1. As briefed by the Permanent Representatives Committee on 15 November 1989, the Working Party on Intellectual Property has re-examined Articles 4 and 5 of the above proposal for a Directive with particular reference to the problem of the analysis (reverse engineering or decompiling) of computer programs.
This report supplements the one contained in 9647/89, in preparation for a policy debate in the Council (Internal Market) meeting on 21 December 1989.

2. The Working Party considered whether the Directive should regulate the problem of analysis of computer programs.

Only the Spanish, Greek and Italian delegations felt that, for reasons of harmonization, the analysis of computer programs should be dealt with in this Directive.

Conversely, the great majority of delegations held that the Directive should remain neutral on this point and should not anticipate future developments in legal doctrine and jurisprudence, given that at present there were no specific relevant provisions in the legislation of any of the Member States. Those delegations thought that although the user of a program ought not, in principle, to be allowed to analyse it with the aim of making a competing program, the Directive should not prevent Member States from allowing users, under reasonable conditions, to make an analysis confined to determining interfaces (for example, to create a new program compatible with the first).
3. However, a number of delegations felt that Article 4(a) of the proposal for a Directive, both in the text proposed by the Commission (5682/89 PI 25) and in the consolidated text (9304/1/89 PI 68), was not neutral on the issue of analysis, in that it made reproduction of a computer program subject to authorization by the author and specifically mentioned certain acts necessary for analysis (running, for example) in this context.

To solve this problem, it was suggested that Article 5 of the Directive, on exceptions to the restricted acts, be supplemented by the following new paragraph 3, which in part reproduces Article 9(2) of the Berne Convention:

"3. This Directive shall not prevent Member States from authorizing reproduction of a computer program for the purposes of analysis to determine interfaces provided that such reproduction does not conflict with a normal exploitation of the works and does not unreasonably prejudice the legitimate interests of the author."

A number of delegations viewed the principle of this new paragraph favourably, but reserved their final positions.
4. The Permanent Representatives Committee should decide whether the problem of the analysis of computer programs should be regulated in this Directive or left to national legislation. In the latter case, the Committee should state its views on the compromise solution proposed in paragraph 3 above.