Subject: Amended proposal for a Council Directive on the protection of individuals with regard to the processing of personal data and on the free movement of such data

The Committee re-examined the substantive questions on the basis of 9957/94 (Working Party report), 9951/94 + COR 1(en) + COR 2 (f,nl) (draft Directive drawn up by the Working Party) and 10496/94 (Coreper summary record of 26 and 28 October 1994).
1. Scope of the Directive

(i) Manual data (Article 2(c) and recital 14b)

IRL and UK confirmed their opposition in principle to the inclusion of manual data in the scope of the Directive; S concurred with these delegations.

NL recalled that it reserved its final position on the current draft until it knew the results of an on-going study of the costs of the draft Directive.

As regards the DK request that recital 14b be reworded (see text of the footnote on page 3 of the Coreper summary record), the Commission submitted the following wording which in its opinion took account of the Danish request:

"(14b) Whereas the protection of individuals must apply as much to automatic processing of data as to manual processing; whereas the scope of this protection must not in effect depend on the techniques used, otherwise this would create serious risks of circumvention; whereas, nonetheless as regards manual processing, this Directive covers only files, not unstructured folders; whereas in particular the content of a file must be structured according to specific criteria relating to individuals allowing easy access to the personal data; whereas, in line with the definition in Article 2(c), the different criteria for determining the constituents of a structured set of personal data, and the criteria governing access to such a set, can be laid down by each Member State; whereas folders or sets of folders, as well as their cover pages, which are not structured according to specific criteria, shall under no circumstances fall within the scope of this Directive".

DK/IRL and UK stated that they would examine this text with an open mind.
(ii) **Sounds and images (Articles 1 and 3)**

F welcomed the Presidency proposal that processing of images and sounds for the purpose of public security be definitively excluded from Article 3. However, this delegation considered that between such processing and processing which was secondary to a personal file, the inclusion of which it accepted, there was a grey area in which the specific nature of the problems it raised made adjustment of the rules necessary (DK/IRL/NL/UK together with S expressed their sympathy with the F position).

The Commission representative suggested a review clause in this respect while UK advocated such a clause but with the exclusion of manual data; DK/IRL and F supported the UK while E/L/I and P supported the Commission.

The Presidency asked the Commission to consider how this question might be resolved and to hold the necessary bilateral talks for that purpose. I announced that it would submit a compromise proposal in the form of a statement in the Council minutes (1).

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(1) The I delegation forwarded the following statement to the Secretariat:
"The Council and the Commission consider that, in addition to the application of Article 14 of this Directive, in the framework of the implementation of Article 5, Member States may take all measures in order to ascertain more precisely personal data consisting in images and sounds which cannot permit the identification of the data subject."
(iii) Exclusion of certain activities from the scope of the Directive (Article 3(2))

(a) exclusion of public safety activities: the Committee endeavoured to solve this question on the basis of the compromise put forward by the Presidency: deletion of the phrase "excepting the areas which come within Community law" in the first indent of Article 3(2) and a reference to the acquis communautaire either in a statement in the minutes (solution preferred by F) or in a recital.

To this end, the Commission representative submitted the following draft recital:

"recital 11a

whereas the activities referred to in Titles V and VI of the Treaty on European Union regarding public safety, defence, State security or the activities of the State in the area of criminal law may be included among the activities which fall outside the scope of Community law; whereas, however, public safety activities fall within the scope of this Directive insofar as they may be the subject of measures taken by the Community institutions in the exercise of the powers conferred on them by the Treaty establishing the European Community; whereas, where the activities referred to in Titles V and VI of the Treaty on European Union are the subject of a decision in accordance with Article K9, such activities shall be subject to the provisions of this Directive once the Council and the European Parliament, acting on a proposal from the Commission, have so decided;"

However, F and UK considered that this text raised difficulties.

(b) Other exclusions: UK, supported by DK, wanted to add to the list of exclusions in Article 3(2) "the economic well-being of the State";
D maintained a scrutiny reservation regarding health data; IRL wanted electoral rolls excluded.

2. Arrangements applicable to sensitive data (Article 8)

- **GR** maintained its reservation on this Article (and on Article 7); the Presidency asked this delegation to review its position and repeated its suggestion of a unilateral statement of interpretation;

- **DK/IRL/UK** together with N and S confirmed their position in favour of a non-exhaustive list of prohibitions; moreover **DK** (with the support of **FIN/N and S**) insisted on excluding trade union membership from the list of prohibitions on processing while **UK** wanted processing regarding the activities of political parties excluded;

- as regards paragraph 2(c), the Committee agreed to adopt the following wording (taken from Article 27(1), point 4):

  
  "(c) the processing relates to data which are manifestly made public by the data subject or is necessary for the establishment, exercise or defence of legal claims."  (NL could now withdraw its reservation, while **DK/IRL and UK** maintained theirs at this stage).

- the reservations by **IRL and NL** on paragraph 2(a) and by **IRL and UK** on paragraph 4 were maintained.
3. Arrangements applicable to the press (Article 9)

(i) Derogations regarding Chapter VI

The Presidency confirmed its compromise solution which consisted of

- introducing a reference to Chapter VI in the first sentence;

- replacing the current second sentence by a text restricted to stipulating that the Member States should lay down the supervisory measures indispensable to ensure the right to privacy

and also suggested amending the proposed statement in the minutes as follows:

"Re Article 9

1. The Council and the Commission consider that reconciling the right to privacy with freedom of expression should not lead Member States to prescribe exemptions from Article 17a on the security of processing nor from Article 30(2), third indent, on the power of the supervisory authority to engage in legal proceedings nor from paragraph 4 of that Article regarding the presentation of a regular report.

2. unchanged (see 9951/94, footnote 1 on page 26)."

NL supported this solution, while IRL and UK considered that it was on the right lines, and DK upheld its reservation.

D/E/F/I and L maintained a preference for the current text.
(ii) Extension of the derogations to include artistic or literary expression

The Council agreed to the following statement in the minutes (suggested by I):

"The Council and Commission note that:

- copyright protection of artistic or literary works does not interfere with this Directive;
- literary and artistic expression is a form of expression whose freedom is guaranteed by Article 10 of the European Convention on Human rights."

4. Rights of individuals
   - right to information (Articles 11 and 12)
   - right of access (Articles 13 and 14)
   - right to object (Article 15)

   (i) Substantive reservations

   IRL and UK maintained their reservations on these provisions.

(ii) Information on recipients or third parties

With regard to whether information should be given on all recipients (or categories of recipients) or only on third parties, the Presidency reiterated its suggestion that, in all cases where the question arose, this information be restricted to categories of recipients (D had already supported this solution by way of compromise).

E stated that it had difficulties with this solution, while DK stated that it would examine it in a positive spirit.
(iii) Knowledge of the logic involved in any automatic processing (Article 13(1), third indent)

DK/IRL and UK, supported by S, maintained their reservations.

The Presidency asked the Commission and the delegations concerned to hold bilateral consultations in order to clarify the object of this provision.

(iv) Exemptions and restrictions (Article 14)

B waived its reservation on Article 14(1).

Moreover, the Committee agreed to the following statement:

"The Council and the Commission state that the derogation included in Article 14(1)(g) does not cover rights such as the right to carry out data-processing."
(v) **Processing for purposes of scientific and statistical research**

DK/IRL/UK and S maintained reservations on the compromise solution put forward by the Presidency at the Committee's last meeting (\(^2\)). More specifically, DK repeated its proposal for a text concerning Article 14(2) (see footnote 2 on page 31 of 9951/94).

(vi) **Automated individual decisions (Article 16)**

The Committee confirmed its agreement on the addition after "decision which produces legal effects concerning him" of the phrase "or significantly affecting him"; however, UK maintained a reservation on this Article.

\(^2\) The solution is as follows:
- addition to article 6(1)(b) of the text given in footnote 3 on page 20 of the consolidated text,
- retention of recitals 15a and 17a,
- entry in the Council minutes of the following statement:
  "The Council and the Commission note that the elements set out in recital 17a of the Directive, which are intended in particular to clarify the concept of public interest in Articles 7 and 8 of the Directive, derive from the purpose of the latter and thus form an integral part of this legal act; it follows that those elements are to be taken into consideration by the Member States when they adopt the laws, regulations and administrative provisions required to comply with the Directive."
5. Notification of the supervisory authorities (Articles 18, 19 and 19a)

(i) Prior checking (Article 19a)

DK/IRL and UK, with the support of A/N and S, confirmed their opposition to the principle of prior checking.

E and NL still wanted paragraph 1 of this Article made more flexible so that national authorities would have greater discretion in this respect; F considered that the text was already sufficiently flexible and did not want it changed.

(ii) Article 18(2) second indent

The Committee considered replacing the last two lines of this indent as follows: "...in order to prevent processing operations from adversely affecting the rights and freedoms of the data subjects".

6. Transfer of data to third countries (Article 26 and 27)

(i) Substantive reservations

DK/IRL and UK (with support of S) maintained their reservations.

(ii) Negotiations with third countries (Article 26(4a))

F wanted this paragraph amended in accordance with the suggestion from the Council Legal Service (taking as an example the Directive of 30 June on the prospection of hydrocarbons).
According to that suggestion, paragraph 4a would read as follows:

"4a The Commission may submit proposals to the Council in order to obtain an appropriate negotiating brief."

With regard to Article 27(6), I was ready to withdraw its scrutiny reservation subject to the following addition to recital 26a:

"and, when the register is intended for consultation by persons having a legitimate interest, it should be made only at the request of the same persons or if the latter are the recipients;"

The Presidency asked the Working Party of Attachés to examine these texts.

7. National law applicable (Article 4)

GR and IRL (with support from N) were opposed to the current solution; DK stated that although it could not support this solution it was examining it; NL and UK retained their scrutiny reservations.

I was ready to support the current text subject to a modification of recital 12a (this delegation was sympathetic towards the Commission representative's suggestion that the phrase "in order to avoid circumvention of national rules" be inserted in the penultimate line (3)).

(3) I had originally proposed adding the following to this recital "whereas the controller may not organize data processing between its establishments so as to circumvent applicable national laws".
8. **Implementing powers - committee procedures (Articles 33 and 34)**

(i) **Implementing rules**

The Commission representative submitted a statement on the scope of the technical measures referred to in Article 33.

This statement is set out in full in the Annex to this record.

F maintained a reservation on Article 33 and pointed out that it would examine the Commission statement with the greatest attention and also asked for the opinion of the Council Legal Service in that connection.

NL proposed removing Articles 9, 18 and 19 from the scope of this provision.

(ii) **Committee procedure**

GR joined the ten delegations already in favour of a type IIIb committee.

B maintained its position in favour of a type IIIa committee.
1. The question of the granting of implementing powers to the Commission has already been discussed on two occasions in the past by Coreper:

- in October 1993 at a policy debate organized by the Belgian Presidency;

- last June in the context of preparations for the Internal Market Council held under the Greek Presidency.

The discussions mainly covered the type of Committee to be adopted in Article 34 of the draft.

On the other hand, the actual principle of granting implementing powers has not hitherto been questioned. Some delegations did however query the scope of such a delegation of powers to the Commission.

In order to accommodate these doubts, the Working Party amended the Commission proposal.

2. The Commission hopes that the approach which thus seems to have emerged can be adopted by the Council.

As it has pointed out in the explanatory memorandum to its proposal, it may prove necessary in future to take Community measures in order to adapt the rules laid down by the Directive to various economic and social sectors.

There are two reasons for this:

- on the one hand, the Directive will have a very broad scope covering numerous economic and social activities such as labour relations, banking, insurance, direct marketing, etc.;

- on the other hand, the processing of personal data is a particularly complex area. The legal objective of protecting the rights and freedoms of individuals must be implemented in the context of extremely varied techniques ranging from simple manual processing to the most sophisticated automated methods.

The general rules in the Directive will therefore have to be transposed into the extremely different contexts of each particular sector.

It is thus very probable that, with a view to the homogeneous implementation of the Directive, initiatives supplementary to the Directive may be required at Community level. The experience gained with Council of Europe Convention 108, which made it
necessary to adopt a large number of recommendations in differing areas such as direct marketing, statistics, health, employment or social security, shows the need to take sectoral measures in the sphere of personal data protection.

It is quite probable that subsequent amendments to the Directive, under the procedures required by Article 100a, may prove necessary in the future.

However, with a view to facilitating smooth management of the internal market, in an area whose importance was recently underlined, inter alia, by the European Council in the context of the information society, the Commission considered that obligatory use for the adoption of implementing measures of the cumbersome procedure of amending the Directive would be excessive.

This would constitute a serious setback in relation to current practice.

3. The Commission is in fact merely asking for the simple application of Article 145 of the EC Treaty.

The title of Article 33 of the draft Directive, which uses the phrase "implementing powers" clearly refers to that Article and rules out any ambiguity, unlike the phrase "rule-making powers" which had been used in the Commission proposal.

It is obvious that this delegation of powers must obey the relevant applicable rules as the Court of Justice has had occasion to interpret them. There is no need to re-open these questions.

Two comments may, however, be made regarding the area of implementing powers, which seems to be a matter of more particular concern to some delegations:

- the Council is not obliged to specify the details of the powers delegated; a delegation drafted in general terms is sufficient;

- when adopting the Directive, the Council and the European Parliament will set what the Court of Justice calls the essential rules reflecting the basic guidelines of the Community policy. The measures taken by the Commission will be able to aim only at implementing the essential rules, without being able to derogate therefrom.

4. The legal form of the measures to be taken by the Commission has also prompted queries from several delegations. It will be noted that it is not current practice for the Council to decide on the form which Commission decisions should take as it is generally acknowledged that it is for the institution responsible for issuing a measure to choose the form which such a measure should take in the light of the content and aim of the proposed measure. The Commission will therefore have to choose the legal form most appropriate to the intended purposes of the implementing measures while taking account of the content and aim of such measures.
5. The rules for the delegation of powers to the Commission, as provided for in the draft of Article 33 and amended by the Working Party, seem sufficiently clear.

According to this text, four conditions will have to be fulfilled before the Commission can take implementing measures:

- the implementing measures will have to be taken in application of certain Articles which are specifically listed in Article 33. These are Article 2, which lays down the essential definitions of the Directive, Article 4 concerning the determination of the applicable national law and Articles 6 to 21, which lay down the essential rules on protection of the rights and freedoms of individuals. Moreover, provision is made for implementing powers for determining which third countries do or do not have an adequate level of protection. On the other hand, it did not seem necessary to the Working Party to provide for the exercise of implementing powers for certain Articles of the Directive. These are Chapter III on judicial remedies, liability and penalties, Chapter V on codes of conduct, Chapter VI on the supervisory authority and its powers;

- to this initial limitation by topic is added a further limitation on the scope of the measures to be taken. It is difficult to give an abstract definition of "technical measures". In any case they are the opposite of "essential rules". It is, moreover, impossible to specify here and now in what areas technical measures may prove to be necessary in future. However, absolutely theoretical examples of possible implementing measures could concern the following areas: practical means of exercising the right of access which could vary widely according to the technology used in processing the data; the definition of the appropriate security measures which would have to follow developments in the technologies; interpretation of the concept of identifiable persons, which could be particularly important in certain sectors such as statistics; the means of informing persons where data had been collected in the context of television broadcasts such as teleshopping; etc.;

- the third condition is that Commission action is subject to the need for the proper operation of the internal market. It should therefore be aimed, for example, at eliminating distortions of competition which might still occur;

- finally, it is obvious that the Commission will be able to take implementing measures solely in compliance with the procedure laid down in Article 34, in which the Member States, the Council and the European Parliament (once, as expected, the draft institutional agreement proposed by the Commission on 19 April 1994 is adopted in the near future) will play more or less significant roles.