



International Chamber of Commerce

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Department of Policy and Business Practices

Update and questionnaire on the BASEL II

This document refers to the ICC work on Basel II and the outcome of the discussion during the conference call on 22 February where it was decided that the Task Force on Privacy and Protection of Personal Data would develop a questionnaire on the Basel II Initiative of the Bank for International Settlements (BIS), with a special focus on the data protection issue.

Your input to the questionnaire will serve as a basis for the development of an ICC position at a later stage. The questionnaire will be circulated to you shortly and will be presented at the 4 April EBITT Commission meeting.

This work will be lead by Christopher Kuner (Hunton & Williams – Belgium), chair of the Task Force on Privacy and Protection of Personal Data and by Rainer Knyrim (Preslmayr – Austria), drafter of the questionnaire and member of this Task Force.

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Background:

Basel II, the forthcoming protocol for the financial sector, is designed to replace the 1988 Capital Accord. It recognizes that managing and controlling financial risk and operational risk, such as IT, is an integral part of corporate governance and, as such, obligates companies to assess and state their vulnerability.

Basel II is based on 3 main areas that allow banks to effectively evaluate the risks financial institutions face: minimum capital requirements, supervisory review of an institution's capital adequacy, and an internal assessment process and market discipline through effective disclosure to encourage safe and sound banking practices. The first phase of Basel II will come into effect at the end of 2006, with the more advanced elements planned for implementation at the end of 2007.

For detailed information on this Framework and/or the BIS, please follow the link:

<http://www.bis.org/publ/bcbsca.htm>

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ICC-Fact Finding Questionnaire Basel II and Data Protection

prepared by Rainer Knyrim (Austria)

Introduction

1. Basel II requires banks to collect and exchange huge amounts of data, including customer data falling under data protection legislation. It is surprising to read that with respect to the difficult relationship between data protection and Basel II, the draft of the new EU capital requirement framework (EU Council Doc Nr. 12890/05 – “New Directive”) has just one paragraph in its introduction reminding credit institutions that *they* “will have to adjust their data processing needs to their clients’ legitimate data protection interests as governed by the existing Community legislation on data protection”. In other words, the New Directive will lay the problem into the hands of the banks and will not solve it itself. References to data collection in the New Directive have an extremely general wording which do not give an idea of what kind of data banks will *really* be allowed to process and *in what way* they will be allowed to share it internally or externally (example: Art 84 2 (d): “The credit institution collects and stores all relevant data to provide effective support to its credit risk measurement and management process.”).
2. The new draft Directive already requests banks to collect data. This data is needed to do the requested ratings in the future (example: Art 154 5. and 6. The new Directive requires banks to keep two years of historical data by the end of 2007). It is questionable how banks shall fulfill data collection duties which are laid down in a (draft) directive which has not been transposed into national law.
3. The rating provisions request the collection of huge amounts of data from their bank customers and banks already collect customer data of various kinds, including for example soft facts (like private/family issues of company managers). Banks question whether they really have the right to collect and process this data which comes from many different sources and is collected partly without the customers’ knowledge. The draft of the new directive does not give any useful help in answering this question.
4. To do ratings and settle credit limits on large customers which are clients in different banks of a banking group, data needs to be exchanged both EU-wide as well as transborder which leads to the well-known data transfer subject with the additional issue that the banks are forced to do so without any useful legal provisions or basis for the transfer. Experience has shown that the argument of a prevailing interest of the bank is more difficult to argue than was thought.



Questionnaire

To find out more and collect facts on the problems that banks experience in the field of Basel II and data protection, we would like to invite you to participate in this questionnaire. Your answers will be treated confidentially. Please fill out the questionnaire as this would help us to formulate a possible answer.

1. Will Basel II cause changes in the way (intensity, depth etc) that you collect and process rating data?
2. Does your bank already collect rating data on its customers to fulfill Basel II requirements? Is your bank already collecting data or will it collect “soft facts” on its customers? Will it collect sensitive data like race, religion, health or criminal information of key personnel of your customer? Will your bank use data on its customers received from third parties?
3. To settle credit limits on large customers who are clients in different banks of a banking group, will your bank exchange customer/rating data within its banking group or with other banks/third parties? Will this transfer involve cross border data flow outside the EU?
4. Will such credit limits be settled by using a joint data base to which different legal entities of your banking group will have access or will there be a central unit in your banking group collecting the data, forming a credit limit and distributing only the information to each entity which is relevant to it? Or will your bank establish another system?
5. Is your bank planning to comply with the Basel II data protection issues by using consent declarations of its customers? If yes, would these consent declarations be used in all cases or only in specific situations (like special groups of customers or special business areas)?
6. Would your bank prefer to get clear international/EU and/or national legislation which would make consent declarations unnecessary?
7. Has your bank thought on how it will treat data subject access rights like information, correction, deletion rights of it's customers concerning their data/rating data?
8. Has your bank already raised privacy issues and data protection issues with regard to Basel II duties internally? Has your bank designated people to work on the subject of Basel II and data protection?
9. Does your national legislation contain any specific provisions on Basel II and data protection or do you know about projects/drafts that will do so? If yes, please inform us about them and where we could obtain the information from.
10. Do you think that the current/drafted (if existing) national data protection legislation and banking legislation in your country is clear enough for your bank to understand how to deal with the data protection issues raised by the Basel II?
11. Do you think that existing international/EU legislation sufficiently covers the data protection issues raised by Basel II?



12. Has your bank already addressed the privacy issues in Basel II with the national Data Protection Authorities (DPAs) or Banking Authorities/Associations? Or do you know about any ongoing projects/discussions in this field?
13. Have you read any newspaper/legal articles/studies on the issue of Basel II and data protection? If yes, please indicate where and when (or send us a copy/link) as this would help us to show that the subject is a public issue. Have you heard about any conferences on the subject? If yes, please send us information as well.
14. Do you think it would be useful for ICC to create a task force on this issue or a joint task force consisting of experts on data protection and banking issues? Would your bank like to be actively involved in such a task force? Would your bank be willing to share costs that could arise from the work done in a task force?
15. Do you think that such task force should include banking secrecy questions in its work? Has your bank discussed banking secrecy issues with regard to Basel II? Have you heard about any ongoing discussions, legal articles, conferences on banking secrecy and Basel II? Please inform us about them.
16. Has your bank already implemented the necessary anti-money-laundering and anti-terrorism measures and solved the data protection issues linked to this subject (including, if necessary the notification or approval by the local data protection authority)? If not, do you think that the current national legislation in your country is sufficient to solve the data protection issues linked to anti money-laundering and anti terrorism measures? Do you think that ICC should get involved in this matter as well?

If you have any further information or any further points you would like to share with us, please do not hesitate to contact Manuela van der Laan at mvn@iccwbo.org

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