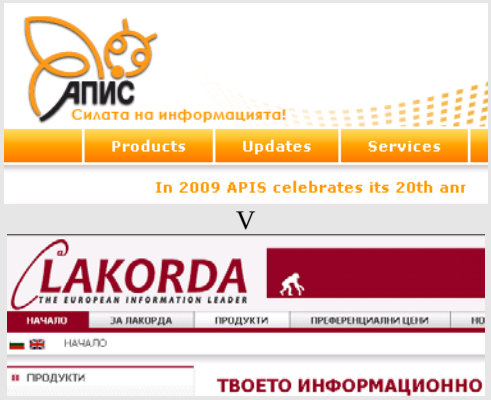
European Court of Justice, 5 March 2009, Apis v Lakorda



DATABASE RIGHTS

Permanent and temporary transfer

- **The distinction between permanent transfer and temporary transfer lies in the duration of storage on another medium of materials extracted from the original data-base. There is permanent transfer when those materials are stored in a permanent manner on a medium other than the original medium, whereas the transfer is tem-porary if the materials are stored for a limited period on another medium, such as the operating memory of a computer.**

Extraction

- **The time at which extraction from an electronic database takes place is the time at which the materials being extracted are placed on a medium other than that of the original database, independently of whether they are placed there permanently or temporarily.**
- **The objective pursued by the act of transfer is immaterial for the purpose of assessing whether there has been an extraction.**

Thus, it is of little importance that the act of transfer in question is for the purpose of creating another database, whether in com-petition with the original database or not, or that the act is part of an activity, whether commercial or not, other than the creation of a database (see, to that effect, Di-rectmedia Publishing, cited above, paragraphs 46 and 47, and the case-law cited therein).

- **The nature of the computer program used to manage two electronic databases is not a factor in assessing the existence of extraction within the meaning of Article 7 of Directive 96/9.**

Evidence of extraction

- **The fact that the physical and technical characteristics present in the contents of a database also appear in the contents of another database may also be interpreted as an indication of the existence of a transfer between the two databases and therefore, of an extraction.**

However, as Lakorda pointed out, it is for the national court to assess whether that coincidence can be explained by other factors, such as the use of identical sources when the two databases were being set up and the presence of those characteristics in the common sources.

- **The fact that materials might also have been collected directly by the maker of the second base from the sources used by the first maker, may constitute circum-stantial evidence of extraction.**

It should also be stated, as the Bulgarian Gov-ernment does, that the fact that materials obtained by the maker of a database from sources not available to the public also appear in a database made by another person is not, as such, sufficient to prove that there has been a transfer from the first database to the second, having regard to the possibility that those materials might also have been collected directly by the maker of the second base from the sources used by the first maker. That fact may, none the less, constitute circum-stantial evidence of extraction.

Body of materials composed of separate modules

- **Where there is a body of materials composed of separate modules, the volume of the materials allegedly extracted and/or re-utilised from one of those modules must be compared with the total contents of that module; otherwise comparison between volume and total contents.**

Article 7 of Directive 96/9 must be interpreted as meaning that, where there is a body of materials composed of separate modules, the volume of the materials allegedly extracted and/or re-utilised from one of those modules must, in order to assess whether there has been extraction and/or re-utilisation of a substantial part, evaluated quantitatively, of the contents of a database within the meaning of that article, be compared with the total contents of that module, if the latter constitutes, in itself, a database which fulfils the conditions for protection by the sui generis right. Otherwise, and in so far as the body of materials constitutes a database protected by that right, the comparison must be made between the volume of the materials allegedly extracted and/or re-utilised from the various modules of that database and its total contents.

Substantial part of the contents of a database

- **The fact that the materials were obtained by the maker of that data-base from sources not accessible to the public may affect the classification of those materials as a substantial part.**

The fact that the materials allegedly extracted and/or re-utilised from a database protected by the sui generis right were obtained by the maker of that data-base from sources not accessible to the public may, according to the amount of human, technical and/or fi-nancial resources deployed by the maker to collect the materials at issue from those sources, affect the classi-fication of those materials as a substantial part, evaluated qualitatively, of the contents of the database concerned, within the meaning of Article 7 of Directive 96/9.

Obligation to verify substantial part

- **The fact that part of the materials contained in a database are official and accessible to the public does not relieve the national court of an obligation to verify whether the materials constitute a substantial part.**

The fact that part of the materials contained in a database are official and accessible to the public does not relieve the national court of an obligation to, in assessing whether there has been extraction and/or re-utilisation of a substantial part of the contents of that database, to verify whether the materials allegedly extracted and/or re-utilised from that database constitute a substantial part, evaluated quantitatively, of its contents or, as the case may be, whether they constitute a substantial part, evaluated qualitatively, of the database inasmuch as they represent, in terms of the obtaining, verification and presentation thereof, a substantial human, technical or financial investment.

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European Court of Justice, 5 March 2009

(K. Lenaerts, T. von Danwitz, R. Silva de Lapuerta, E. Juhász and J. Malenovský)

JUDGMENT OF THE COURT (Fourth Chamber)

5 March 2009 (*)

(Directive 96/9/EC – Legal protection of databases – Sui generis right – Obtaining, verification or presentation of the contents of a database – Extraction – Substantial part of the contents of a database – Database containing official legal data)

In Case C-545/07,

REFERENCE for a preliminary ruling under Article 234 EC from the Sofiyski gradski sad (Bulgaria), made by decision of 19 November 2007, received at the Court on 4 December 2007, in the proceedings

Apis-Hristovich EOOD

v

Lakorda AD,

THE COURT (Fourth Chamber),

composed of K. Lenaerts (Rapporteur), President of the Chamber, T. von Danwitz, R. Silva de Lapuerta, E. Juhász and J. Malenovský, Judges,

Advocate General: E. Sharpston,

Registrar: N. Nanchev, Administrator,

having regard to the written procedure and further to the hearing on 27 November 2008,

after considering the observations submitted on behalf of:

– Apis-Hristovich EOOD, by E. Marcov and A. Andréev, lawyers,

– Lakorda AD, by D. Mateva and M. Mladenov, lawyers,

– the Bulgarian Government, by E. Petranova, D. Drambozova and A. Ananiev, acting as Agents,

– the Commission of the European Communities, by N. Nikolova and H. Krämer, acting as Agents,

having decided, after hearing the Advocate General, to proceed to judgment without an Opinion,

gives the following

Judgment

1 This reference for a preliminary ruling relates to the interpretation of Article 7(1) and (2) 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).

2 The reference has been made in the course of proceedings brought by Apis-Hristovich EOOD ('Apis') against Lakorda AD ('Lakorda'), two companies incorporated under Bulgarian law, who market electronic databases for official legal data.

Legal context

3 According to Article 1(1) thereof, Directive 96/9 'concerns the legal protection of databases in any form'.

4 For the purposes of the application of the directive, Article 1(2) thereof defines the concept of database 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'.

5 According to Article 1(3) of the Directive, '[p]rotection under this Directive shall not apply to computer programs used in the making or operation of databases accessible by electronic means'.

6 Article 2 of Directive 96/9 provides as follows:

'This Directive shall apply without prejudice to Community provisions relating to:

(a) the legal protection of computer programs;

…'

7 Article 3(1) of the Directive introduces protection for 'databases which, by reason of the selection or arrangement of their contents, constitute the author's own intellectual creation'.

8 Article 7 of the Directive, entitled 'Object of protection', introduced a sui generis right in the following terms:

'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 contents.

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.'

9 Under the law of the Republic of Bulgaria, the legal protection of databases is governed by the Law on copyright and related rights (Zakon za avtorskoto pravo i srodnite mu prava, Darzhaven vestnik n° 56, of 29 June 1993), as amended in Darzhaven vestnik n° 73, of 5 September 2006 ('ZAPSP'). The provisions of Article 1(2) and (3) of Directive 96/9 were transposed by Article 2(13) of the Additional Provisions of ZAPSP and those of Article 7(1) and (2) of the Directive by Articles 93b and 93c(1) of ZAPSP.

The facts of the main proceedings and the questions referred to the Court

10 Apis brought proceedings before the Sofiyski gradski sad (Sofia City Court), first, for cessation of the allegedly unlawful extraction and re-utilisation by Lakorda of substantial parts of its modules 'Apis pravo' ('Apis law') and 'Apis praktika' ('Apis case-law'), which form part of a general legal information system, namely, at the time of the facts in the main proceedings, 'Apis 5x', later 'Apis 6' and, second, for compensation for the damage suffered by the applicant in the main proceedings by reason of Lakorda's conduct.

11 Apis states that it is a database-maker within the meaning of ZAPSP and that it made a substantial investment in the compilation, verification, systemisation and updating of the databases of the product modules 'Apis pravo' and 'Apis praktika'. The principal activities linked to that investment are digitalisation, conversion, correction, technological processing and consolidation of the texts of legislative measures, and legal editing.

12 Apis claims that persons who previously worked in its software department before founding Lakorda unlawfully extracted substantial parts of its modules, which permitted the latter to produce and market, in September 2006, its own modules, called 'Balgarsko pravo' ('Bulgarian law') and 'Sadebna praktika' ('Case-law of the courts'), which form part of the general legal information system 'Lakorda legis'.

13 Apis claims that Lakorda extracted without its consent from the database of the product module 'Apis pravo' the texts, in their consolidated version, of more than 19 700 documents, comprising normative measures that were then in force, measures amending or repealing earlier measures, and non-normative measures. In addition, more than 2 500 documents, which were earlier versions of legislative measures from the period 2001 to 2006, were extracted from the 'Apis pravo' module and reutilised in 'Lakorda legis'. Thus, 82.5% of the total number of documents contained in that product module were extracted and re-used by Lakorda, which represents a substantial part, evaluated quantitatively, of the content of that module.

14 Moreover, Apis claims that 2 516 unpublished judicial decisions, obtained by Apis with the permission of the relevant courts and which it had collected in the 'Apis praktika' module, were extracted therefrom by Lakorda and incorporated in the 'Sadebna praktika' module, which, having regard to the particular value of that unpublished case-law, represents, according to Apis, a substantial part, evaluated qualitatively, of the 'Apis praktika' module.

15 Apis claims that the acts of extraction and re-utilisation carried out by Lakorda concerned, not merely the texts of the documents contained in the 'Apis pravo' and 'Apis praktika' modules, but also the data connected with those documents, such as references between the documents and the legal definitions of certain terms and concepts. The fact that this unauthorised conduct took place is shown by the presence in Lakorda's modules of features identical to those in its own modules, such as editor's notes, references to translations of the documents into English, commands, fields, hyperlinks and the chronology of legislative measures.

16 Lakorda denies any unlawful extraction and re-utilisation of Apis's modules. It contends that its 'Lakorda legis' system is the fruit of a substantial, independent investment of around BGN 215 000. Establishment of the system involved a team of software specialists, lawyers and managers and is based on original computer programmes for the establishment, updating and visualisation of databases, allowing data to be processed and information to be accessed in a faster and more efficient way that other legal information systems. In addition, its modules have a fundamentally different structure than those of Apis.

17 Lakorda contends that, in setting up its project, it relied on its contacts with various national and European authorities. It also used publicly accessible sources, such as the Darzahven vestnik (Official Journal of the Republic of Bulgaria) and the official websites of national institutions and courts, which explains the great similarity of the contents of its modules and those of Apis and the presence, although limited, of features similar to Apis's modules regarding, in particular, references to translations and commands. Moreover, by virtue of ZAPSP, official measures adopted by State bodies are not covered by the copyright rules.

18 Lakorda adds that that the great majority of editorial notes and hyperlinks in the 'Lakorda legis' system are derived from a personal concept based on an

extremely detailed systematic processing, classification and marking of the measures collected. That system thus contains 1 200 000 individually accessible, structured data and more than 2 700 000 hyperlinks, created in accordance with a unique method of recognition and classification. Moreover, there are considerable differences between judicial decisions collected in Lakorda's and Apis's respective information systems, in particular at the level of the materials mentioned as essential for the reading of the decision concerned. The editorial techniques used in the Apis modules result from the generally applicable punctuation rules of the Bulgarian language.

19 The Sofiyski gradski sad states that, in order to determine whether an infringement has been committed in the case before it, it must interpret and apply Article 93c(1) of ZAPSP, which transposed Article 7(2) of Directive 96/9.

20 The national court emphasises that the central subject of the dispute in the main proceedings is alleged unlawful extraction by Lakorda of the contents of Apis's modules and that that content comprises measures adopted by State bodies which are constantly amended, supplemented and repealed and it considers that in order to determine whether an infringement of ZAPSP has been committed, it is therefore important to determine the time at which the alleged extraction occurred and whether it constitutes a permanent transfer or a temporary transfer.

21 Since those two concepts are not defined in ZAPSP, the national court wonders whether, in interpreting the terms 'permanent' or 'temporary' in Article 7(2)(a) of Directive 96/9, it is necessary to apply a test based on the duration of the period of transfer or on the time during which the extracted product is stored on another medium. It considers that if the second test is applied, it would have to be determined whether the database from which the alleged extraction was made was stored on a fixed medium (hardware), in which case there is a permanent transfer, or whether the database was stored temporarily in the computer's 'working' memory, in which case, the transfer would be temporary.

22 Bearing in mind Lakorda's contention that the 'Apis pravo' and 'Apis praktika' modules do not represent a substantial part, evaluated quantitatively, of its 'Lakorda legis' system, the national court considers that it must interpret the concept of a substantial part, evaluated qualitatively, within the meaning of Article 7(1) and (2) of Directive 96/9. It wonders, in that regard, whether, in order to determine whether there has been extraction of a substantial part, the quantity of data extracted from the modules in question should be compared with the quantity contained in Lakorda's modules taken separately or, on the other hand, taken together.

23 Apis's claim that its 'Apis praktika' module contains judicial decisions which were obtained from courts whose case-law is not generally accessible to the public leads the national court to wonder whether the relevant test in assessing the existence of a substantial part, evaluated qualitatively, of the contents of a database within the meaning of Article 7(1) and (2) of Directive 96/9 is the accessibility of the data with a view to their capture or the value of the data in the light of the information which they contain.

24 Finally, the national court wonders whether, for the purpose of determining whether extraction, within the meaning of Article 7 of Directive 96/9, has taken place, not only the databases as such should be compared, but also the computer programmes which manage them.

25 Faced with those difficulties of interpretation, the Sofiyski gradski sad decided to stay proceedings and refer the following questions to the Court for a preliminary ruling:

'1. How are the terms "permanent transfer" and "temporary transfer" to be interpreted and to be delimited in relation to each other for the purpose of:

– determining whether extraction within the meaning of Article 7(2)(a) of Directive 96/9 … from a database accessible by electronic means has taken place[?]

– at what point in time is it to be assumed that extraction within the meaning of Article 7(2)(a) of Directive 96/9 … from a database accessible by electronic means has taken place[?]

– what is the significance, for the assessment of extraction, of the fact that the content of a database extracted in this way has served to create a new and amended database?

2. Which criterion is to be applied in interpreting the concept "extraction of a substantial part, evaluated quantitatively" if the databases are divided into separate subgroups and are used in these subgroups, which are independent commercial products? Is the size of the databases in the entire commercial product or the size of the databases in the relevant subgroup to be used as the criterion?

3. In interpreting the concept "a substantial part, evaluated qualitatively", is the fact that a certain type of data allegedly extracted was obtained by the database maker from a source which is not generally accessible, so that it was possible to procure the data only by extracting them from the databases of that very database maker, to be used as a criterion?

4. What criteria are to be applied when determining whether extraction from a database accessible by electronic means has taken place? Can it be regarded as an indication that extraction has taken place if the maker's database has a particular structure, notes, references, commands, fields, hyperlinks and editorial text and these elements are also found in the database of the person who has committed the alleged infringement? In the carrying out of this assessment, are the various original organisational structures of the two opposing databases relevant?

5. When determining whether extraction has taken place, is the computer program/the system for database management material if it is not part of the database?

6. Since, according to Directive 96/9 … and the case-law of the Court of Justice of the European Com-

munities, “a substantial part of the database from a quantitative and qualitative point of view” is linked to substantial investment in the obtaining, verification or presentation of a database: how are these concepts to be interpreted in relation to legislative measures, and measures having individual application, which have been adopted by executive State bodies and are publicly accessible, to their official translations and to case-law?’

The questions referred to the Court

Admissibility

26 Lakorda considers that the reference for a preliminary ruling is not necessary to resolve the dispute in the main proceedings.

27 Lakorda contends that the dispute does not concern the interpretation of expressions such as ‘extraction’ or a ‘substantial part’ of a database within the meaning of Directive 96/9. It contends that the concept of extraction is defined in Bulgarian law and that the provisions of the Directive referred to in the reference have already been interpreted by the Court. It adds, in regard to the alleged unlawful extraction complained of, that the national court is in a position to assess the materials with which the parties have provided it in the light, in particular, of the reports from technical and accounting experts which it called for and obtained in order to resolve the dispute in the main proceedings, without any intervention on the part of the Court.

28 In this respect, it must be recalled that, according to the settled case-law of the Court, it is solely for the national court before which the dispute has been brought, and which must assume responsibility for the subsequent judicial decision, to determine in the light of the particular circumstances of the case both the need for a preliminary ruling in order to enable it to deliver judgment and the relevance of the questions which it submits to the Court (**Case C-415/93 Bosman [1995] ECR I-4921**, paragraph 59; Case C-380/05 Centro Europa 7 [2008] ECR I-349, paragraph 52; and Case C-213/07 Michaniki [2008] ECR I-0000, paragraph 32).

29 Consequently, where the questions submitted concern the interpretation of Community law, the Court is in principle bound to give a ruling (see, inter alia, Case C-326/00 IKA [2003] ECR I-1703, paragraph 27, and Michaniki [2008] ECR I-0000, paragraph 33).

30 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 (see, inter alia, Case C-379/98 PreussenElektra [2001] ECR I-2099, paragraph 39, and Michaniki [2008] ECR I-0000, paragraph 34).

31 However, it must be pointed out that the present case does not fall under any of the hypotheses set out in the preceding paragraph. On the contrary, the description of the legal and factual framework of the main proceedings contained in the order for reference shows – and that, indeed, was confirmed at the hearing – that the resolution of the dispute before the national court requires, inter alia, that that court obtain a series of explanations concerning the expressions ‘extraction’ and ‘substantial part’, evaluated qualitatively or quantitatively, of the contents of a database within the meaning of Article 7 of Directive 96/9.

32 It must be added that, in the procedure referred to in 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 court. However, in order to give the national court a useful answer, the Court may, in a spirit of cooperation with national courts, provide it with all the guidance that it deems necessary (Case C-49/07 MOTOE [2008] ECR I-0000, paragraph 30 and the case-law cited therein).

33 Under those circumstances, the reference for a preliminary ruling must be regarded as admissible.

Substance

34 The first, fourth and fifth questions, which should be considered together, concern, principally, the concept of extraction, in the sense of the physical transfer of data, in the context of Directive 96/9. The second, third and sixth questions, which should also be considered together, concern, essentially, the concept of a substantial part, evaluated qualitatively or quantitatively, of the contents of a database in the same context.

The first, fourth and fifth questions, concerning the expression ‘extraction’ within the meaning of Article 7 of Directive 96/9

35 In its first question, the national court is seeking an interpretation of the concepts of ‘permanent transfer’ and ‘temporary transfer’ used in Article 7(2)(a) of Directive 96/9 to define the concept of extraction. It also wonders when extraction is deemed to take place in regard to a database accessible by electronic means and whether the fact that the content extracted from a database is used to set up another, modified, database influences the assessment regarding the existence of such an extraction.

36 The fourth question concerns, essentially, the relevance, in the context of the assessment of the existence of extraction from a database accessible by electronic means, first, of the fact that the physical and technical characteristics of that database are to be found in the database of the alleged perpetrator of an infringement of the sui generis right and, second, of the difference between the structural organisation of the two databases concerned.

37 In its fifth question, the national court asks whether the software programme used to manage a database, but which is not part of the database itself, affects the assessment of whether or not there has been extraction.

38 In that respect, it must be recalled that the concept of extraction is defined in Article 7(2)(a) of Directive 96/9 as ‘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’.

39 Since the concept of extraction is used in various provisions of Article 7 of Directive 96/9, the answers to the questions being considered must be placed in the general context of that article (see, to that effect, **Case C-304/07 Directmedia Publishing [2008] ECR I-0000**, paragraph 28).

40 The Court has already held that, having regard to the terms employed in Article 7(2)(a) of Directive 96/9 to define the concept of extraction and to the objective of the sui generis right instituted by the Community legislature (see, in that regard, **Case C-203/02 The British Horseracing Board and Others [2004] ECR I-10415**, paragraphs 45, 46 and 51, and Directmedia Publishing, paragraphs 31 to 33), that concept must, in the context of Article 7, be given a broad interpretation as referring to any unauthorised act of appropriation of the whole or a part of the contents of a database, the nature and form of the process used being immaterial (see, to that effect, The British Horseracing Board and Others, paragraphs 51 and 67, and Directmedia Publishing, paragraphs 34, 35, 37 and 38).

41 The decisive criterion in this respect is to be found in the existence of an act of 'transfer' of all or part of the contents of the database concerned to another medium, whether of the same nature as the medium of that database or of a different nature. Such a transfer implies that all or part of the contents of a database are to be found in a medium other than that of the original database (see Directmedia Publishing, paragraph 36).

42 In that context, it should be borne in mind, in connection with the national court's first question, that, as is clear from the very terms of Article 7(2)(a) of Directive 96/9, the Community legislature intended to include in the concept of 'extraction' within the meaning of Article 7 not merely acts of 'permanent transfer' but also those of 'temporary transfer'.

43 As the Commission of the European Communities stated at the hearing, the Community legislature's objective was to exclude explicitly a form of de minimis rule in the interpretation and application of the concept of 'transfer' within the meaning of Article 7 of Directive 96/9. Moreover, as the Commission also confirmed at the hearing, while the directive itself attaches no specific legal consequence to the permanent or the temporary nature of the transfer concerned, the question of the existence of a permanent transfer or of a temporary transfer might, depending on the national law at issue, be relevant to assessing the gravity of any infringement of the sui generis right of the maker of a protected database or the scope of the reparable damage connected with such an infringement.

44 Like the Commission, the Court considers that the distinction between permanent transfer and temporary transfer lies in the duration of storage on another medium of materials extracted from the original database. There is permanent transfer when those materials are stored in a permanent manner on a medium other than the original medium, whereas the transfer is temporary if the materials are stored for a limited period on another medium, such as the operating memory of a computer.

45 The time at which extraction from an electronic database takes place is the time at which the materials being extracted are placed on a medium other than that of the original database, independently of whether they are placed there permanently or temporarily.

46 Moreover, the objective pursued by the act of transfer is immaterial for the purpose of assessing whether there has been an extraction. Thus, it is of little importance that the act of transfer in question is for the purpose of creating another database, whether in competition with the original database or not, or that the act is part of an activity, whether commercial or not, other than the creation of a database (see, to that effect, Directmedia Publishing, cited above, paragraphs 46 and 47, and the case-law cited therein).

47 As is confirmed by the 38th recital in Directive 96/9, it is also immaterial, for the purposes of interpreting the concept of extraction, that the transfer of the contents of a protected database to another medium result in an arrangement or an organisation of the material concerned which is different from that in the original database (see, to that effect, Directmedia Publishing, paragraph 39).

48 Consequently, bearing in mind the technical possibilities of reorganisation which are possible with electronic databases, the fact that all or part of the contents of a database protected by the sui generis right is found in a modified form in another database does not, as such, preclude a finding that there has been extraction. The same is true in regard to the organisational structures of the two databases concerned, referred to by the national court in its fourth question.

49 It must also be stated in that regard that, if it is established – and that is for the national court to determine – that the contents or a substantial part of the contents of a database protected by the sui generis right was transferred, without the permission of its maker, to a medium owned by another person so as to be made available to the public subsequently by that person, for example in the form of another, possibly modified, database, that fact would show, in addition to the existence of extraction, the existence of re-utilisation within the meaning of Article 7 of Directive 96/9, re-utilisation being the making available to the public of all or a substantial part of the contents of a protected database (see, to that effect, The British Horseracing Board and Others, cited above, paragraph 61 and 67).

50 As the Commission has pointed out, it is also important to emphasise that the fact – the existence of which must also be ascertained by the national court – that an unlawful extraction from a protected database took place for the purpose of setting up and marketing a new database, in competition with the original database could, in certain circumstances be relevant in assessing the extent of the damage caused by that act to the maker of the original database.

51 The fact, also referred to by the national court in its fourth question, that the physical and technical characteristics present in the contents of a database also

appear in the contents of another database may also be interpreted as an indication of the existence of a transfer between the two databases and therefore, of an extraction. However, as Lakorda pointed out, it is for the national court to assess whether that coincidence can be explained by other factors, such as the use of identical sources when the two databases were being set up and the presence of those characteristics in the common sources.

52 It should also be stated, as the Bulgarian Government does, that the fact that materials obtained by the maker of a database from sources not available to the public also appear in a database made by another person is not, as such, sufficient to prove that there has been a transfer from the first database to the second, having regard to the possibility that those materials might also have been collected directly by the maker of the second base from the sources used by the first maker. That fact may, none the less, constitute circumstantial evidence of extraction.

53 Finally, as the Bulgarian Government and the Commission contend, the fact – referred to by Lakorda in the main proceedings and being the ground for the national court's fifth question – that the perpetrator of an alleged infringement of the sui generis right of the maker of another database has used an original software programme to manage his database could certainly be relevant in the context of Council Directive 91/250/EEC of 14 May 1991 on the legal protection of computer programs (OJ 1991 L 122, p. 42) (see, in that regard, the 23rd recital and Article 2(a) of Directive 96/9).

54 On the other hand, such a situation does not, as such, exclude the possibility that the presence of all or part of the materials appearing in the database of the alleged perpetrator of such an infringement is due to an unauthorised transfer of that material from the protected database.

55 In the light of the foregoing considerations, the answer to the first, fourth and fifth questions is that:

– The delimitation of the concepts of 'permanent transfer' and 'temporary transfer' in Article 7 of Directive 96/9 is based on the criterion of the length of time during which materials extracted from a protected database are stored in a medium other than that database. The time at which there is an extraction, within the meaning of Article 7, from a protected database, accessible electronically, is when the materials which are the subject of the act of transfer are stored in a medium other than that database. The concept of extraction is independent of the objective pursued by the perpetrator of the act at issue, of any modifications he may make to the contents of the materials thus transferred, and of any differences in the structural organisation of the databases concerned.

– The fact that the physical and technical characteristics present in the contents of a protected database made by a particular person also appear in the contents of a database made by another person may be interpreted as evidence of extraction within the meaning of Article 7 of Directive 96/9, unless that coincidence can be explained by factors other than a transfer between the two databases concerned. The fact that materials obtained by the maker of a database from sources not accessible to the public also appear in a database made by another person is not sufficient, in itself, to prove the existence of such extraction but can constitute circumstantial evidence thereof.

– The nature of the computer program used to manage two electronic databases is not a factor in assessing the existence of extraction within the meaning of Article 7 of Directive 96/9.

The second, third and sixth questions concerning the concept of a 'substantial part of the contents of a database' within the meaning of Article 7 of Directive 96/9

56 In its second question, the national court asks, essentially, in what way the concept of extraction of a 'substantial part', evaluated quantitatively, of the contents of a database, within the meaning Article 7 of Directive 96/9, is to be interpreted where the databases concerned are separate modules, constituting independent commercial products, within a body of materials.

57 The third question seeks essentially to know whether the fact that some of the materials allegedly extracted from a database were obtained by the database maker from a source not freely accessible to the public has an influence on the interpretation of the concept of a 'substantial part', evaluated qualitatively, of the contents of a database, within the meaning of Article 7 of Directive 96/9.

58 In its sixth question, the national court asks, essentially, in what way the concept of 'a substantial part of the contents of a database' is to be interpreted in the context of Article 7 of Directive 96/9, bearing in mind the guidance already contained in the Court's case-law, where that database contains official measures accessible to the public, such as legislative measures or individual acts of the executive branch of the State, their official translations, and case-law.

59 With regard to the national court's second question, it must be recalled that, according to the Court's case-law, the concept of a substantial part, evaluated quantitatively, of the contents of a protected database refers to the volume of materials extracted from the database and/or re-utilised, and must be assessed in relation to the volume of the contents of the whole of that database. If a user extracts and/or re-utilises a quantitatively significant part of the contents of a database whose creation required the deployment of substantial resources, the investment in the extracted or re-utilised part is, proportionately, equally substantial (The British Horseracing Board and Others, cited above, paragraph 70).

60 On the other hand, as the Commission pointed out, the size of the contents of the database into which material from a protected database has been transferred is of no relevance in assessing the substantial nature of the part of the contents of the latter database affected by the alleged extraction and/or re-utilisation.

61 Moreover, as Apis, the Bulgarian Government and the Commission all pointed out, the assessment,

from the quantitative point of view, of the substantial nature of an extraction and/or re-utilisation can, in any event, be carried out only in the light of a body of materials capable of protection by the sui generis right by reason, first, of the fact that it is a database within the meaning of Article 1(2) of Directive 96/9 and, secondly, of the substantial investment involved in setting up that database, within the meaning of Article 7(1) of the Directive.

62 It follows that in a situation such as that referred to by the national court in its second question, where a body of materials consists of several separate modules, it is necessary, in order to assess whether an extraction and/or re-utilisation allegedly made from one of the modules covered a substantial part, evaluated quantitatively, of the contents of a database, to determine first whether that module itself constitutes a database within the meaning of Directive 96/9 (see, in that regard, **Case C-444/02 Fixtures Marketing [2004] ECR I-10549**, paragraphs 19 to 32) and, in addition, fulfils the criteria laid down in Article 7(1) of the Directive for protection by the sui generis right.

63 In the affirmative, the volume of materials allegedly extracted and/or re-utilised from the module concerned must be compared with the total contents solely of that module.

64 In the negative, and in so far as the body of materials of which the module is a part itself constitutes a database eligible for protection by the sui generis right by reason of the combined application of Articles 1(2) and 7(1) of Directive 96/9, the comparison must be made between the volume of materials allegedly extracted and/or re-utilised from that module and any other modules, and the total content of that body of materials.

65 It must also be stated in that regard that the fact that the various modules of one body of materials are marketed separately as independent products is not, in itself, sufficient to make them databases eligible, as such, for protection by the sui generis right. Such a classification is based, not on commercial considerations, but on fulfilment of all the legal conditions laid down in Articles 1(2) and 7(1) of the Directive.

66 With regard to the national court's third question, it must be pointed out that, according to the Court's case-law, the concept of a substantial part, evaluated qualitatively, of the contents of a protected database refers to the scale of the investment in the obtaining, verification or presentation of the contents of the subject of the act of extraction and/or re-utilisation, regardless of whether that subject represents a quantitatively substantial part of the general contents of the protected database. A quantitatively negligible part of the contents of a database may in fact represent, in terms of obtaining, verification or presentation, significant human, technical or financial investment (The British Horseracing Board and Others, cited above, paragraph 71).

67 In the light of the 46th recital in Directive 96/9, according to which the existence of the sui generis right does not give rise to the creation of a new right in the works, data or materials themselves, it has been held moreover that the intrinsic value of the materials affected by the act of extraction and/or re-utilisation does not constitute a relevant criterion for assessment in that regard (The British Horseracing Board and Others, paragraphs 72 and 78).

68 Bearing in mind what was stated in paragraph 66 of the present judgment, the fact that the materials allegedly extracted and/or re-utilised from a database protected by the sui generis right were obtained by its maker from sources not accessible to the public may, according to the amount of human, technical and/or financial resources deployed in collecting the materials at issue from those sources, affect the assessment of whether there has been a substantial investment in the 'obtaining' of the material within the meaning of Article 7(1) of Directive 96/9 (see, to that effect, **Case 46/02 Fixtures Marketing [2004] ECR I-10365**, paragraphs 34 and 38) and, consequently, influence the classification of the material as a substantial part, evaluated qualitatively, of the contents of the database concerned.

69 Finally, with regard to the presence in the database concerned of official materials accessible to the public, referred to in the national court's sixth question, it must be pointed out that it is apparent both from the general nature of the terms used in Article 1(2) of Directive 96/9 to define the concept of a database within the meaning of the Directive and from the objective of the protection afforded by the sui generis right that the Community legislature intended to give that concept a wide scope, unencumbered by considerations relating, in particular, to the substantive content of the body of materials in question (see, to that effect, **Case 444/02 Fixtures Marketing**, cited above, paragraphs 19 to 21).

70 Moreover, as is apparent from Article 7(4) of Directive 96/9, the sui generis right applies independently of whether the database and/or its contents are protected, inter alia, by copyright.

71 Thus, as the Bulgarian Government pointed out, it follows that the fact, alleged by Lakorda, that the materials contained in Apis's legal information system are, by reason of their official nature, not eligible for copyright protection does not, as such, justify a collection consisting of those materials being refused classification as a 'database' within the meaning of Article 1(2) of Directive 96/9 or that such a collection should be excluded from the scope of the protection accorded by the sui generis right instituted by Article 7 of the Directive.

72 Consequently, as Apis, the Bulgarian Government and the Commission argue, the fact that all or part of the materials brought together in a collection of data are official and publicly accessible does not relieve the national court of an obligation to verify, in the light of all relevant facts, whether that collection constitutes a database capable of being protected by the sui generis right on the ground that a substantial investment, in quantitative or qualitative terms, was necessary to obtain, verify and/or present its overall contents (see, to

that effect, **Case 46/02 Fixtures Marketing**, cited above, paragraphs 32 to 38).

73 The fact that the contents of a protected database consist essentially of official materials, accessible to the public, also does not relieve the national court of an obligation to verify, in order to assess whether there has been extraction and/or re-utilisation of a substantial part of those contents, whether the materials extracted or re-utilised from that database constitute a substantial part, quantitatively evaluated, of the total contents of the database or, as the case may be, a substantial part thereof, qualitatively evaluated, by reason of the fact that the obtaining, verification and presentation of those materials represent a substantial human, technical or financial investment.

74 In the light of the foregoing considerations, the answer to the second, third and sixth questions is that:

– Article 7 of Directive 96/9 must be interpreted as meaning that, where there is a body of materials composed of separate modules, the volume of the materials allegedly extracted and/or re-utilised from one of those modules must, in order to assess whether there has been extraction and/or re-utilisation of a substantial part, evaluated quantitatively, of the contents of a database within the meaning of that article, be compared with the total contents of that module, if the latter constitutes, in itself, a database which fulfils the conditions for protection by the sui generis right. Otherwise, and in so far as the body of materials constitutes a database protected by that right, the comparison must be made between the volume of the materials allegedly extracted and/or re-utilised from the various modules of that database and its total contents.

– The fact that the materials allegedly extracted and/or re-utilised from a database protected by the sui generis right were obtained by the maker of that database from sources not accessible to the public may, according to the amount of human, technical and/or financial resources deployed by the maker to collect the materials at issue from those sources, affect the classification of those materials as a substantial part, evaluated qualitatively, of the contents of the database concerned, within the meaning of Article 7 of Directive 96/9.

– The fact that part of the materials contained in a database are official and accessible to the public does not relieve the national court of an obligation to, in assessing whether there has been extraction and/or re-utilisation of a substantial part of the contents of that database, to verify whether the materials allegedly extracted and/or re-utilised from that database constitute a substantial part, evaluated quantitatively, of its contents or, as the case may be, whether they constitute a substantial part, evaluated qualitatively, of the database inasmuch as they represent, in terms of the obtaining, verification and presentation thereof, a substantial human, technical or financial investment.

Costs

75 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 (Fourth Chamber) hereby rules:

1. The delimitation of the concepts of ‘permanent transfer’ and ‘temporary transfer’ in Article 7 of Directive 96/9/EC of the European Parliament and of the Council of 11 March 1996 on the legal protection of databases is based on the criterion of the length of time during which materials extracted from a protected database are stored in a medium other than that database. The time at which there is an extraction, within the meaning of Article 7, from a protected database, accessible electronically, is when the materials which are the subject of the act of transfer are stored in a medium other than that database. The concept of extraction is independent of the objective pursued by the perpetrator of the act at issue, of any modifications he may make to the contents of the materials thus transferred, and of any differences in the structural organisation of the databases concerned.

The fact that the physical and technical characteristics present in the contents of a protected database made by a particular person also appear in the contents of a database made by another person may be interpreted as evidence of extraction within the meaning of Article 7 of Directive 96/9, unless that coincidence can be explained by factors other than a transfer between the two databases concerned. The fact that materials obtained by the maker of a database from sources not accessible to the public also appear in a database made by another person is not sufficient, in itself, to prove the existence of such extraction but can constitute circumstantial evidence thereof.

The nature of the computer program used to manage two electronic databases is not a factor in assessing the existence of extraction within the meaning of Article 7 of Directive 96/9.

2. Article 7 of Directive 96/9 must be interpreted as meaning that, where there is a body of materials composed of separate modules, the volume of the materials allegedly extracted and/or re-utilised from one of those modules must, in order to assess whether there has been extraction and/or re-utilisation of a substantial part, evaluated quantitatively, of the contents of a database within the meaning of that article, be compared with the total contents of that module, if the latter constitutes, in itself, a database which fulfils the conditions for protection by the sui generis right. Otherwise, and in so far as the body of materials constitutes a database protected by that right, the comparison must be made between the volume of the materials allegedly extracted and/or re-utilised from the various modules of that database and its total contents.

The fact that the materials allegedly extracted and/or re-utilised from a database protected by the sui generis right were obtained by the maker of that database from sources not accessible to the public may, according to the amount of human, technical and/or financial resources deployed by the maker to collect the materials

at issue from those sources, affect the classification of those materials as a substantial part, evaluated qualitatively, of the contents of the database concerned, within the meaning of Article 7 of Directive 96/9.

The fact that part of the materials contained in a database are official and accessible to the public does not relieve the national court of an obligation, in assessing whether there has been extraction and/or re-utilisation of a substantial part of the contents of that database, to verify whether the materials allegedly extracted and/or re-utilised from that database constitute a substantial part, evaluated quantitatively, of its contents or, as the case may be, whether they constitute a substantial part, evaluated qualitatively, of the database inasmuch as they represent, in terms of the obtaining, verification and presentation thereof, a substantial human, technical or financial investment.