I. Introduction

1. On 18 July 1990, the Commission forwarded to the Council a proposal for a Directive on the protection of individuals with regard to the processing of personal data (1). The proposal is based on Articles 100a and 113 of the EC Treaty.

The purpose of the proposal is to establish an equivalent high level of protection in all Member States of the Union in order to ensure the free movement of such data within the Community and to eliminate the distortions of competition and the risks of decentralization which may arise therefrom.

It should be noted that the White Paper on growth, competitiveness and employment submitted by the Commission further underlines the need for the Directive as a

(1) OJ No C 277, 5.11.1990, p. 3.
regulatory measure accompanying the creation of a European information area. This should provide further impetus to personal data processing. The emergence of "information highways" and the "multi-media world", as it has been agreed to call these technologies which will link up data processing, telecommunications and television, will create data processing possibilities which are increasingly intrusive for private life, simultaneously covering textual data, sound (such as the human voice) and images (such as photographs, movement of persons, etc.)

2. **The European Parliament** delivered its Opinion at first reading on 11 March 1992 and suggested a number of amendments to the Commission proposal (\(^2\)).

3. **The Economic and Social Committee** delivered its Opinion on 24 April 1991 (\(^3\)).


6. The Working Party subsequently resumed discussion of the whole question from the autumn of 1992 on the basis of the amended proposal and completed a first reading of the proposal at five meetings under the United Kingdom Presidency and a further five meetings under the Danish Presidency, before proceeding with a second reading of the text under the Belgian Presidency.

   The Greek Presidency, although about to conclude this second reading, has examined in detail certain politically or technically difficult aspects.

7. It should also be noted that the Belgian Presidency submitted a note to Coreper on the progress of discussions (8381/2/93 ECO 206 REV 2 and 8798/93 ECO 226). On the basis of that note, Coreper held an initial exchange of views, which showed that

---

\(^3\) OJ No C 159, 17.6.1991, p. 38.
\(^5\) In the 1986 Single Act version.
the great majority of delegations agreed on the need for the Directive.

8. Certain major points raised by the amended proposal are in abeyance at this stage of the discussions and are referred below to Coreper for discussion. To that end, a consolidated document containing the draft Directive, in its present form, has been drawn up: see 6285/1/94 REV 1 ECO 76.

Further questions (6) could also be referred to Coreper at a later stage.

The aim of the Presidency is to obtain the political agreement of the Internal Market Council at the latter's meeting on 16 June 1994.

II. Major questions unresolved

Recapitulation of the general structure of the proposal

It would seem useful first of all to recall the principles of protection in terms of:

– on the one hand, the obligations incumbent upon persons, public authorities, undertakings or associated bodies who or which carry out the processing operations under their responsibility;

– on the other hand, the rights granted to natural persons whose data undergo processing.

The obligations of controllers concern, in particular, the quality of data, which must be used to serve a specified and legitimate purpose in the light of the grounds for processing data, one of which may be the consent of the data subjects, technical security with a view to preventing unauthorized access to files and notification of processing to the national supervisory authority.

The rights granted to natural persons comprise the right to be informed in various circumstances of processing on the basis of data relating to them, the right to have knowledge of such data and the right to request that such data be rectified if they prove to be incorrect and, indeed, to object to processing.

(6) raised by Articles 2, 4, 6 and 7 in particular.
9. The nature of the harmonization sought

(see Article 5 in particular).

9.1 As proposed by the Commission, the draft Directive is a framework text establishing the general principles of the protection of individuals in respect of the processing of personal data. This text allows the Member States a degree of discretion in transposing the common principles and in choosing the means and procedures for ensuring that these principles are actually complied with.

9.2 With the support of the Commission, the Presidency has endeavoured throughout the Working Party's discussions to preserve and even to enhance the framework directive character of the draft Directive. Various provisions have been deleted (see Article 10); others have been considerably streamlined (see in particular Articles 18 to 21 of the amended proposal). The Presidency has likewise opposed the introduction of over-detailed provisions aimed solely at clarifying the principles already enshrined in the draft Directive (see in particular the discussions of the Working Party on Scientific Research, Epidemiology and Statistics).

9.3 Some delegations (D/DK/I/NL and UK), however, wanted to keep open the possibility of leaving the Member States a greater degree of discretion and asked that the principle of a minimal directive enabling the Member States to grant greater protection should they so wish be retained. These delegations were afraid in particular, that a tendency in favour of the protection of individuals would be prevented in the Member States following the adoption of the Directive.

The other delegations, however, supported the Commission proposal. They commented that a minimal Directive could have the effect of undermining the objectives sought by harmonization; in particular, distortions of competition would probably continue
to exist in the Community area between undertakings subject to constraints, restrictions or prohibitions on the use of data resulting from greater protection and those not subject to such constraints.

9.4 **The Presidency** suggests that the Committee go along with the viewpoint of the latter delegations.

It points out that:

– the minimal approach had been adopted in the case of several provisions where it appeared to be more especially necessary (see Article 8 on sensitive data, Articles 11 and 12 on the list of information to be provided to the data subjects, Article 19 on the list of information to be given to the supervisory authority in the notification and Article 30 on the powers of the supervisory authority);

– the level of protection adopted was high, as proposed by the Commission, so that under current legislation no Member State would have to reduce its present level of protection when transposing the Directive. The need for further protection had not, therefore, been demonstrated;

– the legal basis of Article 100a(4) offered the appropriate procedure for enabling the needs which might arise subsequently in any individual Member State to be met.

9.5 In order to take account of concerns experienced by delegations in favour of a minimal approach, **the Presidency** suggests that the text emphasize that the Member States should face up to their obligations in a dynamic manner by endeavouring to improve the protection at present provided for in their legislation. With that end in view, it is proposed that recital 8a be amended.

10. **The scope of the Directive**

Two questions arise here:

– the inclusion of manual data in the scope of the Directive;
- the exclusion of certain activities outside the sphere of Community law.

**The inclusion of manual data in the scope of the Directive**

(see Articles 3(1) and 35(2), second subparagraph)

10.1 The inclusion in the scope of the Directive of data which are the subject of simple manual processing, to the exclusion of any recourse to data-processing, is a highly controversial issue within the Working Party.

10.2 It should be noted that a very clear distinction exists in current national legislation between legislation covering manual data and legislation excluding manual data from protection.

Convention 108 of the Council of Europe, to which 10 Member States are Contracting Parties, allows total freedom in this area, moreover.

10.3 A minority of delegations (DK/IRL and UK) is opposed to the inclusion of manual data in the scope of the Directive. These delegations, whose national legislation does not provide for the protection of individuals with respect to the manual processing of personal data, thought that legislative intervention in this area had been made necessary twenty years previously by the introduction of data processing and by the considerable means which it provided for the processing of information. They also took the view that implementation of the protection of existing manual files would entail very high costs.
10.4 All the other delegations could endorse the Commission proposal calling for manual data to be included in the scope of protection. In their view, the manual processing of data actually involved the same risks for the protection of personal privacy.

As a compromise and in order to take account of objections from a minority of delegations concerning the cost of implementing protection, which had also been expressed by representatives of various professional circles, the majority of delegations was willing to support suggestions tabled at the meeting by the Commission representatives. These suggestions were designed to make it clear that the Member States would have more time in which to implement the Directive with regard to the manual data already contained in files at the time national provisions for the transposition of the Directive entered into force. This clarification would be introduced in Article 35 relating to the time limit for the Directive's transposition (second subparagraph of paragraph 2).

10.5 The Presidency suggests that the Committee adopt this compromise solution put together under the Belgian Presidency, which:

- would enable the objective of protecting individuals, which should not depend on the technology employed for the processing operation, to be achieved in the long run;

- met concerns over the cost of implementing the Directive.

**The exclusion of certain activities from the scope of the Directive**

(see the first subparagraph of Article 3(2))
10.6 The Commission has proposed excluding from the Directive the processing of personal data in respect of activities falling outside the scope of Community law.

10.7 Some delegations support the approach proposed by the Commission.

10.8 Other delegations (F/UK and DK in particular) are asking, however, that Article 3 include a list of activities which were in any case excluded from the scope of the Directive:

(a) the list of excluded activities would cover: State security, defence, public security, the monetary interests of the State, including the establishment and collection of taxes, and criminal court proceedings;

(b) these exclusions should in any case apply even where such activities came under Community law.

10.9 In order to reach a compromise on this point, the Presidency would make the following comments:

(a) there is no reason to exclude from the scope of the Directive activities coming under Community law which are likely to fall within such broad concepts as "public security" (for example, measures to combat money-laundering laid down by Council directive) or "the establishment or collection of taxes" (for example, mutual assistance measures between national administrations as organized in Community texts on fiscal, customs, agricultural or social matters
and likely to be deployed shortly under the strategic programme for the consolidation of the internal market);

(b) the legitimate concerns of the Member States in the areas in question are covered by Article 14 of the Directive, which authorizes the latter to derogate from the protection of individuals in order to satisfy certain important interests in a democratic society;

(c) a list of examples of activities could, however, be introduced into the Directive in order to satisfy delegations which had made such requests. To that end, reference could usefully be made to activities falling within the scope of Titles V and VI of the Treaty;

(d) the question, raised by the French delegation of whether the legal basis of Article 100a would or would not be sufficient subsequently to cover activities which are the subject of the "bridging" clause pursuant to Article K.9 does not require an immediate answer. Such an answer could be provided at the appropriate time in the light of the type of activities for which the bridging clause would actually be used. An appropriate statement in the Council minutes could be arranged.

11. The arrangements applicable to sensitive data
(see Article 8)

11.1 As is evident from the highly detailed discussions conducted by the Working Party under the Belgian Presidency and under the current Presidency, the greater protection proposed for the data considered as sensitive is without question the most controversial provision of the draft Directive.
11.2 This situation is explained by the profound differences existing between current national legislations, despite the provisions of the Council of Europe Convention which requires the Contracting States (including 10 Member States of the European Union) to prohibit the processing of sensitive data except where the appropriate exemption has been authorized.

11.3 In the case of such sensitive data, the protection of individuals should take the form of a prohibition on the processing of data, coupled with a limited number of exceptions in response to clearly defined needs.

11.4 The fundamental question with regard to the scope of the prohibition is whether the list of sensitive data contained in Article 8(1) of the draft Directive should be exhaustive or minimal.

In compliance with the objectives of the draft Directive on the free movement of data and the removal of distortions of competition, five delegations (B/E/F/I and L) expressed a preference for an exhaustive list, as proposed by the Commission. As a compromise, certain of them were, however, to some extent amenable to a minimum list.

The principle of a minimum list is supported by the other seven delegations, which take the view that specific present and future national features make it impossible to achieve harmonization in this area.

11.5 The Presidency suggests that the Committee go along with the opinion of the latter delegations. It points out that it will of course be up to the Member States which consider categories of data not included in Article 8(1) of the Directive as being sensitive and, therefore, subject to the prohibition on processing to notify
the Commission of the fact under the terms of the general requirement to notify national provisions (see final provisions of the Directive).

11.6 The exceptions to the prohibition on the processing of sensitive data are listed in Article 8(2) to (5).

11.7 In addition to the consent of the data subject, Article 8(2) lists various exceptions aimed at authorizing processing in situations unlikely to prejudice the rights of individuals (processing of data required under a contract of employment; processing by certain associations of which the data subject is a member; processing of manifestly public data; processing in response to a vital interest).

11.8 The Presidency asks the Committee to state an opinion on the draft compromises contained in the consolidated document (see Article 8(2)(aa), (ab), (b) and (c)).

11.9 With regard to the processing of health data, the Presidency notes that there is a broad consensus on the text as it stands following the Working Party's proceedings, even if certain points raised by some delegations will still have to be discussed (see Article 8(2b)).

11.10 Member States may also derogate from the prohibition on the basis of "an important public interest". This provision proposed by the Commission has the support of eight delegations; the other four delegations (DK/D/IRL and UK) simply want the Member States to be able to derogate without the need for an explanation in the text of the Directive of the grounds for derogation.

11.11 In order to ensure the desired harmonization, the Presidency suggests that the Committee go along with the opinion of the majority of delegations and thus retain
the "important public interest" criterion in the text of the draft Directive.

In order to allay the concerns of various delegations, it may be useful, however, to provide several examples in order to clarify the idea of important public interest.

These examples could be provided in either a recital or the actual text of the Article if it is thought that greater legal security is required.

They should include scientific research, in particular epidemiological research, and public statistics.

11.12 The Presidency reminds the Committee that the Health Council has pointed to the need to avoid endangering epidemiological research through excessively cumbersome constraints which might arise from this draft Directive. In the view of the Presidency the major concerns voiced in connection with important public interest could be fully satisfied by each Member State. This solution, proposed by the Commission, is supported by a number of delegations (in particular D/F and GR). Other delegations, on the other hand (B/DK/E/I/NL and UK), want the draft Directive to include far more detailed provisions so as to preserve the balance between the protection of the rights of individuals and research and statistical requirements. Such provisions have, moreover, been prepared by the Belgian Presidency. In the view of the Presidency, this would presuppose the introduction into the Directive of far too precise and detailed provisions which are not essential in view of the objectives of the draft Directive.
12. **The arrangements applicable to the press**
(see Article 9)

12.1 The Member States would be required to take the necessary measures to reconcile the right to protection of privacy and freedom of expression, both of which are regarded as fundamental rights under the European Convention on Human Rights.

12.2 Agreement exists on the principle of such an obligation.

12.3 The representatives of the press, for their part, appear to have received the amended Commission proposal well.

12.4 There are, however, differences of views on two points:

- does freedom of expression, to be balanced against the protection of privacy, apply solely to journalistic activities, as is the case with the Commission proposal, or should it also cover literary and artistic creation, as provided for in the draft Article prepared under the Belgian Presidency?

- should the exemptions to be implemented by the Member States concern the provisions of Chapter VI of the draft Directive on national supervisory authorities and, in particular, the powers of such authorities? Could the latter, which are also subject to a strict professional secrecy requirement, in connection with the checks which they are called upon to carry out, have access to, for example, the source of information available to the press?

12.5 Despite the text of the European Convention, which does not restrict freedom of expression to journalism alone, the reference to artistic and literary creation
failed to achieve a consensus, with three delegations (D/E and GR) opposed and other delegations still with misgivings.

12.6 The inclusion of the powers of national authorities among the provisions likely to be the subject of exemptions was unacceptable to four delegations (F/L/I and P).

12.7 The Presidency suggests to the Committee that it agree to the draft text of Article 9 drawn up by the Working Party under the Belgian Presidency, which contains a reference to literary and artistic creation and to Chapter VI.

13. **The rights of individuals**
   (see Articles 11, 12, 13, 14, 15 and 16; Article 10 having been deleted).

13.1 The Presidency hereby submits to the Committee the unresolved problems concerning the rights to information (Articles 11 and 12). (The problems encountered in the case of Articles 13 and 14 should be able to be resolved at Working Party level; Articles 15 and 16 will, moreover, be examined at a forthcoming Working Party meeting).

13.1.1 **Principle of information**

A majority of delegations was able to agree to the information of individuals at the time when the data was gathered from them or at the time when the data were communicated to third parties or when they were registered, subject to certain exceptions, as provided for in Article 14 in particular.

Four delegations (DK/IRL/NL and UK) stood by scrutiny reservations on these provisions. The United Kingdom and Irish delegations also questioned the need for
the latter, which they thought amounted purely and simply to the application of principles already contained in Article 6 on the fair processing of data. The UK/IRL and NL delegations also thought that the introductory wording of Articles 11 and 12 should, like the text proposed by the Commission, be so drafted as to leave a greater degree of discretion as regards the person actually providing the information and the time at which such information should be given.

13.1.2 The list of information to be given to the data subject

Several delegations (D/DK/IRL/NL and UK) thought that the list was too long and called for information on the data recipients and the possible consequences of a failure to reply (Article 11(c) and (d)) to be dispensed with, since such information should not be provided spontaneously by the controller but solely at the request of the data subject.

The B/E/F/I/L and P delegations endorsed the list proposed by the Commission.

13.2 The Presidency suggests that the Committee adopt the texts of Articles 11 and 12 as contained in the attached consolidated document, which is a compromise between the positions adopted by the two groups of delegations providing for information on the existence of right of access to be given solely at the request of the data subjects.

14. Notification of processing operations to national supervisory authorities

(see Articles 18, 19 and 21; Article 20 having been deleted).

14.1. Notification of personal data processing operations to national supervisory authorities serves a dual purpose: to enable these authorities to carry out the required checks
and to ensure transparency of processing with respect to the general public.

14.2 The provisions in question are among the most controversial in the draft Directive. The proposal submitted by the Commission has, moreover, been substantially restructured and streamlined in this regard.

14.3 The actual principle of notification is not disputed by any delegations. It may be useful to note that the object of notification is not each individual processing operation, but rather a series of operations put in hand for the same purpose, or for connected purposes. Similarly, it should also be noted that the notification of manual processing operations is purely optional for the Member States.

14.4 Delegations were also unanimous in thinking, in the light particularly of experience gained in certain Member States, that very many processing operations should be exempt from the notification requirement. In the absence of such exemptions, the supervisory authorities would be swamped with information of no great importance for the exercise of their supervision. The Commission suggested that 80% of processing operations should be exempted.

14.5 Differences of opinion continue to exist between delegations regarding three points, viz. the definition of the obligation to notify, the information to be notified and supervision by national authorities of notifications.

14.6 **Obligation to notify** (see Article 18(2))

A large majority of delegations supports the principle - as proposed by the
Commission - of blanket notification of processing operations, with exemptions or simplifications to be implemented by the Member States in the case of processing operations which are not likely to affect data subjects' rights adversely.

Some delegations belonging to this first group want to ensure that the wording adopted rules out exemptions or simplifications in the case of data deemed to be sensitive within the meaning of Article 8.

Four delegations (DK/IRL/NL and UK) consider that the scope afforded by the text to the obligation to notify is too far-reaching and are pressing for adoption of the principle of a positive list - to be drawn up by the Member States - of processing operations to be notified.

14.7 Information to be notified (see Article 19(1))

Some delegations (D/DK/IRL/NL and UK) want to reduce the list of particulars to be notified by removing information on the data subjects or categories of data subject affected by the notified processing operations as well as on security measures adopted. The Portuguese delegation, for its part, would like the information referred to first above to be removed.

Likewise, delegations are split regarding information on potential data recipients or categories of data recipients; should only those recipients that are third parties vis-à-vis the controller be indicated, or should the notification also specify, in addition to third parties, any other categories of recipients coming under the controller's authority?
14.8 **Supervision of notifications by national authorities** (see Article 19(3))

So as not to impose too heavy a burden on the supervisory authority, **eight delegations** are in favour of a **selective examination** of certain categories of processing operations prior to their implementation, on the understanding that prior examination should concern chiefly sensitive data and should be carried out within a period of time laid down in the Directive.

**Four delegations** (D/DK/IRL and UK), however, are not in favour of a prior examination.

14.9 The Presidency suggests that the Committee adopt the solutions contained in Articles 18 and 19 of the consolidated document, which have the advantage of permitting genuine harmonization, while leaving Member States a sufficient degree of discretion for ensuring that the supervision of national authorities does not assume bureaucratic proportions.

15. **Arrangements for transferring personal data to third countries**

(see Articles 26 and 27)

15.1 A consensus exists on the need for a joint approach by the Member States of the Community vis-à-vis third countries.

15.2 The Commission proposed the following arrangements for transferring data to third countries:

- transfers from a third country to a Member State of the Community are subject to the Directive's protection provisions;
– transfers from a Member State of the Community to a third country are subject to different provisions depending on whether or not an adequate level of protection is ensured in the third country to which data are exported:

– if the third country ensures an adequate level of protection, data may be transferred;

– if no adequate level of protection exists in the third country, no data may be transferred, other than those conditionally authorized under Article 27.

15.3 In the absence of a well-structured and homogeneously implemented joint approach, it is clear that controllers would find it particularly easy to bypass a Member State's export ban.

By calling into question the confidence which each Member State might have in the processing of personal data in the other Member States, this could ultimately disrupt free movement within the Community, which is the prime objective of the draft Directive.

15.4 For this reason, a large majority of delegations can agree to the text proposed by the Commission, with the amendments emerging from the Working Party's proceedings.

15.5 Several delegations (D/DK/IRL and UK), however, continue to have strong misgivings about the approach proposed for assessing the adequacy of protection in third countries, on the one hand, and defining exceptions to the transfer ban on the other.

15.6 In connection with the wording of the exceptions to the transfer ban, the German delegation formulated some proposals which were backed only by DK/IRL and UK. The other delegations and the Commission felt that the German proposals were too
loosely worded, permitting transfers to third countries with no adequate level of protection to take place under conditions that were too liberal, thereby posing risks for the protection of individuals.

Also, the current wording of the exceptions (as set out in Article 27) scrupulously takes account of objections expressed by various professional circles to the Commission's original proposal.

15.7 The Presidency therefore advises the Committee to retain the wording of the attached consolidated document which:

- meets the requirements of economic operators;
- ensures homogeneous implementation of a Community policy on the subject;
- guarantees a high level of protection of individuals.

15.8 The Presidency suggests the same approach with regard to assessment of the adequacy of the level of protection in a third country.

A joint approach in this area presupposes conferral of implementing powers upon the Commission (under a procedure still to be determined). If no such powers were provided, the adequacy of the level of protection in a third country could be assessed only by each Member State acting individually, subject to the control, where appropriate, of the Court of Justice following proceedings based on Articles 169 or 177 of the EC Treaty. Accordingly, conferral of implementing powers upon the Commission ought to afford a guarantee of early implementation of homogeneous assessment for all the Union's Member States.
16. National supervisory authorities
(see Article 30(1), second subparagraph)

16.1 The entire Working Party agrees that supervisory authorities need to be set up in the Member States in order to monitor the correct application of national laws.

16.2 Agreement also exists on the need for these authorities to be independent.

16.3 However, delegations have differing views as to what such independence should involve.

16.4 Several delegations (F/I and P) support the Commission proposal that the said authorities should enjoy organic independence, spelled out in a formal statute.

16.5 To accommodate the German delegation's constitutional problems, all the other delegations can accept that the authorities should merely enjoy functional independence, guaranteeing them freedom to exercise their powers.

16.6 As a compromise, the Presidency advises the Committee to adopt the criterion of functional independence, as contained in the attached consolidated document. That criterion ensures equivalent protection without requiring a more specific obligation to be imposed upon the Member States.

17. Committee procedure
(see Articles 33 and 34)

17.1 The attached consolidated document adopts the solution of a type III(a) regulatory
committee, which is acceptable to several delegations (B/P/GR and I), and not for an advisory committee as proposed by the Commission and rejected unanimously by delegations.

However, many delegations have come out in favour of a type III(b) committee.

17.2 Many delegations also want the scope of the Commission's implementing powers to be clearly defined. Several delegations are calling for an exhaustive list of these powers.

The text proposed by the Presidency in agreement with the Commission seeks to limit the implementing powers to certain areas of the Directive, by ruling them out for certain chapters (Articles 1 and 3, Chapter 3 on judicial remedies, liability and penalties).

The Presidency also points out that the Commission will be entitled to adopt simple technical measures taking account of the specific characteristics of the various sectors concerned, with due respect for the standards set by the Council.

17.3 However, in view of the current situation regarding committee procedure, the Presidency advises the Committee to postpone a final decision on this point until later.