

Court of Justice EU, 9 november 2004, Fixtures Marketing v OPAP



DATABASE LAW

A fixture list for a football league constitutes a database: it refers to any collection of works, data or other materials, separable from one another without the value of their contents being affected.

- that the term database as defined in Article 1(2) of the directive refers to any collection of works, data or other materials, separable from one another without the value of their contents being affected, including a method or system of some sort for the retrieval of each of its constituent materials.
- In the case in the main proceedings, the date and the time of and the identity of the two teams playing in both home and away matches are covered by the concept of independent materials within the meaning of Article 1 (2) of the directive in that they have autonomous informative value.
- Although it is true that the interest of a football league lies in the overall result of the various matches in that league, the fact remains that the data concerning the date, the time and the identity of the teams in a particular match have an independent value in that they provide interested third parties with relevant information.
- The compilation of dates, times and names of teams relating to the various fixtures in a football league is, accordingly, a collection of independent materials. The arrangement, in the form of a fixture list, of the dates, times and names of teams in those various football matches meets the conditions as to systematic or methodical arrangement and individual accessibility of the constituent materials of that collection. The fact, raised by the Greek and Austrian Governments, that lots are drawn to decide the pairing of the teams is not such as to call into question the above analysis.

No substantial investment in the fixture list for a football league

- It follows that neither the obtaining, nor the verification nor yet the presentation of the contents

of a football fixture list attests to substantial investment which could justify protection by the sui generis right provided for by Article 7 of the directive.

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Court of Justice EU, 9 november 2004

(V. Skouris, President P. Jann, C.W.A. Timmermans, A. Rosas and K. Lenaerts (Rapporteur), Presidents of Chambers, J.-P. Puissechet, R. Schintgen, N. Colneric, J.N. Cuna.)

JUDGMENT OF THE COURT (Grand Chamber)

9 November 2004 (1)

Directive 96/9/EC – Legal protection of databases – Definition of database – Scope of the sui generis right – Football fixture lists – Betting)

In Case C-444/02,

REFERENCE for a preliminary ruling under Article 234 EC, from the Monomeles Protodikio Athinon (Greece), made by decision of 11 July 2002, received at the Court on 9 December 2002, in the proceedings

Fixtures Marketing Ltd

v

Organismos prognostikon agonon podosfairou AE (OPAP),

THE COURT (Grand Chamber),

composed of: V. Skouris, President, P. Jann, C.W.A. Timmermans, A. Rosas and K. Lenaerts (Rapporteur), Presidents of Chambers, J.-P. Puissechet, R. Schintgen, N. Colneric and J.N. Cunha Rodrigues, Judges, Advocate General: C. Stix-Hackl,

Registrars: M. Múgica Arzamendi and M.-F. Contet, Principal Administrators,

having regard to the written procedure and further to the hearing on 30 March 2004,

after considering the observations submitted on behalf of:

- Fixtures Marketing Ltd, by K. Giannakopoulos, dikigoros,

- Organismos Prognostikon Agonon Podosfairou AE, by F. Chdstodoulou, K. Christodoulou, A. Douzas, L. Maravelis and C. Pampoukis, dikigoroï,

- the Greek Government, by E. Mamouna and I. Bakopoulos and V. Kyriazopoulos, acting as agents, the Belgian Government, by A. Snoecx, acting as agent, and P. Vlaemminck, advocaat,

- the Austrian Government, by E. Riedl, acting as agent,

- the Portuguese Government, by L. Fernandes and A.P. Matos Barros, acting as agents,

- the Finnish Government, by T. Pynnä, acting as agent, the Commission of the European Communities, by K. Banks and M. Patakia, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 8 June 2004,

gives the following

Judgment

1. This reference for a preliminary ruling concerns the interpretation of the provisions of Directive 96/9/EC of

the European Parliament and of the Council of 11 March 1996 on the legal protection of databases (OJ 1996 L 77, p. 20, 'the directive').

2. The reference was made in the course of proceedings brought by Fixtures Marketing Limited ('Fixtures') against Organismes Prognostikon Agonon Podofairou AE ('OPAP'). The litigation arose over the use by OPAP, for the purpose of organizing betting games, of information taken from the fixture lists for the English and Scottish football leagues.

Legal background

3. The directive, according to Article 1(1) thereof, concerns the legal protection of databases in any form. A database is defined, in Article 1(2) of the directive, as 'a collection of independent works, data or other materials arranged in a systematic or methodical way and individually accessible by electron or other means'.

4. Article 3 of the directive provides for copyright protection for databases which, 'by reason of the selection or arrangement of their contents, constitute the author's own intellectual creation'.

5. Article 7 of the directive provides for a *sui generis* right in the following terms:

'Object of protection

1. Member States shall provide for a right for the maker of a database which shows that there has been qualitatively and/or quantitatively a substantial investment in either the obtaining, verification or presentation of the contents to prevent extraction and/or re-utilisation of the whole or of a substantial part, evaluated qualitatively and/or quantitatively, of the contents of that database.

2. For the purposes of this Chapter:

(a) "extraction" shall mean the permanent or temporary transfer of all or a substantial part of the contents of a database to another medium by any means or in any form;

(b) "re-utilisation" shall mean any form of making available to the public all or a substantial part of the contents of a database by the distribution of copies, by renting, by on-line or other forms of transmission. The first sale of a copy of a database within the Community by the rightholder or with his consent shall exhaust the right to control resale of that copy within the Community. Public lending is not an act of extraction or re-utilisation.

3. The right referred to in paragraph 1 may be transferred, assigned or granted under contractual licence.

4. The right provided for in paragraph 1 shall apply irrespective of the eligibility of that database for protection by copyright or by other rights. Moreover, it shall apply irrespective of eligibility of the contents of that database for protection by copyright or by other rights. Protection of databases under the right provided for in paragraph 1 shall be without prejudice to rights existing in respect of their content.

5. The repeated and systematic extraction and/or re-utilisation of insubstantial parts of the contents of the database implying acts which conflict with a normal

exploitation of that database or which unreasonably prejudice the legitimate interests of the maker of the database shall not be permitted.'

6. The directive was implemented in Greek law by Law No 2819/2000 (FEK A' 84/15- 3-2000).

The main proceedings and the questions referred for a preliminary ruling

7. According to the order for reference, the organisers of English and Scottish league football retained a company, Football Fixtures Limited, to handle the exploitation of the fixture lists outside the United Kingdom through licensing. Fixtures was assigned the right to represent the holders of the intellectual property rights in those fixture lists.

8. In Greece, OPAP has a monopoly on the organisation of gambling. In its activities it uses information from the fixture lists for the English and Scottish football leagues.

9. Fixtures brought an action against OPAP before the Manomeles Protodikio Athinon on the ground that OPAP's practices were precluded by the *sui generis* right it held under Article 7 of the directive.

10. In the light of the problems of interpretation of the directive, the Manomeles Protodikio Athinon decided to stay proceedings and refer the following questions to the Court for a preliminary ruling:

'1. What is the definition of database and what is the scope of Directive 96/9/EC and in particular Article 7 thereof which concerns the *sui generis* right?

2. In the light of the definition of the scope of the directive, do lists of football fixtures enjoy protection as databases over which there is a *sui generis* right in favour of the maker and under what conditions?

3. How exactly is the database right infringed and is it protected in the event of rearrangement of the contents of the database?'

The questions referred

Admissibility

11. The Finnish Government disputes the admissibility of the request for a preliminary ruling. It maintains that the order for reference is marred by insufficient detail of the legal and factual background to the main proceedings, which is liable to prevent the Court from giving a proper answer to the questions asked and the Member States from submitting relevant observations on those questions.

12. It must be recalled that according to settled case-law, the need to provide an interpretation of Community law which will be of use to the national court makes it necessary that the national court define the factual and legal context of the questions it is asking or, at the very least, explain the factual circumstances on which those questions are based (Case C-67/96 Albany [1999] ECR I-5751, paragraph 39).

13. The information provided in orders for reference must not only be such as to enable the Court to reply usefully but must also enable the governments of the Member States and other interested parties to submit observations pursuant to Article 23 of the Statute of the Court of Justice. It is the Court's duty to ensure that

that possibility is safeguarded, bearing in mind that, by virtue of the abovementioned provision, only the orders for reference are notified to the interested parties (Albany, cited above, paragraph 40).

14. In the present case, it appears from the observations submitted by the parties to the main proceedings and by the governments of the Member States pursuant to Article 23 of the Statute of the Court of Justice, that the information given in the order for reference enabled them to understand that the dispute arose over the use by OPAP, for the purpose of organising sporting bets, of information from the fixture lists prepared by the professional football leagues and that, against that background, the referring court has raised questions about the term database as defined in Article 1 (2) of the directive and of the scope and extent of the sui generis right provided for by Article 7 of the directive.

15. Moreover, the order for reference gives details of the relationship between the football leagues concerned, Football Fixtures Limited and Fixtures, which shed light on the basis on which the latter claims the protection of the sui generis right in the litigation in the main proceedings.

16. Furthermore, the information provided by the national court gives the Court of Justice sufficient knowledge of the factual and legislative context of the main proceedings to enable it to interpret the Community rules which are relevant to the situation which forms the subject-matter of the dispute.

17. It follows that the request for a preliminary ruling is admissible.

The merits

The term database as defined in Article 1(2) of the directive

18. The referring court asks, first, in its first two questions, what the term database as defined in Article 1(2) of the directive covers and whether football fixture lists fall within that definition.

19. A database in the terms of the directive is defined in Article 1(2) as ‘a collection of independent works, data or other materials arranged in a systematic or methodical way and individually accessible by electronic or other means’.

20. As both Fixtures and the Commission submit, there are several indications of the intention of the Community legislature to give the term database as defined in the directive, a wide scope, unencumbered by considerations of a formal, technical or material nature.

21. For instance, according to Article 1(1) of the directive, it concerns the legal protection of databases ‘in any form’.

22. Although the proposal for a Council Directive on the legal protection of databases (OJ 1992 C 156, p. 4), presented by the Commission on 15 April 1992 concerned exclusively electronic databases according to the definition of database contained in Article 1(1) of that proposal for a Directive, it was agreed in the course of the legislative process, that ‘protection under this Directive should be extended to cover non-

electronic databases’, according to the 14th recital of the preamble to the directive.

23. According to the 17th recital of the preamble to the directive, ‘the term “database” should be understood to include literary, artistic, musical or other collections of

works or collections of other material such as texts, sound, images, numbers, facts, and data’. The fact that the data or information at issue relate to a sporting activity thus does not preclude the database from being recognised as such in the terms of the directive.

24. Whereas, in its opinion of 23 June 1993 on the Commission proposal for a Council directive on the legal protection of databases (OJ 1993 C 194, p. 144), the European Parliament had suggested defining a database as a collection of a ‘large number’ of data, works or other materials, that condition no longer appears in the definition in Article 1(2) of the directive.

25. For the purposes of determining whether there is a database within the meaning of the directive, it is irrelevant whether the collection is made up of materials from a source or sources other than the person who constitutes that collection, materials created by that person himself or materials falling within both those categories.

26. Contrary to the contentions of the Greek and Portuguese Governments, nothing in the directive points to the conclusion that a database must be its maker’s own intellectual creation to be classified as such. As the Commission points out, the criterion of originality is only relevant to the assessment whether a database qualifies for the copyright protection provided for by Chapter II of the directive, as is clear from Article 3(1) and from the 15th and 16th recitals of the preamble to the directive.

27. Against the background of a wide interpretation various aspects of the directive demonstrate that the term database within the meaning thereof is more specifically defined in terms of its function.

28. A reading of the recitals of the preamble to the directive reveals that, given the ‘exponential growth, in the Community and worldwide, in the amount of information generated and processed annually in all sectors of commerce and industry as the 10th recital states, the legal protection provided by the directive is intended to encourage the development of systems performing a function of ‘storage’ and ‘processing’ of information, according to the 10th and 12th recitals.

29. Thus, classification as a database is dependent, first of all, on the existence of a collection of ‘independent’ materials, that is to say, materials which are separable from one another without their informative, literary, artistic, musical or other value being affected. On that basis, a recording of an audiovisual, cinematographic, literary or musical work as such does not fall within the scope of the directive, according to the 17th recital of the preamble to the directive.

30. Classification of a collection as a database then requires that the independent materials making up that collection be systematically or methodically arranged and individually accessible in one way or another.

While it is not necessary for the systematic or methodical arrangement to be physically apparent, according to the 21st recital, that condition implies that the collection should be contained in a fixed base, of some sort, and include technical means such as electronic, electromagnetic or electro-optical processes, in the terms of the 13th recital of the preamble to the directive, or other means, such as an index, a table of contents, or a particular plan or method of classification, to allow the retrieval of any independent material contained within it.

31. That second condition makes it possible to distinguish a database within the meaning of the directive, characterised by a means of retrieving each of its constituent materials, from a collection of materials providing information without any means of processing the individual materials which make it up.

32. It follows from the above analysis that the term database as defined in Article 1(2) of the directive refers to any collection of works, data or other materials, separable from one another without the value of their contents being affected, including a method or system of some sort for the retrieval of each of its constituent materials.

33. In the case in the main proceedings, the date and the time of and the identity of the two teams playing in both home and away matches are covered by the concept of independent materials within the meaning of Article 1 (2) of the directive in that they have autonomous informative value.

34. Although it is true that the interest of a football league lies in the overall result of the various matches in that league, the fact remains that the data concerning the date, the time and the identity of the teams in a particular match have an independent value in that they provide interested third parties with relevant information.

35. The compilation of dates, times and names of teams relating to the various fixtures in a football league is, accordingly, a collection of independent materials. The arrangement, in the form of a fixture list, of the dates, times and names of teams in those various football matches meets the conditions as to systematic or methodical arrangement and individual accessibility of the constituent materials of that collection. The fact, raised by the Greek and Austrian Governments, that lots are drawn to decide the pairing of the teams is not such as to call into question the above analysis.

36. It follows that a fixture list for a football league such as that at issue in the case in the main proceedings constitutes a database within the meaning of Article 1(2) of the directive.

The scope of the sui generis right

37. The referring court goes on, in its first two questions, to seek the Court's view of the scope of the protection afforded by the sui generis right in circumstances such as those of the case in the main proceedings.

38. Article 7(1) of the directive reserves the protection of the *sui generis* right to databases which meet a specific criterion, namely to those which show that

there has been qualitatively and/or quantitatively a substantial investment in the obtaining, verification or presentation of their contents.

39. Under the 9th, 10th and 12th recitals of the preamble to the directive, its purpose, as OPAP and the Greek Government point out, is to promote and protect investment in data 'storage' and 'processing' systems which contribute to the development of an information market against a background of exponential growth in the amount of information generated and processed annually in all sectors of activity. It follows that the expression '*investment in ... the obtaining, verification or presentation of the contents*' of a database must be understood, generally, to refer to investment in the creation of that database as such.

40. Against that background, the expression 'investment in ... the obtaining ... of the contents' of a database must, as OPAP and the Belgian, Austrian and Portuguese Governments point out, be understood to refer to the resources used to seek out existing independent materials and collect them in the database, and not to the resources used for the creation as such of independent materials. The purpose of the protection by the sui generis right provided for by the directive is to promote the establishment of storage and processing systems for existing information and not the creation of materials capable of being collected subsequently in a database.

41. That interpretation is backed up by the 39th recital of the preamble to the directive, according to which the aim of the sui generis right is to safeguard the results of the financial and professional investment made in '*obtaining and collection of the contents*' of a database. As the Advocate General points out in points 67 to 72 of her [Opinion](#), despite slight variations in wording, all the language versions of the 39th recital support an interpretation which excludes the creation of the materials contained in a database from the definition of obtaining.

42. The 19th recital of the preamble to the directive, according to which the compilation of several recordings of musical performances on a CD does not represent a substantial enough investment to be eligible under the sui generis right, provides an additional argument in support of that interpretation. Indeed, it appears from that recital that the resources used for the creation as such of works or materials included in the database, in this case on a CD, cannot be deemed equivalent to investment in the obtaining of the contents of that database and cannot, therefore, be taken into account in assessing whether the investment in the creation of the database was substantial.

43. The expression '*investment in ... the ... verification ... of the contents*' of a database must be understood to refer to the resources used, with a view to ensuring the reliability of the information contained in that database, to monitor the accuracy of the materials collected when the database was created and during its operation. The expression '*investment in ... the ... presentation of the contents*' of the database concerns, for its part, the resources used for the purpose of giving

the database its function of processing information, that is to say those used for the systematic or methodical arrangement of the materials contained in that database and the organisation of their individual accessibility.

44. Investment in the creation of a database may consist in the deployment of human, financial or technical resources but it must be substantial in quantitative or qualitative terms. The quantitative assessment refers to quantifiable resources and the qualitative assessment to efforts which cannot be quantified, such as intellectual effort or energy, according to the 7th, 39th and 40th recitals of the preamble to the directive.

45. In that light, the fact that the creation of a database is linked to the exercise of a principal activity in which the person creating the database is also the creator of the materials contained in the database does not, as such, preclude that person from claiming the protection of the sui generis right, provided that he establishes that the obtaining of those materials, their verification or their presentation, in the sense described in paragraphs 40 to 43 of this judgment, required substantial investment in quantitative or qualitative terms, which was independent of the resources used to create those materials.

46. In those circumstances, although the search for data and the verification of their accuracy at the time a database is created do not require the maker of that database to use particular resources because the data are those he created and are available to him, the fact remains that the collection of those data, their systematic or methodical arrangement in the database, the organisation of their individual accessibility and the verification of their accuracy throughout the operation of the database may require substantial investment in quantitative and/or qualitative terms within the meaning of Article 7(1) of the directive.

47. In the case in the main proceedings, the resources deployed for the purpose of determining, in the course of arranging the football league fixtures, the dates and times of and home and away teams playing in the various matches represent, as OPAP and the Belgian, Austrian and Portuguese Governments submit, an investment in the creation of the fixture list. Such an investment, which relates to the organisation as such of the leagues is linked to the creation of the data contained in the database at issue, in other words those relating to each match in the various leagues. It cannot, therefore, be taken into account under Article 7(1) of the directive.

48. Accordingly, it must be ascertained, leaving aside the investment referred to in the previous paragraph, whether the obtaining, verification or presentation of the contents of a list of football fixtures constitutes a substantial investment in qualitative or quantitative terms.

49. Finding and collecting the data which make up a football fixture list do not require any particular effort on the part of the professional leagues. Those activities are indivisibly linked to the creation of those data, in which the leagues participate directly as those responsible for the organisation of football league

fixtures. Obtaining the contents of a football fixture list thus does not require any investment independent of that required for the creation of the data contained in that list.

50. The professional football leagues do not need to put any particular effort into monitoring the accuracy of the data on league matches when the list is made up because those leagues are directly involved in the creation of those data. The verification of the accuracy of the contents of fixture lists during the season simply involves, according to the observations made by Fixtures, adapting certain data in those lists to take account of any postponement of a match or fixture date decided on by or in collaboration with the leagues. Such verification cannot be regarded as requiring substantial investment.

51. The presentation of a football fixture list, too, is closely linked to the creation as such of the data which make up the list. It cannot therefore be considered to require investment independent of the investment in the creation of its constituent data.

52. It follows that neither the obtaining, nor the verification nor yet the presentation of the contents of a football fixture list attests to substantial investment which could justify protection by the sui generis right provided for by Article 7 of the directive.

53. In the light of the foregoing, the first two questions referred should be answered as follows:

- The term database as defined in Article 1(2) of the directive refers to any collection of works, data or other materials, separable from one another without the value of their contents being affected, including a method or system of some sort for the retrieval of each of its constituent materials.

- A fixture list for a football league such as that at issue in the case in the main proceedings constitutes a database within the meaning of Article 1 (2) of the directive.

- The expression 'investment in ... the obtaining ... of the contents' of a database as defined in Article 7(1) of the directive must be understood to refer to the resources used to seek out existing independent materials and collect them in the database. It does not cover the resources used for the creation of materials which make up the contents of a database. In the context of drawing up a fixture list for the purpose of organising football league fixtures, therefore, it does not cover the resources used to establish the dates, times and the team pairings for the various matches in the league.

54. In the light of the foregoing, there is no need to reply to the third question referred.

Costs

55. Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable. On those grounds, the Court (Grand Chamber) rules as follows:

The term ‘*database*’ as defined in Article 1(2) of Directive 96/9/EC of the European Parliament and of the Council of 11 March 1996 on the legal protection of databases refers to any collection of works, data or other materials, separable from one another without the value of their contents being affected, including a method or system of some sort for the retrieval of each of its constituent materials.

A fixture list for a football league such as that at issue in the case in the main proceedings constitutes a database within the meaning of Article 1(2) of Directive 96/9.

The expression ‘investment in ... the obtaining ... of the contents’ of a database in Article 7(1) of Directive 96/9 must be understood to refer to the resources used to seek out existing independent materials and collect them in the database. It does not cover the resources used for the creation of materials which make up the contents of a database. In the context of drawing up a fixture list for the purpose of organising football league fixtures, therefore, it does not cover the resources used to establish the dates, times and the team pairings for the various matches in the league.

Signatures.

OPINION OF ADVOCATE GENERAL

STIX-HACKL

Delivered on 8 June 2004¹

I - Preliminary observations

1. This reference for a preliminary ruling is one of four parallel sets of proceedings² concerning the interpretation of Directive 96/9/EC of the European Parliament and of the Council of 11 March 1996 on the legal protection of databases³ (‘the Directive’). Like the other cases, this case concerns the so-called *sui generis* right and its scope in the area of sporting bets.

II - Legal background

A - Community law

2. Article 1 of the Directive contains provisions on the scope of the Directive. It provides *inter alia*:

‘1. This Directive concerns the legal protection of databases in any form.

2. For the purposes of this Directive, ‘database’ shall mean a collection of independent works, data or other materials arranged in a systematic or methodical way and individually accessible by electronic or other means.’

3. Chapter III regulates the *sui generis* right in Articles 7 to 11. Article 7, which concerns the object of protection, provides *inter alia*: *‘1. Member States shall provide for a right for the maker of a database which shows that there has been qualitatively and/or quantitatively a substantial investment in either the obtaining, verification or presentation of the contents to prevent extraction and/or reutilisation of the whole*

or of a substantial part, evaluated qualitatively and/or quantitatively, of the contents of that database.

2. For the purposes of this Chapter:

(a) “extraction” shall mean the permanent or temporary transfer of all or a substantial part of the contents of a database to another medium by any means or in any form;

(b) “re-utilisation” shall mean any form of making available to the public all or a substantial part of the contents of a database by the distribution of copies, by renting, by on-line or other forms of transmission. The first sale of a copy of a database within the Community by the rightholder or with his consent shall

exhaust the right to control resale of that copy within the Community; Public lending is not an act of extraction or re-utilisation.

3. The right referred to in paragraph 1 may be transferred, assigned or granted under contractual licence.

5. The repeated and systematic extraction and/or re-utilisation of insubstantial parts of the contents of the database implying acts which conflict with a normal exploitation of that database or which unreasonably prejudice the legitimate interests of the maker of the database shall not be permitted.’

4. Article 8, which governs the rights and obligations of lawful users, provides in paragraph 1:

‘1. The maker of a database which is made available to the public in whatever manner may not prevent a lawful user of the database from extracting and/or re-utilising insubstantial parts of its contents, evaluated qualitatively and/or quantitatively, for any purposes whatsoever. Where the lawful user is authorised to extract and/or re-utilise only part of the database, this paragraph shall apply only to that part.’

5. Article 9 provides that Member States may provide for exceptions to the *sui generis* right.

6. Article 10, which concerns the term of protection, provides in paragraph 3:

‘Any substantial change, evaluated qualitatively or quantitatively, to the contents of a database, including any substantial change resulting from the accumulation of successive additions, deletions or alterations, which would result in the database being considered to be a substantial new investment, evaluated qualitatively or quantitatively, shall qualify the database resulting from that investment for its own term of protection’.

B – National law

7. The Directive was implemented in Greek law by Law No 2819/2000. According to Article 7B of the explanatory report to that Law ‘the need for protection of databases stems from the fact that the making of databases requires the investment of considerable human, technical and financial resources while such databases can be copied or accessed at a fraction of the cost needed to design them independently’. Under Article 7E of the explanatory report, in addition to the right of intellectual property a *sui generis* right is recognised in favour of the maker of the databases in order to prevent the extraction or re-utilisation of a

¹ Original language: German.

² Proceedings In Cases C-46/02, C-203/02 and C-338/02 (judgment of 9 November 2004., ECR I•10365, ECR I•104.15, ECR I•10497) in which I am also delivering my Opinion today.

³ OJ 1996 L 77, p. 20.

substantial part of the content of the database without its permission.

III - Facts and main proceedings

A – General facts

8. In England professional football in the top divisions is organised by The Football Association Premier League Limited and The Football League Limited and in Scotland FIXTURES MARKETING by The Scottish football League. The Premier League and the football League (comprising Division One, Division Two and Division Three) cover four leagues in total. Before the start of each season, fixture lists are drawn up for the matches to be played in the various divisions during the season. The data are stored electronically and are accessible individually. The fixture lists are set out *inter alia* in printed booklets, both chronologically and by reference to each team participating in the relevant league. The pairs are indicated as X v Y (for example, Southampton v Arsenal). Around 2 000 matches are played during each season over a period of 41 weeks.

9. The organisers of English and Scottish football retained a Scottish company, Football Fixtures Limited, to handle the exploitation of the fixtures lists through licensing etc. football Fixtures Limited, in turn, assigned its rights to manage and operate outside the United Kingdom to Fixtures Marketing Limited ('Fixtures').

B - Specific facts

10. Fixtures brought a number of actions against the limited company Organismos Prognostikon Agonon Podofairou AE ('OPAP'). It claims that OPAP unlawfully and without the permission of the English and Scottish associations which are the makers and the operators of lists of football fixtures in England and Scotland, repeatedly extracts a substantial number of pairings of football teams playing against each other and transfers them to its internet sites '*Pame Stoichima*', '*Podosfairo Kathe Mera*', '*Chryso Podosfairo*' and '*Propo*' which distribute them and make them available to the Greek public, thereby infringing the *sui generis* right of the companies represented by Fixtures. They cite the urgency of the situation in support of their application for interim measures specifically to prohibit OPAP, on pain of a fine for any future infringement, from infringing their rights over the lists of football fixtures in question in England and Scotland, together with publication at the defendant's expense of the decision in the Athens daily press.

IV - The questions referred

11. The Monomeles Protodikio Athinon (Single-Judge Court of First Instance, Athens) seeks a preliminary ruling from the Court of Justice on the following questions: 1. What is the definition of database and what is the scope of Directive 96/9/EC and in particular Article 7 thereof which concerns the *sui generis* right?

2. In the light of the definition of the scope of the directive, do lists of football fixtures enjoy protection as databases over which there is a *sui generis* right in favour of the maker and under what conditions?

3. How exactly is the database right infringed and is it protected in the event of rearrangement of the contents of the database?

V - Admissibility

12. In the view of the Finnish Government the order for reference does not fulfill the criteria laid down in the case-law of the Court of Justice for the admissibility of questions referred for a preliminary ruling. For instance, insufficient details are given of the position under national law. Moreover, reference is made to Article 3 rather than Article 7 of the Directive which is the relevant article here. Further the facts were given only in the summary of Fixtures' arguments. There is thus no description of OPAP. Nor is the connection between the legal provisions and the facts made clear. The information given was so inadequate that the Finnish Government could not give a detailed opinion.

13. The Commission merely observes that the the information provided by the national court did not allow the provisions of the Directive to be applied to the specific facts. However, the Commission expressed no doubts regarding admissibility.

14. According to settled case-law, it is solely for the national courts before which actions are brought, and which must bear the responsibility for the subsequent judicial decision, to determine in the light of the special features of each case both the need for a preliminary ruling in order to enable them to deliver judgment and the relevance of the questions which they submit to the Court. Where the questions referred involve the interpretation of Community law, the Court is, in principle, obliged to give a ruling.⁴

15. The Court may refuse to rule on a question referred for a preliminary ruling by a national court only where it is quite obvious that the interpretation of Community law that is sought bears no relation to the actual facts of the main action or its purpose, where the problem is hypothetical, or where the Court does not have before it the factual or legal material necessary to give a useful answer to the questions submitted to it.⁵

16. In the present case it is not clear that the questions referred by the national court meet one of those descriptions. First, it cannot be assumed that the interpretation of Community law that is sought bears no relation to the actual facts of the main action or its purpose since the decision in the main proceedings turns *inter alia* on the meaning of the term database in Article 1 of the Directive. Second, the referring court has given the Court of Justice - albeit in summary form - all the material it needs to give a useful answer to the questions referred to it.

17. According to settled case-law, the need to provide an interpretation of Community law which will be of use to the national court makes it necessary that the

⁴ Case C 18/01 *Korhonen Oy* (2003) ECR I-5321, paragraph 19, Case C-390/99 *Q11u11 Satellite* (2002) ECR I-607, paragraph 18, and Case C-379/98 *PreussenElektra* (2001) ECR I-2099, paragraph 38.

⁵ Case C-268/01 *Agmrgenossenschaft Alkersleben* (2003) ECR I-4353, paragraph 16. and Case C-379/98. cited in footnote 4. paragraph 39.

national court define the factual and legal context of the questions it is asking or, at the very least, explain the factual circumstances on which those questions are based.⁶ Given that it is the role of the national court to apply the law to the facts, the information about the factual and legal framework is sufficient to enable the Court of Justice to give a useful answer to the questions referred. The order for reference even gives information which is not contained in the order for reference in the parallel Case C-46/02, which is not criticised by the Finnish Government, that is to say information on the relationship between Fixtures and Football Fixtures Limited. The information given about the activities of OPAP is sufficient.

18. The information provided in orders for reference must not only be such as to enable the Court to reply usefully but must also enable the governments of the Member States and other interested parties to submit observations pursuant to Article 23 of the Statute of the Court of Justice. It is the Court's duty to ensure that that possibility is safeguarded, bearing in mind that, by virtue of the abovementioned provision, only the orders for reference are notified to the interested parties.⁷

19. It is clear from the many observations submitted - not least by the Finnish Government - under Article 23 of the Statute of the Court of Justice, that the information in the order for reference amply enabled those submitting them to give a useful opinion on the questions referred to the Court.

20. The Court has also held that it is essential that the national court should give at the very least some explanation of the reasons for the choice of the Community provisions which it requires to be interpreted and of the link it establishes between those provisions and the national legislation applicable to the dispute.⁸

21. According to the case-law of the Court, it is sufficient if, on the facts as described by the national court, it appears likely that the facts of the main proceedings may be governed by the provisions of which an interpretation is sought. The Court can provide an interpretation of Community law which may assist the national court in deciding the case in the main proceedings and it may therefore deem it necessary to consider provisions of Community law to which the national court has not referred in the text of its question.⁹

22. In the light of the foregoing observations, the questions referred by the Monomeles Protodikio Athinon are in principle admissible.

⁶ Case C-207/01 *Altair Chimica v ENEL Distribuzione* [2003] ECR I-8875, paragraph 24, and Joined Cases C-115/97 to C-117/97 *Brentjens* (1999) ECR I-6025, paragraph 38.

⁷ Case C-207/01, cited in footnote 6, paragraph 25. Joined Cases C-128/97 and C-137/97 *Testa and Modesti* (1998) ECR I-2181, paragraph 6, and Case C-325/98 *Anssens* (1999) ECR I-2969, paragraph 8.

⁸ Case C-318/00 *Bacardi/Martini SAS and Cellier des Dauphins* (2003) ECR I-905, paragraph 44, and order in Case C-116/00 *Langlaumie* (2000) ECR I-4979, paragraph 16.

⁹ Case C-439/01 *Libor Cipra and Vlastimil Kvasnicka* (2003) ECR I-745, paragraph 22, and Case C-304/00 *Strawso11 and Gagg & Sons* (2002) ECR I-10737, paragraphs 57 and 58.

23. In many respects the questions referred do not so much concern the interpretation of Community law, in other words the Directive, as the application of the directive to a specific set of facts. That being so, I must endorse the Commission's view that, in proceedings on a reference for a preliminary ruling under Article 234 EC, that is not the role of the Court of Justice but that of the national court and that the Court of Justice must confine itself to interpreting Community law in the case before it

24. According to the settled case-law of the Court of Justice, in proceedings under Article 234 EC, which is based on a clear separation of functions between the national courts and the Court of Justice, any assessment of the facts in the case is a matter for the national court¹⁰

25. The Court therefore has no jurisdiction to give a ruling on the facts in the main proceedings or to apply the rules of Community law which it has interpreted to national measures or situations, since those questions are matters for the exclusive jurisdiction of the national court. The analysis of individual events in connection with the database at issue in these proceedings thus requires a factual assessment, which it is for the national court to make.¹¹ That apart, the Court has jurisdiction to answer the questions referred.

VI - Assessment of the merits

26. The questions referred for a preliminary ruling by the national court relate to the interpretation of a series of provisions of the Directive and in the main to the construction of certain terms. The matters addressed fall within different fields and must be dealt with accordingly. While some of the questions concern the scope *ratione materiae* of the Directive, others relate to the requirements for granting the sui generis right and its content.

A - Scope *ratione materiae*: the term 'database' (first and second questions)

27. Many of the parties submitting observations referred in their written observations on the term 'database' within the meaning of Article 1(2) of the Directive to criteria which are relevant only to the determination of the object of sui generis protection.

28. The interpretation of the term 'database' within the meaning of Article 1(2) constitutes one of the fundamental requirements for the application of the Directive and thus for its scope *ratione materiae* altogether. That scope must be distinguished from the scope *ratione materiae* of the sui generis right, that is to say the 'object of protection' provided for by Article 7 of the Directive. Although that provision is connected with the legal definition of 'database' it lays down a series of additional conditions regarding the object of

¹⁰ Judgments in Case 36/79 *Dcnkavit* (1979) ECR 3439, paragraph 12, Joined Cases C-175/98 and C-177/98 *Lirussi and Bizzaro* (1999) ECR I-6881, paragraph 37, Case C-318/98 *Fornasar and Others* (2000) ECR I-4785, paragraph 31, and Case C-421/01 *1'rawtfilllitr* (2003) ECR I-II941, paragraph 21 et seq.

¹¹ See Case C-448/01 *EVN* (2003) ECR I-14527, paragraph 59.

the sui generis protection. That means that not all databases within the meaning of Article 1(2) are at the same time objects of protection within the meaning of Article 7 of the Directive.

29. That distinction is also made in the recitals in the preamble to the Directive. The 17th recital concerns the term database and the 19th recital the sui generis right. Admittedly, the examples given there were not the best ones to illustrate the different meanings: a recording of certain artistic musical works does not even constitute a database, while a compilation of musical recordings does not fall within the objects of protection covered. However, that is clear from the very fact that a database does not even exist in such a case.

30. Falling within the definition of a 'database' is thus a necessary, but not a sufficient, condition for the grant of the sui generis right laid down by Article 7.

31. An initial reference point for the interpretation of the term 'database' lies in the rules of international law which serve to provide guidance. The first such rule is Article 10(2) of the Agreement on Trade-related Aspects of Intellectual Property Rights (TRIPs Agreement),¹² although that provision does not contain all the criteria in Article 1(2) of the Directive. Then there is Article 2(5) of the Berne Convention as revised. On the other hand rules of international law which are more recent than the Directive cannot provide an adequate yardstick. That is true, for example, of Article 5 of the WCT WIPO Copyright Treaty, which was not adopted until 1996. As is clear from the background to the adoption of the Directive and the Commission's documents in particular, the Directive was intended primarily to reflect the Berne Convention.

32. However, an interpretation in the light of the above rules of international law is not of much further use as regards the construction of the term database because Article 1(2) of the Directive contains a legal definition which, while not very precise, lays down several requirements. Their significance will be examined in greater detail below. However, it must be borne in mind that, although the Court of Justice can provide the national court with useful information for the solution of the case, it remains the task of the national court to apply the provisions of Community law or the provisions of national law transposing them, as interpreted by the Court of Justice, to the facts of the individual case.

33. The very structure of Article 1 of the Directive, which contains various rules on databases, points to a wide interpretation. Thus, Article 1(1) expressly provides that the Directive applies to 'databases in any form'. Moreover, the fact that Article 1(3) provides for an exception, namely for computer programmes, reinforces the case for a wide interpretation of the term 'database'.

34. The intention of the Community legislature, as demonstrated by the background to the adoption of the

Directive,¹³ can also be cited in support of a wide interpretation.

35. However, fulfilment of the three requirements laid down in Article 1(2) is essential for the definition of the term 'database'.

36. First 'a collection of independent works, data or other materials' (emphasis added) is required. The question whether the main proceedings concern data or materials need not be considered in greater depth, because in practice they concern either data, in the sense of combinations of signs representing facts, that is to say, elementary statements with potentially informative content,¹⁴ or materials as recognisable entities.

37. In the absence of a clear provision to that effect in the Directive it is not necessary for a significant number of data or materials to be involved. A demand for such a provision by the Parliament was not taken up by either the Council or the Commission. Requirements of a quantitative nature, namely for 'a substantial investment,' are laid down only by Article 7(1) of the Directive.

38. Rather, in the present proceedings, it must be ascertained whether the requirement of independence of the data or materials is fulfilled.

39. That criterion should be understood as meaning that the data or materials must not be linked or must at least be capable of being separated without losing their informative content,¹⁵ which is why sound or pictures from a film are not covered. One possible approach to interpretation is to focus not only on the mutual independence of the materials from one another but on their independence within a collection.¹⁶

40. Second, the Directive only covers collections which have been arranged systematically or methodically. In the 21st recital it is made clear that it is not necessary for those materials to have been physically stored. That requirement serves to exclude random accumulations of data and ensure that only planned collections of data are covered,¹⁷ that is to say, data organised according to specific criteria.¹⁸ It is sufficient if a structure is established for the data and they are organised only following application of the appropriate search programme,¹⁹ and thus essentially through sorting and, possibly, indexation. Both statistical and dynamic²⁰ databases are covered.

¹³ Jens-Lienhard Gaster, *Der Rechtsschutz von Datenbanken*, 1999, paragraph 58 et seq.

¹⁴ Josef Krähn, *Der Rechtsschutz von elektronischen Datenbanken, unter besonderer Berücksichtigung des sui-generis-Rechts*, 2001, 7.

¹⁵ Matthias Leistner, 'The Legal Protection of Telephone Directories Relating to the New Database Maker's Right', *International Review of Industrial Property and Copyright Law* 2000, 950 (956).

¹⁶ Simon Chalton, 'The Copyright and Rights in Databases Regulations 1997: Some Outstanding Issues on Implementation of the Database Directive', *E.I.P.R.* 1998, 178 (179).

¹⁷ Matthias Leistner, *Der Rechtsschutz von Datenbanken im deutschen und europäischen Recht*, 2000, 53 et seq.

¹⁸ Silke von Lewinski, in: Michel M. Walter (Ed.), *Europäisches Urheberrecht*, 2001, paragraph 20 on Article 1 of the Database Directive.

¹⁹ Herman M. H. Speyart, 'De databank-richtlijn en haar gevolgen voor Nederland', *Informatierecht – AMI* 1996, 151 (155).

²⁰ Von Lewinski (cited in footnote 18), paragraph 6 on Article 1.

¹² OJ 1994 L 336, p. 214.

41. Thirdly, Article 1(2) of the Directive requires that the data be '*individually accessible by electronic or other means.*' Thus, mere storage of data is not covered by the term '*database*' within the meaning of Article 1(2) of the Directive.

42. Accordingly, the term '*database*' in Article 1(2) must be interpreted widely. However, the conditions regarding the object of protection laid down in Article 7(1) of the Directive entail limitations.

43. Certain Governments express the view that the selection or organisation of the contents of a database on sporting bets does not constitute an independent intellectual creation. In that connection it must be observed that creativity is not a defining characteristic of a database within the meaning of Article 1 of the Directive. Even in the light of the object of protection of the sui generis right it must be doubted whether creativity is a defining characteristic. In contrast, it is an essential condition for protection of a database by the copyright provided for in Chapter II of the Directive (Article 3 et seq.) that a database should be the author's own intellectual creation. Article 7(4) of the Directive provides that the sui generis right is to apply irrespective of the eligibility of that database or its contents for protection by copyright.

44. The object of protection of the sui generis right is different from that of copyright. The newly created right is intended, unlike copyright, which protects creative input, to protect investment.²¹ Thus, there is a difference as regards the proprietor of the right. While the sui generis right protects the maker of a database, copyright – as the term itself (in German) indicates – protects the author of a work.

45. Some Governments have pointed out in their written observations that the database at issue in the proceedings is not systematically or methodically organised, because the teams are paired by drawing lots. In that connection it must be observed that the contents of the database do not only consist in data derived from drawing lots but that additional entries are made, such as place and time of the match.

B – Object of protection: Conditions (first and second questions referred)

46. In order to be covered by the sui generis right under Article 7 of the Directive a database must fall within the defining elements laid down by that provision. These proceedings concern the interpretation of some of those criteria.

47. In that connection, reference should be made to the legal debate on the question whether the sui generis right covers the creation, in the sense, essentially, of the activity of creating a database, or the outcome of that process. On that point, it must be observed that the Directive protects databases or their contents but not the information they contain as such. Ultimately it is thus a matter of protecting the product, while at the same time indirectly protecting the expenditure

incurred in the process, in other words, the investment.²²

48. The requirements laid down by Article 7 of the Directive must be read in conjunction with those laid down by Article 1(2). The resulting definition of the object of protection is narrower than that of '*database*' in Article 1.

49. The sui generis right introduced by the Directive derives from the Scandinavian catalogue protection rights and the Dutch '*geschriftenbescherming*'. However, that background must not mislead us into importing the thinking on those earlier provisions developed in academic writings and case-law into the Directive. Rather, the Directive should serve as a yardstick for the interpretation of national law, even in those Member States which had similar provisions before the Directive was adopted. In those Member States, too, the national legislation had to be brought into line with the precepts of the Directive.

1. '*Substantial investment*'

50. A key term for the definition of the object of protection of the sui generis right is the expression '*substantial investment*' in Article 7(1) of the Directive. The criterion is further qualified by the requirement that the investment be '*qualitatively and/or quantitatively*' substantial. However, the Directive does not lay down legal definitions of those two alternatives. Academic legal writers have called for clarification of that point by the Court of Justice. That demand is entirely justified since only such clarification will ensure an autonomous and uniform Community interpretation. It must, of course, not be forgotten that the application of the criteria for interpretation is ultimately a matter for the national court, which entails a risk of differing applications.

51. As is clear from the structure of Article 7(1) of the Directive, the term '*substantial investment*' is to be construed in relative terms. According to the preamble to the Common Position, in which that provision was given its final version, the investments used to draw up and compile the contents of a database were to be protected.²³

52. The investment must thus relate to certain activities connected with the making of a database. Article 7 lists the following three activities: obtaining, verification and presentation of the contents of a database. As those defining elements are the subject of another question referred, their meaning will not be considered in detail here.

53. It is made clear what type of investments may be covered by the 40th recital, the last sentence of which reads: '*such investment may consist of the implementation of financial resources and/or the*

²² Malte Grützmacher, Urheber-, Leistungs- und Sui-generis-Schutz von Datenbanken, 1999, 329; Georgios Koumantos, 'Les bases de données dans la directive communautaire', *Revue internationale du droit d'auteur* 1997, 79 (117). On the other hand, many writers see the investment as the object of protection (see, for example, von Lewinski (cited in footnote 18)), paragraph 3 on Article 7, and the writings cited by Grützmacher on page 329 in footnote 14.

²³ Common Position (EC) No 20/95, adopted by the Council on 10 July 1995, No 14.

²¹ Von Lewinski (cited in footnote 18), paragraph 6 on Article 1.

expending of time, effort and energy.' According to the seventh recital, it is a matter of *'the investment of considerable human, technical and financial resources.'*

54. Further, the term *'substantial'* must also be construed in relative terms, first in relation to costs and their redemption²⁴ and secondly in relation to the scale, nature and contents of the database and the sector to which it belongs.²⁵

55. Thus it is not only investments which have a high value in absolute terms that are protected.²⁶ On the other hand the criterion *'substantial'* cannot be construed only in relative terms. The Directive requires an absolute lower threshold for investments worthy of protection as a sort of *de minimis* rule.²⁷ That is implied by the 19th recital, according to which the investment must be *'substantial enough.'*²⁸ However that threshold should probably be set low. First, that is the implication of the 55th recital²⁹ in which there is no clarification as regards level. Secondly, it can be inferred from the fact that the Directive is intended to bring different systems into line. Thirdly, a lower limit that was too high would undermine the intended purpose of the Directive, which is to create incentives for investment.

56. Many of the parties submitting observations based their observations on the so-called *'spin-off theory'* according to which by-products are not covered by the right. It is only permissible to protect profits which serve to repay the investment. Those parties pointed out that the database at issue in the proceedings was necessary for the organisation of sporting bets, that is to say, it was made for that purpose. The investment was for the purpose of organising bets and not, or not exclusively, for that of creating the database. The investment would have been made in any event, as there is an obligation to undertake such organisation. The database is thus merely a by-product on another market.

57. In the present proceedings it must thus be clarified whether and in what way the so-called *'spin-off theory'* can be of relevance to the interpretation of the Directive and in particular of the *sui generis* right. In the light of the reservations expressed in these proceedings regarding the protection of databases which are mere by-products, a demystification of the *'spin-off theory'* seems called for. This theory, leaving aside its origins at national level, can be traced back, first, to the purpose implied by the 10th to 12th recitals of the Directive, which is to provide incentives for investment by improving the protection of investment. However, it is also based on the idea that investments

should be repaid by profits from the principal activity. The *'spin-off theory'* is also bound up with the idea that the Directive only protects those investments which were necessary to obtain the contents of a database.³⁰

All these arguments have their value and must be taken into account in the interpretation of the Directive. However that must not result in the exclusion of every spin-off effect solely in reliance on a theory. The provisions of the Directive are and remain the decisive factor in its interpretation.

58. The solution to the legal issue in these proceedings turns on whether the grant of protection to a database depends on the intention of the maker or the purpose of the database, where these are not the same. In that connection, one could simply point out that the Directive makes no reference to the purpose of a database in either Article 1 or Article 7. If the Community legislature had wanted to lay down such a requirement, it would surely have done so. For both Article 1 and Article 7 demonstrate that the Community legislature was perfectly prepared to lay down a number of requirements. According to those requirements the purpose of the database is not a criterion for the assessment of the eligibility for protection of a database. Rather, the requirements laid down by Article 7 are decisive. The position is not altered by the 42nd recital which many of the parties submitting observations cite. First, that recital concerns the scope of the *sui generis* right and, secondly, here too, what is important is that the investment is not harmed.

59. However, even in the other recitals of the Directive which refer to investment and emphasise its importance, such as the 12th, 19th and 40th recitals, there is no suggestion that the protection of a database depends on its purpose.

60. Moreover, in practice there may be makers of databases who are pursuing several purposes in making a database. It may be that the investments made cannot be attributed to a certain single purpose or are not separable. In such a situation, the criterion of the purpose of a database would not provide an unequivocal solution. Either the investment would be protected independently of another purpose or it would be wholly unprotected because of the other purpose. The criterion of purpose thus proves either impracticable or irreconcilable with the purpose of the Directive. Excluding the protection of databases which serve several purposes would run counter to the objective of providing incentives for investment. That would prove an enormous obstacle to investments in multifunctional databases.

61. The database at issue in the main proceedings is an example of a situation where the database is created for the additional purpose of organising fixture lists. Creating a separate – possibly almost identical – database would be contrary to fundamental economic

²⁴ Von Lewinski (cited in footnote 18), paragraph 9 on Article 7.

²⁵ Koumantos (cited in footnote 22), 119.

²⁶ Von Lewinski (cited in footnote 18), paragraph 11 on Article 7.

²⁷ Krähn (cited in footnote 14), 138 et seq.; Leistner (cited in footnote 15), 958.

²⁸ Gunnar W. G. Karnell, 'The European *Sui Generis* Protection of Data Bases', *Journal of the Copyright Society of the U.S.A.*, 2002, 994.

²⁹ J. van Manen, 'Substantial investments', in *Allied and in friendship: for Teartse Schaper*, 2002, 123 (125).

³⁰ For more detail, see P. Bernt Hugenholtz, 'De spin-off theorie uitgesponnen', *Tidschrift voor auteurs-, media- & informatierecht* 2002, 161 et seq.

principles and such a requirement cannot be inferred from the Directive.

62. It is to be determined whether there was a substantial investment in the main proceedings by the application of the above criteria to the specific facts. According to the distribution of responsibilities in a reference for a preliminary ruling under Article 234 EC, that is the task of the national court. In any event, the assessment of investments in the database must include the circumstances to be taken into account in drawing up the fixture lists, such as the attraction of the game for spectators, the interests of the bookmakers, marketing by associations, other events in the area on the planned date, the appropriate geographical distribution of the games and the avoidance of public order issues. Finally, the number of games must be taken into account in the assessment. The burden of proof of the investment made is on the party invoking the *sui generis* right.

2. '*Obtaining*' within the meaning of Article 7(1) of the Directive

63. One issue in the present case is whether there was any '*obtaining*' within the meaning of Article 7(1) of the Directive. That provision only protects investment in the '*obtaining*', '*verification*' or '*presentation*' of the contents of a database.

64. We must base our discussion on the thrust of the protection conferred by the *sui generis* right, in other words the protection of the creation of a database. Creation can then be seen as an umbrella term for obtaining, verification and presentation.³¹

65. The main proceedings deal with an often discussed legal problem, that is to say whether, and, if so, under what conditions, and to what extent the Directive protects not only existing data but also data created by the maker of a database. If obtaining is only to relate to existing data, the protection of the investment would only cover such data. Thus, if we take that interpretation of obtaining as a basis, the protection of the database in the main proceedings depends on whether existing data were obtained.

66. However, if we take the umbrella-term creation, in other words the supplying of the database with content,³² as a basis, both existing and newly created data could be covered.³³

67. A comparison of the term '*obtaining*' used in Article 7(1) with the activities listed in the 39th recital in the preamble to the Directive might shed some light. However, it must be pointed out at the start that there are divergences between the various language versions.

68. If we start with the term '*Beschaffung*', used in the German version of Article 7(1), it can only concern existing data, as it can only apply to something which already exists. In that light *Beschaffung* is the exact

opposite of *Erschaffung* (creation). Analysis of the wording of the Portuguese, French, Spanish and English versions, which are all based on the Latin, to receive, yields the same result. The Finnish and Danish versions also suggest a narrow interpretation. The wide interpretation of the English and German versions advocated by many parties to the proceedings is therefore based on an error.

69. Further assistance with the correct interpretation of in the terms of Article 7(1) of the Directive might be provided by the 39th recital in the preamble, which is the introductory recital for the subject of the *sui generis* right. That recital lists only two activities in connection with the protected investments, that is to say and of the contents. However, here too, problems arise over the differences between the various language versions. In most versions, the same term is used for the first activity as that used in Article 7(1). Moreover, although the terms used do not always describe the same activity, they essentially concern the seeking and collecting of the contents of a database.

70. The language versions which use, in the 39th recital, two different terms from those used in Article 7(1) of the Directive are to be construed so that the two activities listed are viewed as subspecies of obtaining within the meaning of Article 7(1) of the Directive. Admittedly, that raises the question why the 39th recital only defines obtaining but not verification or presentation more precisely. The latter two terms appear first in the 40th recital.

71. On the other hand, the language versions which use the same term in the 39th recital as in Article 7(1) of the Directive will have to be construed so that the term obtaining in the 39th recital is understood in a narrower sense, whereas the term used in Article 7(1) of the Directive is to be understood in a wide sense, in other words as also encompassing the other activity listed in the 39th recital.

72. All the language versions thus allow of an interpretation according to which, although within the meaning of Article 7(1) of the Directive does not cover the mere production of data, that is to say, the generation of data,³⁴ and thus not the preparatory phase,³⁵ where the creation of data coincides with its collection and screening, the protection of the Directive kicks in.

73. In that connection, it should be pointed out that the so-called cannot apply. Nor can the objective pursued in obtaining the contents of the database be of any relevance.³⁶ That means that protection is also possible where the obtaining was initially for the purpose of an activity other than the creation of a database. For the Directive also protects the obtaining of data where the data was not obtained for the purposes of a database.³⁷ That implies that an external database, which is derived

³¹ Giovanni Guglielmetti, 'La tutela delle banche dati con diritto sui generis nella direttiva 96/9/CE', *Contratto e impresa. Europa*, 1997, 177 (184).

³² Andrea Etienne Calame, *Der rechtliche Schutz von Datenbanken unter besonderer Berücksichtigung des Rechts der Europäischen Gemeinschaften*, 2002, 115 FN 554.

³³ Grützmacher (cited in footnote 22), 330 et seq.; Leistner (cited in footnote 17), 152.

³⁴ Leistner (cited in footnote 17), 152.

³⁵ Guglielmetti (cited in footnote 31), 184; Karnell (cited in footnote 28), 993.

³⁶ As regards the views put forward, see Hugenholz (cited in footnote 30), 161 (164 FN 19).

³⁷ Von Lewinski (cited in footnote 18), paragraph 5 on Article 7.

from an internal database, should also be covered by protection.

74. It is the task of the national court, using the interpretation of the term set out above, to assess the activities of Fixtures. It is primarily a matter of classifying the data and its handling from its receipt to its inclusion in the database at issue in the proceedings. That entails the assessment of the drawing up of the fixture lists, in other words, essentially tying up the pairings with the place and time of the individual games. The fact that the fixture list is the outcome of negotiation between several parties, in particular, the police, associations and fan clubs, suggests that the present case is concerned with existing data. The fact that, as many of the parties have pointed out, the data were obtained for a purpose other than the creation of a database similarly suggests that these are existing data.

75. However, even if those activities were classified as the creation of new data, there might be within the meaning of Article 7(1) of the Directive. That would be the case if the creation of the data took place at the same time as its processing and was inseparable from it.

3. within the meaning of Article 7(1) of the Directive

76. The usefulness of the database for betting and for its economic exploitation depends on continuous monitoring of the contents of the database at issue in these proceedings. According to the case-file, the database is constantly checked for correctness. If such a check reveals the need for changes, the necessary adjustments are made.

77. The fact that some of those adjustments do not constitute verification of the contents of the database is not detrimental. In order for there to be an object which is covered by the *sui generis* right it is only necessary that many of the activities undertaken can be classified as verification within the meaning of Article 7(1) of the Directive and that the substantial investment should at least concern *inter alia* the part of the activities covered by Article 7.

4. within the meaning of Article 7(1) of the Directive

78. The object of protection of the *sui generis* right is constituted by and of the contents of a database and also by its . That entails not only the presentation for users of the database, that is to say, the external format, but also the conceptual format, such as the structuring of the contents. An index and a thesaurus are generally used to assist with the processing of data. As is clear from the 20th recital, such materials relating to the interrogation of the database can enjoy the protection of the Directive.³⁸

C – Content of the protected right

79. It must first be observed that, strictly speaking, the introduction of the *sui generis* right was intended not to harmonise existing law but to create a new right.³⁹ That right goes beyond previous distribution and reproduction rights. That should also be taken into account in the interpretation of prohibited activities.

³⁸ Calame (cited in footnote 32), 116.

³⁹ Common Position (EC) No 20/95 (cited in footnote 23), No 14.

Accordingly, the legal definition in Article 7(2) of the Directive assumes particular importance.

80. At first sight Article 7 of the Directive contains two groups of prohibitions or, from the point of view of the person entitled, that is to say the maker of a database, two different categories of right. Whereas paragraph 1 lays down a right to prevent use of a substantial part of a database, paragraph 5 prohibits certain acts relating to insubstantial parts of a database. On the basis of the relationship between substantial and insubstantial, paragraph 5 can also be understood as an exception to the exception implied by paragraph 1.⁴⁰ Paragraph 5 is intended to prevent circumvention of the prohibition laid down by paragraph 1,⁴¹ and can thus also be classified as a protection clause.⁴²

81. Article 7(1) provides for a right of the maker to prevent certain acts. That entails a prohibition on such preventable acts. The preventable and thus prohibited acts are, first, extraction and, second, re-utilisation. Legal definitions of the terms and are given in Article 7(2) of the Directive.

82. However, the prohibition laid down by Article 7(1) is not absolute, but requires the whole or a substantial part of a database to have been affected by a prohibited act.

83. The two defining elements must therefore be examined on the basis of the criterion determining application of Article 7(1) and (5): or part as the case may be. Thereafter the prohibited acts under Article 7(1) and (5) are to be considered.

1. Substantial or insubstantial parts of a database (first and second questions referred

a) General observations

84. It was contended in the proceedings that Article 7(1) of the Directive only prohibits acts which entail that the data are arranged in as systematic or methodical a way and are as individually accessible as in the original database.

85. That argument must be understood as laying down a condition for the application of the *sui generis* right. Whether there is in fact any such condition must be determined on the basis of the provisions on the object of protection and in particular on the basis of the legal definition laid down in Article 7(2) of the acts prohibited under Article 7(1).

86. Neither Article 7(1) nor Article 7(5) of the Directive lays down the above condition expressly or makes any reference to it. Rather, the fact that express reference is made in Article 1(2) to arrangement whereas no such reference is made in Article 7 suggests the opposite conclusion, that is to say, that the Community legislature did not intend to make that criterion a condition for the application of Article 7.

87. Moreover, the very purpose of the Directive precludes such an additional criterion.

⁴⁰ Gaster (cited in footnote 13), paragraph 492.

⁴¹ Oliver Hornung, *Die EU-Datenbank-Richtlinie und ihre Umsetzung in das deutsche Recht*, 1998, 116 et seq.; Leistner (cited in footnote 17), 180; von Lewinski (cited in footnote 18), paragraph 16 on Article 7.

⁴² Common Position (EC) No 20/95 (cited in footnote 23), No 14.

88. The protection provided for in Article 7 would be undermined by such an additional criterion because the prohibition laid down by that article could be circumvented by simple alteration of parts of the database.

89. The 38th recital in the preamble to the Directive demonstrates that the Directive was also intended to prohibit possible breaches consisting in the rearrangement of the contents of a database. That recital refers to that risk and to the inadequacy of copyright protection.

90. The purpose of the Directive is precisely the creation of a new right, and even the 46th recital cannot refute that as it concerns another aspect.

91. Even the 45th recital, according to which copyright protection is not to be extended to mere facts or data, does not support the argument for an additional criterion. That, of course, does not mean that the protection covers the data themselves or individual data. The object of protection is and remains the database.

92. Accordingly it must be considered that the fact of having the same systematic or methodical arrangement as the original database does not constitute a criterion for the determination of the legality of the actions taken in connection with the database. Therefore, the view that the Directive does not protect data which are compiled in an altered or differently structured way is fundamentally mistaken.

b) The expression within the meaning of Article 7(1) of the Directive

93. This question seeks an interpretation of the term in Article 7(1) of the Directive. In contrast with other key terms in the Directive there is no legal definition of this term. It was removed in the course of the legislative procedure, at the stage of the Common Position of the Council, to be precise.

94. Article 7(1) of the Directive provides for two alternatives. As is clear from the wording a part may be substantial in quantitative or qualitative terms. The wording chosen by the Community legislature must be interpreted as meaning that a part may be substantial even when it is not substantial in terms of quantity but is in terms of quality. Thus the argument that there must always be a minimum in terms of quantity must be dismissed.

95. The quantitative alternative must be understood as requiring the amount of the part of the database affected by the prohibited act to be determined. That raises the question whether this must be assessed in relative or absolute terms. In other words whether a comparison must be made of the amount in question with the whole of the contents of the database⁴³ or whether the affected part is to be assessed in itself.

96. In that connection, it must be observed that a relative assessment would tend to disadvantage the makers of large databases⁴⁴ because the larger the total amount the less substantial the affected part.

⁴³ See inter alia von Lewinski (cited in footnote 18), paragraph 15 on Article 7.

⁴⁴ Grützmacher (cited in footnote 22), 340.

However, in such a case, a qualitative assessment undertaken at the same time could balance out the equation where a relatively small affected part could none the less be considered substantial in terms of quality. Equally, it would be possible to combine both quantitative approaches. On that basis even a part which was small in relative terms could be considered substantial because of its absolute size.

97. The question also arises whether the quantitative assessment can be combined with the qualitative. Of course, it only arises in cases where an assessment in terms of quality is possible in the first place. If it is, there is nothing to prevent the affected parts from being assessed according to both methods.

98. In a qualitative assessment, technical or economic value is relevant in any event.⁴⁵ Thus, a part which is not large in volume but is substantial in terms of value may also be covered. Examples of valuable characteristics of lists in the field of sport would be completeness and accuracy.

99. The economic value of an affected part is generally measured in terms of the drop in demand⁴⁶ caused by the fact that the affected part is not extracted or re-utilised under market conditions but in some other way. The affected part and its economic value can also be assessed from the point of view of the wrongdoer, that is to say in terms of what the person extracting it or re-utilising it has saved.

100. In the light of the objective of protecting investment pursued by Article 7 of the Directive, the investment made by the maker will always have to be taken into consideration in the assessment of whether a substantial part is involved.⁴⁷ According to the 42nd recital, the prohibition on extraction and re-utilisation is intended to prevent detriment to investments.⁴⁸

101. Thus, investments, and in particular the cost of obtaining data, can also be a factor in the assessment of the value of the affected part of a database.⁴⁹

102. There is no legal definition in the Directive of the point at which a part becomes substantial. The unanimous view expressed in legal writings is that the Community legislature intentionally left such demarcation to the Courts.⁵⁰

103. However, the question whether a substantial part is affected may not be allowed to depend on whether there is significant detriment.⁵¹ Mere reference to such

⁴⁵ Gaster (cited in footnote 13), paragraph 495; Grützmacher (cited in footnote 22), 340; von Lewinski (cited in footnote 18), paragraph 15 on Article 7.

⁴⁶ Krähn (cited in footnote 14), 162.

⁴⁷ See Guglielmetti (cited in footnote 31), 186; Krähn (cited in footnote 14), 161, and Leistner (cited in footnote 17), 172.

⁴⁸ In that regard, on some views, a theoretical likelihood of detriment is sufficient, see Leistner (cited in footnote 17), 173; see Speyart (cited in footnote 19), 171 (174).

⁴⁹ Carine Doutrelepont, 'Le nouveau droit exclusif du producteur de bases de données consacré par la directive européenne 96/6/CE du 11 Mars 1996: un droit sur l'information?', in: *Mélanges en hommage à Michel Waelbroeck*, 1999, 903 (913).

⁵⁰ Doutrelepont (cited in footnote 49), 913; Gaster (cited in footnote 13), paragraph 496; Leistner (cited in footnote 17), 171; von Lewinski (cited in footnote 18), paragraph 15 on Article 7.

⁵¹ See, however, Karnell (cited in footnote 28), 1000; Krähn (cited in footnote 14), 163.

detriment in a recital, that is to say at the end of the 42nd recital, cannot be sufficient to cause the threshold for protection to be set so high. It is, moreover, debatable whether can be relied on as a criterion for defining substantialness at all since the 42nd recital could also be construed as meaning that is to be seen as an additional requirement in cases in which a substantial part is affected, that is to say in cases where substantialness has already been established. Even the of prohibited acts referred to in the eighth recital cannot justify too strict an assessment in relation to detriment. Both recitals serve, rather, to emphasise the economic necessity for protection of databases.

104. As regards the assessment of the affected parts of the database, it is not disputed that the acts take place weekly. That raises the question whether, if a relative approach is taken, the affected parts are to be compared with the database as a whole or with the whole in the relevant week. Finally, it would be possible to aggregate all the parts affected each week over the whole season and then compare the resulting quantity with the database as a whole.

105. An interpretation geared to the objective of the sui generis right thus simply amounts to a comparison of the affected part and of the whole over the same period of time. That comparison can be made either over a week or over the season. If more than half of the games are involved, the affected part can be described as substantial. However, a proportion of less than half the games altogether may be sufficient if the proportion is higher in some categories of game, for example in the Premier League.

106. If the assessment is made in absolute terms, the affected parts would have to be aggregated until the threshold above which the affected parts were substantial was reached. The period of time over which substantial parts can be said to have been affected can thus be assessed.

2. Prohibitions relating to the substantial part of the contents of a database (second question and first part of the third question)

107. The right of the maker enshrined in Article 7(1) of the Directive to prevent certain acts implies a prohibition on such acts, namely extraction and/or re-utilisation. Such acts are therefore described as in a series of recitals.⁵²

108. I now turn to the interpretation of the terms and . In that connection the corresponding legal definitions in Article 7(2) of the Directive must be analysed. Here too, the objective of the Directive of introducing a new form of right must be borne in mind. Reference will have to be made to that yardstick for guidance in the analysis of the two terms.

109. The principle applies, with regard to both prohibited acts, that the objective or intention of the user of the contents of the database is not relevant. Thus, it is not of decisive importance whether the use is purely commercial. Only the defining elements of the two legal definitions are of relevance.

110. Again, with regard to both prohibited acts, and in contrast to the position under Article 7(5), it is not only repeated and systematic acts which are covered. As the acts prohibited under Article 7(1) have to concern substantial parts of the contents of a database, the Community legislature has less stringent requirements of such acts than those applicable in respect of insubstantial parts under Article 7(5).

111. In that connection, an error in the structure of the Directive must be pointed out.⁵³ As the legal definition of Article 7(2) also focuses on the whole or a substantial part, it duplicates the requirement laid down by Article 7(1) unnecessarily. In combination with Article 7(5), the legal definition laid down in Article 7(2) even entails a contradiction since Article 7(5) prohibits the extraction and re-utilisation of insubstantial parts. Analysis of extraction and re-utilisation according to the legal definition in Article 7(2) yields the odd result that Article 7(5) prohibits certain acts in relation to insubstantial parts only when such acts concern the whole or substantial parts.

112. Several parties also raised the question of competition. This aspect should be considered in the light of the fact that the final version of the Directive does not contain the rules on the distribution of compulsory licences originally planned by the Commission.

113. Opponents of extensive protection for the maker of a database fear that extensive protection gives rise to a danger of the creation of monopolies, particularly in the case of hitherto freely accessible data. For instance, a maker who has a dominant position on the market could abuse that position. In that connection it must be borne in mind that the Directive does not preclude the application of the competition rules in primary law and in secondary legislation. Anti-competitive conduct by makers of databases is still subject to those rules. That is clear both from the 47th recital and from Article 16(3) of the Directive, under which the Commission is to verify whether the application of the sui generis right has led to abuse of a dominant position or other interference with free competition.

114. In these proceedings the issue of the legal treatment of freely accessible data was also addressed. In that connection, it was those governments submitting observations in the proceedings which expressed the view that public data were not protected by the Directive.

115. On that point, it must first be emphasised that the protection covers the contents of databases and not of data. First, the risk that the protection might extend to the information contained in the database can be countered by interpreting the Directive narrowly in that respect, as proposed here. Second, recourse to the national and Community instruments of competition law where necessary is mandatory.

116. As regards the protection of data which make up the content of a database of which the user of the data is unaware, it must be pointed out that the Directive

⁵² See, for example, the eighth, 41st, 42nd, 45th and 46th recitals.

⁵³ See Koumantos (cited in footnote 22), 121.

prohibits only certain acts, that is to say, extraction and re-utilisation.

117. Although the prohibition of extraction laid down in the Directive presupposes knowledge of the database, that is not necessarily the case as regards re-utilisation. I will come back to that issue in connection with re-utilisation.

a) The term in Article 7 of the Directive

118. The term in Article 7(1) of the Directive is to be interpreted on the basis of the legal definition in Article 7(2)(a).

119. The first element is the transfer of the contents of a database to another medium, such transfer being either permanent or temporary. The wording implies that the Community legislature gave the term a wide meaning.

120. It thus covers not only the transfer to a data medium of the same type⁵⁴ but also to one of another type.⁵⁵ That means that merely printing out data falls within the definition of .

121. Furthermore, clearly cannot be construed as meaning that the extracted parts must then no longer be in the database if the prohibition is to take effect. Nor, however, must be so widely construed as also to cover indirect transfer. Rather, direct transfer to another data medium is required. In contrast to it does not require any public element. Private transfer is also sufficient.

122. As regards the second element, that is to say the affected part of the database (), reference can be made to the arguments on substantialness.

123. It is the task of the national court to apply the above criteria to the specific facts of the main proceedings.

b) The term in Article 7 of the Directive

124. According to the legal definition in Article 7(2)(b) of the Directive, re-utilisation involves making data publicly available.

125. By deliberately using the term rather than the Community legislature wanted to make clear that the protection was to cover acts by non-commercial users too.

126. The means of listed in the legal definition such as are to be understood simply as a list of examples, as is clear from the additional words .

127. In cases of doubt, the term is to be construed widely⁵⁶ as the use of the additional words in Article 7(2)(b) suggests. On the other hand, mere ideas⁵⁷ or a search for information as such using a database⁵⁸ are not covered.

128. Many of the parties expressed the view that the data were in the public domain. Whether that is so can be determined by examination of the specific facts, which is a matter for the national court.

129. However, even if the national court reaches the conclusion that the data are in the public domain that

does not preclude parts of the database containing data in the public domain from also enjoying protection.

130. In Article 7(2)(b) of the Directive there are also rules on the exhaustion of the right. The right is exhausted only under certain conditions. One of those conditions is described as . That suggests that there can be exhaustion of the right only in respect of such physical objects. If re-utilisation happens in some other way than through a copy, there is no exhaustion. As regards on-line transmission that principle is expressly laid down in the 43rd recital. The sui generis right thus does not only apply on the first .

131. As the Directive does not mention the number of transactions following the first that number cannot be relevant. Thus, if a substantial part of the contents of a database is involved that is protected even if it was obtained from an independent source such as a print medium or the internet and not from the database itself. Unlike extraction, also covers indirect means of obtaining the contents of a database. The defining element must therefore be interpreted widely.⁵⁹

132. It is for the national court to apply the above criteria to the specific facts of the main proceedings.

3. Prohibitions concerning insubstantial parts of the contents of a database (second question and first part of third question)

133. As already pointed out, Article 7(5) of the Directive lays down a prohibition on the extraction and/or re-utilisation of insubstantial parts of the contents of a database. This provision differs from Article 7(1) firstly in that not every extraction or re-utilisation is prohibited but only defined instances. acts are required. Secondly, the prohibition in Article 7(5) differs from that in Article 7(1) as regards its subject-matter. This prohibition applies even to insubstantial parts. Thirdly, to offset this lesser requirement of the affected part in comparison with Article 7(1), Article 7(5) requires unauthorised acts to have a specific effect. In that regard, Article 7(5) provides for two alternatives: the unauthorised acts must either conflict with a normal exploitation of that database or unreasonably prejudice the legitimate interests of the maker of the database.

134. The provision on the connection between the act and its effect must be understood to mean that it is not necessary for every individual act to have one of the two effects but that the overall result of the acts must have one of the two prohibited effects.⁶⁰ The objective of Article 7(5) of the Directive and of Article 7(1) is the protection of the return on investment.

135. However, the interpretation of Article 7 generally raises a problem in that the German language final version of the Directive was formulated rather more weakly than the Common Position. It is now sufficient for the act to () rather than () one of the effects described. The other language versions are formulated more directly and essentially concern extraction and/or re-utilisation which conflicts with a normal exploitation

⁵⁴ Von Lewinski (cited in footnote 18), paragraph 19 on Article 7.

⁵⁵ Gaster (cited in footnote 13), paragraph 512.

⁵⁶ Von Lewinski (cited in footnote 18), paragraph 27 on Article 7.

⁵⁷ Von Lewinski (cited in footnote 18), paragraph 31 on Article 7.

⁵⁸ Grützmacher (cited in footnote 22), 336.

⁵⁹ Von Lewinski (cited in footnote 18), paragraph 38 on Article 7.

⁶⁰ Leistner (cited in footnote 17), 181; von Lewinski (cited in footnote 18), paragraph 18 on Article 7, FN 225.

of that database or which unreasonably prejudices the legitimate interests of the maker of the database.

136. In this connection related international law should be discussed. Both the effects mentioned in Article 7(5) of the Directive are modelled on Article 9(2) of the Berne Convention as revised and in fact on the first two stages of the three-step test laid down therein. However, that does not mean that both provisions must be interpreted in the same way.

137. First, Article 9 of the Berne Convention as revised serves a different purpose. That provision gives the parties to the Convention the authority to derogate from the strict rule of protection under the conditions in the three-step test. Provision is made for that sort of construction (that is to say, the option of exceptions for Member States) in Article 9 of the Directive.

138. Secondly, Article 9 of the Berne Convention as revised differs in that it does not formulate and as alternatives but as two of three cumulative defining characteristics.⁶¹

139. Other international rules similar to Article 7(5) of the Directive are to be found in Article 13 of the TRIPs Agreement and certain WIPO agreements. However, as the latter were adopted after the Directive they should be left out of account.

140. As regards the interpretation of Article 13 of the TRIPs Agreement, similar reservations can be raised as in connection with the Berne Convention as revised. For Article 13, like Article 9 of the Berne Convention as revised, regulates the limits on and exceptions to the exclusive rights imposed by the Member States. However, unlike Article 9 of the Berne Convention as revised, both effects, that is to say and , are given as alternatives as in the Directive.

141. These considerations demonstrate that the interpretation of the above rules of international law cannot be transferred to Article 7(5) of the Directive.

142. The acts of extraction and re-utilisation prohibited under the Directive and the effects of such acts regulated by it have in common that the purpose of the acts is not of decisive importance. Article 7(5) of the Directive cannot be interpreted in that way in the absence of any rule concerning purpose. If the Community legislature had wanted purpose to be taken into account it could have used in Article 7 of the Directive a formulation like that in Article 9(b) of the Directive.

a)

143. The requirement for acts is intended to prevent the undermining of protection by successive acts each concerning only an insubstantial part.⁶²

144. On the other hand, it is unclear whether Article 7(5) lays down two alternative or two cumulative requirements. Any interpretation should begin with the wording of the provision. However, that does not yield any unequivocal result. Some language versions link

the two requirements with ,⁶³ others with .⁶⁴ Most of the language versions and the objective of the Directive, however, indicate that the two characteristics are to be understood as cumulative requirements.⁶⁵ A repeated but not systematic extraction of an insubstantial part of the contents of a database is therefore not covered.

145. There is a repeated and systematic act when it is carried out at regular intervals, for example, weekly or monthly. If the interval is less and the affected part small, the act will have to be carried out more frequently for the part affected overall to fulfil one of the two requirements laid down by Article 7(5) of the Directive.

b) The expression '*normal exploitation*' in Article 7(5) of the Directive

146. The term '*normal exploitation*' in Article 7(5) of the Directive must be interpreted in the light of the objective of that protective clause. That is clear in particular from the preamble to the Directive. In the 42nd recital the prevention of detriment to investment is cited as a reason for the prohibition of certain acts. In the 48th recital the objective of the protection enshrined in the Directive is expressly described '*as a means to secure the remuneration of the maker of the database*'.

147. That indicates a wide interpretation of the term '*normal exploitation*'. Thus '*conflict with ... exploitation*' must be understood not only in the technical sense that only effects on the technical usability of the affected database are covered. Rather, Article 7(5) also relates to purely economic effects on the maker of a database. It is a matter of protecting the economic use made of it under normal circumstances.⁶⁶

148. Thus, Article 7(5) is applicable not only in relation to acts which result in the creation of a competing product which then conflicts with the exploitation of the database by its maker.⁶⁷

149. In individual cases Article 7(5) may cover the exploitation of potential markets not exploited by the maker of the database. Accordingly, it is, for example, sufficient, if the person extracting or re-utilising the data fails to pay licence fees to the maker of the database. If such acts were allowed, that would provide an incentive for other persons to extract or re-utilise the contents of the database without paying licence fees.⁶⁸ If there were thus the possibility of exploiting the database without charge, that would have serious implications for the value of licences, resulting in reduced income.

150. The rule is not limited to cases where the maker of the database wishes to use its contents in the same way as the person extracting or re-utilising the data. Nor is it

⁶¹ Sam Ricketson, *The Berne Convention for the Protection of Literary and Artistic Works: 1886-1986, 1987*, 482.

⁶² Gaster (cited in footnote 13), paragraph 558.

⁶³ Most of the Romance languages, and the German, English and Greek versions.

⁶⁴ The Spanish, Swedish and Finnish versions.

⁶⁵ Leistner (cited in footnote 17), 181; von Lewinski (cited in footnote 18), paragraph 17 on Article 7.

⁶⁶ That is also consistent with the interpretation of Article 13 of the TRIPs Agreement by a WTO Panel (WT/DS160/R of 27 July 2000, 6.183).

⁶⁷ Leistner (cited in footnote 17), 181.

⁶⁸ See WT/DS160/R of 27 July 2000, 6.186.

relevant either that the maker of a database cannot exploit its contents in the same way as the person extracting or re-utilising it because of a statutory prohibition.

151. Finally ‘*conflict with ... exploitation*’ must not be interpreted so narrowly that only a total ban on exploitation would be prohibited. According to all the language versions other than the German the prohibition is applicable as soon as there is any conflict with exploitation, that is to say, even in the case of negative effects on a limited scale. That is also where the threshold lies above which detriment to the maker of the database can be assumed, thus triggering the prohibition.

152. As many of the parties have pointed out, it is for the national court to assess the specific acts and their effect on the database at issue in the proceedings on the basis of the above criteria.

c) The expression ‘*unreasonably prejudice*’ in Article 7(5) of the Directive

153. As regards the interpretation of the term ‘*unreasonably prejudice*’ in Article 7(5) of the Directive it must first be recalled that there had already been discussion, in connection with the Berne Convention as revised, as to whether such an unspecific legal term was usable at all. Reference to the ways in which it differs from ‘*normal exploitation*’ is also crucial to the interpretation of the expression ‘*unreasonably prejudice*’.

154. As regards the scope of protection the provision at issue makes lesser demands of the expression ‘*unreasonably prejudice*’ than of ‘*normal exploitation*’ in so far as in the former case ‘*legitimate interests*’ are protected. The protection therefore goes beyond legal position and also covers interests, that is to say ‘*legitimate*’ and not only legal interests.

155. To offset this, Article 7(5) lays down stricter requirements as regards the effect of the unauthorised acts. They must ‘*unreasonably prejudice*’ and not merely prejudice. However, the term ‘*unreasonably*’ must not be interpreted too strictly. Otherwise the Community legislature would have required damage or even significant damage to the maker here too.

156. In the light of the language versions other than the German, it will have to be interpreted as requiring the acts to have damaged interests to a certain extent. In that connection the Directive focuses, here as elsewhere, on detriment to the maker. The main proceedings show very clearly that the protection of the maker’s rights affects the economic interests of others. However, that does not mean that great importance can be attached, in the interpretation of Article 7(5) of the Directive, to the effects of the sui generis right on the interests of other persons or to any possible ‘*damage*’ to the relevant Member State as a result of possible effects on income from taxation. The Directive is intended to prevent detriment to makers of databases. Unlike the other effects, this objective is expressly enshrined in the Directive.

157. The maker’s investments and the return on them constitute the core interest referred to in Article 7(5).

Thus, here too, the economic value of the contents of the database is the starting point for assessment. The focus of the assessment is the effects on the actual or anticipated income of the maker of the database.⁶⁹

158. We can use the expression ‘*normal exploitation*’ as a basis for assessing the extent of protection. If we interpret that term narrowly, as not covering the protection of potential markets, such as new ways of exploiting the contents of a database,⁷⁰ we will at least have to describe the impact on potential markets as prejudice to legitimate interests. Whether such prejudice is unreasonable, will depend on the facts of the individual case. However, the fact that the person extracting or re-utilising the data is a competitor of the maker of the database cannot be decisive.

159. In this connection, too, it must be recalled that it is for the national court to investigate the specific facts and to ascertain whether they must be considered to ‘*unreasonably prejudice*’ the legitimate interests of the maker of the database at issue in the proceedings.

D – Change to the contents of a database and term of protection (second part of the third question referred)

160. In the present case the issue is how the database right is protected in the event of change to the contents of the database.

161. Under Article 10(3) of the Directive any substantial change – under certain conditions – qualifies the database for its own term of protection. One of those conditions, namely the criterion ‘*substantial change to the contents of a database*’, and the consequences it entails will be examined below. In the present case the issue is to be investigated from the perspective of ‘*repeated and systematic extraction and/or re-utilisation*’ within the meaning of Article 7(5) of the Directive.

162. Essentially this question concerns the object of the extended term of protection. In that connection, it must be clarified whether substantial changes result in the creation of a new database. If it is concluded that a new database exists alongside the existing database what is decisive is which database the prohibited acts relate to.

163. In response to various submissions, the question whether Article 10(3) of the Directive is to be interpreted as meaning that it governs only the term of protection and not the object of protection is to be considered at the same time.

164. The wording of Article 10(3), according to which a substantial change, under certain circumstances, ‘*shall qualify the database resulting from that investment for its own term of protection*’, suggests that the Community legislature assumed that such a change resulted in a separate database. That conclusion is confirmed by the other language versions.

165. Nor can the systematic interpretation be adduced in refutation. For instance, although the title of Article 10 is ‘*term of protection*’ that does not mean that that Article merely regulates the period of time and not also the object of that protection.

⁶⁹ See WT/DS160/R of 27 July 2000, 6.229.

⁷⁰ Leistner (cited in footnote 17), 182.

166. The view taken by the Community in the context of the WIPO also supports the argument for a new database in the event of a substantial change under certain circumstances.⁷¹

167. It is obvious that the new term of protection laid down by Article 10(3) can only relate to a specific object. It is clear from the background to the drafting of this provision that the result of the further investment was meant to enjoy protection.⁷² Limiting the object of protection to the resulting database is consistent with the objective of providing for a new term of protection.⁷³

168. It should be recalled, here, that the database at issue in these proceedings is what is known as a dynamic database, that is to say, a database which is constantly updated. It must be borne in mind that not only deletions and additions but also, as is clear from the 55th recital, verifications are to be considered changes within the meaning of Article 10(3) of the Directive.

169. It is characteristic of dynamic databases that there is only ever one database, namely the most recent. Previous versions '*disappear*'. That raises the question of what the new term of protection covers, in other words, what the object of protection, that is to say, the new one, is.

170. The point of departure must be the objective of the changes, which is to bring the database up to date. That means that the whole database is the object of the new investment. Thus, the most recent version, that is to say, the whole database, is always the object of protection.⁷⁴

171. The background to the drafting of the Directive also supports that interpretation. Although Article 9 of the original proposal⁷⁵ still made provision for extension of the term of protection of a database, in its explanatory statement to the proposal the Commission expressly referred to a new '*edition*' of the database.⁷⁶ A clarification as regards constantly updated databases was then included in an amended proposal.⁷⁷ In the legal definition in Article 12(2)(b) the successive accumulation of small changes typical of dynamic databases is expressly mentioned.

172. Viewed in that light Article 10(3) of the Directive provides for a '*rolling*' sui generis right.

173. Ultimately, the solution proposed here for dynamic databases reflects the principle that it is always the result, that is to say, the new and not the old database, which is protected. Dynamic databases differ

from static databases simply in that, in the case of dynamic databases, the old database ceases to exist because it is constantly transformed into a new one.

174. Further, the fact that in the case of dynamic databases the whole database and not only the changes as such enjoy a new term of protection can, regardless of the objective and subject-matter of the new investment, be justified by the fact that only an assessment of the whole of the database as such is practicable.

175. The objective of protecting investments and of providing an incentive for investment lends further support to the argument for assessment as a whole. In the case of dynamic databases these objectives can only be attained if updates are also covered.⁷⁸ Otherwise investment in dynamic databases would be disadvantaged.

176. It is for the national court to assess the specific changes to the database in the main proceedings. In the course of that assessment the national court must take account of the fact that even insubstantial changes in sufficient number are to be classified as substantial changes. As is clear from the 54th recital in the preamble to the Directive, the burden of proof that the criteria in Article 10(3) exist lies with the maker of the new database.

177. It is for the national court to judge at what point the threshold above which a part becomes substantial has been crossed. In that connection it must be ascertained whether the new investment is substantial. The assessment of the substantial nature of a part must be based on the requirements in Article 7 of the Directive. The relevant conditions with regard to investment must also be observed. That is so, regardless of the fact that Article 10(3) refers expressly to '*new investment*', whereas Article 7 concerns initial investment.⁷⁹

VII – Conclusion

178. I therefore propose that the Court should answer the questions referred as follows:

1. The term '*database*' in Article 1 of Directive 96/9/EC of the European Parliament and of the Council of 11 March 1996 on the legal protection of databases is to be interpreted as meaning that it can also cover lists of football fixtures.

2. Article 7(1) of the Directive must be interpreted as meaning that a database containing lists of football fixtures can be the object of protection, if qualitatively or quantitatively a substantial investment in the obtaining, verification or presentation of the contents is necessary. The maker of such a database has the right to prevent extraction and/or re-utilisation of the whole or of a substantial part, evaluated qualitatively and/or quantitatively, of the contents of that database.

3. Article 7(5) of the Directive prohibits the repeated and systematic extraction and/or re-utilisation of insubstantial parts of the contents of the database implying acts which conflict with a normal exploitation

⁷¹ Standing Committee on Copyright and Related Rights (19 May 1998), SCCR/1/INF/2.

⁷² Common Position (EC) No 20/95 (cited in footnote 23), No 14.

⁷³ Von Lewinski (cited in footnote 18), paragraph 5 on Article 10.

⁷⁴ Simon Chalton, 'The Effect of the E.C. Database Directive on United Kingdom Copyright Law in Relation to Databases: A Comparison of Features', E.I.P.R. 1997, 278 (284); Hornung (cited in footnote 41), 173 et seq.; Leistner (cited in footnote 17), 209; see St. Beutler, 'The Protection of multimedia products under international law', UFITA 1997, 5 (24); Guglielmetti (cited in footnote 31), 192; Speyart (cited in footnote 19), 171 (173).

⁷⁵ COM(92) 24 final.

⁷⁶ Explanatory Statement to Proposal COM (92) 24, No 9.2.

⁷⁷ COM(93) 464 final.

⁷⁸ Grützmacher (cited in footnote 22), 390 et seq.

⁷⁹ See, on that point, at greater length, Leistner (cited in footnote 17), 207 et seq.

of that database or which unreasonably prejudice the legitimate interests of the maker of the database.

Article 7 in conjunction with Article 10(3) of the Directive must be interpreted as meaning that extraction and/or re-utilisation is also prohibited in respect of a database to the contents of which there has been a substantial change, evaluated qualitatively or quantitatively, which is thus the result of a substantial new investment, evaluated qualitatively or quantitatively.
