has expired! Electronic Frontier Foundation, Deeplinks, 15 June 2026. https://www.eff.org/deeplinks/2026/06/victory-702-has-expired
- Executive Order 12333 (1981). *United States Intelligence Activities*, 4 December 1981, as amended. https://www.archives.gov/federal-register/codification/executive-order/12333.html
- Fermigier, S. (2026a). *Shifting to sovereign digital supply: a "how to" approach: Six questions: scope, AI, the business case, contracts, rent or build, and the consortium.* Version 1.2, 22 September 2026. Abilian Econ Lab. https://econ.lab.abilian.com/papers/sovereign-supply-questions/
- Fermigier, S. (2026b). *Exit, Pursued by a Bill: Lock-in Rents and Portability in European Cloud and Software.* Draft working paper v0.14, 2026-09-23. Abilian Econ Lab. https://econ.lab.abilian.com/papers/rent-channel/
- FISA (2008). Section 702, 50 U.S.C. §1881a. https://www.law.cornell.edu/uscode/text/50/1881a
- Gellman, B., and Soltani, A. (2013). NSA infiltrates links to Yahoo, Google data centers worldwide, Snowden documents say. *The Washington Post*, 30 October 2013. https://www.washingtonpost.com/world/national-security/nsa-infiltrates-links-to-yahoo-google-data-centers-worldwide-snowden-documents-say/2013/10/30/e51d661e-4166-11e3-8b74-d89d714ca4dd_story.html
- General Court (2025). Case T-553/23, *Latombe v Commission*, judgment of 3 September 2025; appeal C-703/25 P pending. https://curia.europa.eu/site/upload/docs/application/pdf/2025-09/cp250106en.pdf
- NPR (2026). FISA 702, a key U.S. spy tool, has lapsed. Now what? 12 June 2026. https://www.npr.org/2026/06/12/nx-s1-5856291/fisa-702-surveillance-expiration-bill-pulte
- ODNI (2025). *Annual Statistical Transparency Report, Calendar Year 2024*, figure 4. https://archive.dni.gov/files/CLPT/documents/2025_ASTR_for_CY2024.pdf
- RISAA (2024). Reforming Intelligence and Securing America Act, Pub. L. 118-49, 20 April 2024. https://www.congress.gov/118/plaws/publ49/PLAW-118publ49.pdf

- Sénat (2025). Audition de Microsoft France, 10 juin 2025, in *Commission d'enquête sur les coûts et les modalités effectifs de la commande publique*, rapport n° 830 (2024-2025), tome II. https://www.senat.fr/rap/r24-830-2/r24-830-2.html