



## Can Citibank's TBDF contract work for others in EU Directive context?

**Citibank uses a transborder data flow contract for transfers of credit card data from Germany to the USA (PL&B Dec '96 p. 6-10). If it works for Citibank, can contractual agreements provide a legal basis for international flows of personal data, and be a successful technique for others once the EU Data Protection Directive is implemented? Duncan MacDonald, Citibank's General Counsel, Card Products, is positive.**

In 1995, Citibank announced its "Bahncard" project to develop, together with German transport authorities in Berlin, an all-in-one card which combined a credit card function with a train travel pass. When it became known that the project would involve the export of large quantities of personal data to the US, Citibank, which had greatly underestimated the sensibility of German consumers on data protection matters, were suddenly faced with a major public relations headache. Duncan MacDonald went to Germany to sort out the legal problems.

After negotiations with Berlin's Data Protection Commission, a solution was eventually agreed which permitted the export of the data on the basis of a legal contract which applied the provisions of the German law directly to the processing in the US of the exported data, and also provided for the German data protection authorities to visit the US to audit compliance with these rules, if necessary.

Partly as a consequence of the "Bahncard" experience, Citibank and others organised an EU-US dialogue on data protection issues at Berlin's Aspen Institute in November 1996. The results of this conference, which brought together experts from government, data protection authorities, industry and universities from both sides of the Atlantic, are now available in an in-depth conference report entitled *Data Protection in the Global Society* (Tel: +(1) 202 332 9312).

Citibank's view is that the contractual solution used in the "Bahncard" case is the way forward in resolving the issue of the "adequacy" of third country protection posed by the EU's Data Protection Directive. It would be possible to create generic contractual agreements which could be used widely by companies in all sectors. There

is no alternative, because new cross-sectoral US privacy legislation will not happen.

MacDonald is very positive about the potential for auditing of data protection compliance to be conducted on-line. This was the way forward, given the lack of funds and resources available to European-style data protection authorities which monitor application of data protection principles.

The Berlin meeting agreed on the idea of an independent but global data protection website, to be established by *Privacy and American Business*. The website, which should be ready by January 1998, is intended to be the world's most comprehensive data protection library. Another initiative is a study by the US-based Brookings Institute on the economic impact of the EU Directive's adequacy provisions on US business, and on the possibility for using contracts solutions to ensure privacy in international data flows.

It is important to talk about the economics of privacy protection. For a global company like Citibank, international and not national solutions are needed. For Citibank's Chairman, John Reid, the global privacy issue is as important as global tax or intellectual property questions. Resolving the privacy issue is a major company objective.

**Dr Stefan Walz** (Data Protection Commissioner, Bremen, Germany) commented that the "Bahncard" case was to do with the application of German law prior to the implementation of the EU Directive. He pointed to the importance of distinguishing between the issue of whether the contractual solution in this case would satisfy the "adequacy" standard of the Directive (perhaps), from the issue of whether such a contractual solution was a model which could be more generally applied when implementing the Directive's provisions (the answer is no).

**Simon Chalton** (Bird and Bird) raised the important point that it was very difficult, if not impossible, to grant data subjects enforceable legal rights by way of a contract between two firms.

**Nick Platten** and **Professor Joel Reidenberg** (see p.28) suggested that for smaller companies, many now already trading globally over the Internet, drafting elaborate legal contracts to allow them to collect and disclose data across international frontiers would be costly and burdensome.

**Report by Nick Platten independent consultant.**