Court of Justice EU, 3 June 2021, CV-Online Latvia v Melons

DATABASE RIGHTS

Indexing and copying to your own server of content substantial content of database is extraction and re-utilisation within the meaning of Article 7 Database Directive:

- **which may be prohibited provided that it is depriving income from the person intended to enable him or her to redeem the cost of investment**

36 Moreover, by indexing and copying the content of the websites on its own server, that search engine transfers the content of the databases that comprise those websites to another medium.

37 It follows that such a transfer of the substantial contents of the databases concerned and such a making available of those data to the public, without the consent of the person who created them, are, respectively, measures of extraction and re-utilisation of those databases, prohibited by Article 7(1) of Directive 96/9, provided that they have the effect of depriving that person of income intended to enable him or her to redeem the cost of that investment. As the Advocate General stated in point 36 of his Opinion, provision of hyperlinks to the advertisements on CV-Online's website and the reproduction of the information in the meta tags on that site are merely external manifestations, of secondary importance, of that extraction and that re-utilisation.

Source: **ECLI:EU:C:2021:434**

Court of Justice EU, 3 June 2021

(…)

JUDGMENT OF THE COURT (Fifth Chamber)

3 June 2021 (*)

(Reference for a preliminary ruling – Legal protection of databases – Directive 96/9/EC – Article 7 – Sui generis right of makers of databases – Prohibition on any third party to *'extract'* or *'re-utilise'*, without the maker's permission, the whole or a substantial part of the contents of the database – Database freely accessible on the internet – Meta search engine specialising in job advertisement searches – Extraction and/or re-utilisation of the contents of a database – Risk to the substantial investment in the obtaining, verification or presentation of the content of a database)

In Case C-762/19,

REQUEST for a preliminary ruling under Article 267 TFEU from the Rīgas apgabaltiesas Civillietu tiesas kolēģija (Regional Court, Riga (Civil Law Division), Latvia), made by decision of 14 October 2019, received at the Court on 17 October 2019, in the proceedings *'CV-Online Latvia'* SIA

v

'Melons' SIA,

THE COURT (Fifth Chamber),

composed of E. Regan, President of the Chamber, M. Ilešič (Rapporteur), E. Juhász, C. Lycourgos and I. Jarukaitis, Judges,

Advocate General: M. Szpunar,

Registrar: M. Aleksejev, Head of Unit,

having regard to the written procedure and further to the hearing on 22 October 2020,

after considering the observations submitted on behalf of:

– *'CV-Online Latvia'* SIA, by L. Fjodorova and U. Zeltiņš, advokāti,

– *'Melons'* SIA, by A. Upenieks,

– the Latvian Government, initially by V. Soņeca, K. Pommere and L. Juškeviča, and subsequently by K. Pommere, acting as Agents,

– the European Commission, by J. Samnadda and E. Kalniņš, acting as Agents,

after hearing **the Opinion of the Advocate General** at the sitting on 14 January 2021,

gives the following

Judgment

1 This reference for a preliminary ruling relates to the interpretation of Article 7(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 request has been made in proceedings between *'CV-Online Latvia'* SIA (*'CV-Online'*) and *'Melons'* SIA concerning the display by the latter, in the list of results generated by its search engine, of a hyperlink to CV-Online's website and the meta tags inserted by CV-Online in the programming of that site.

Legal context

EU law

3 Recitals 7, 39 to 42 and 47 of Directive 96/9 state: *'(7) Whereas 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;*

…

(39) Whereas, in addition to aiming to protect the copyright in the original selection or arrangement of the contents of a database, this Directive seeks to safeguard the position of makers of databases against misappropriation of the results of the financial and professional investment made in obtaining and collection the contents by protecting the whole or substantial parts of a database against certain acts by a user or competitor;

(40) Whereas the object of this sui generis right is to ensure protection of any investment in obtaining, verifying or presenting the contents of a database for the limited duration of the right; whereas such investment may consist in the deployment of financial resources and/or the expending of time, effort and energy;

(41) Whereas the objective of the sui generis right is to give the maker of a database the option of preventing the unauthorised extraction and/or re-utilisation of all or a substantial part of the contents of that database; whereas the maker of a database is the person who takes the initiative and the risk of investing; whereas this excludes subcontractors in particular from the definition of maker;

(42) Whereas the special right to prevent unauthorised extraction and/or [re-utilisation] relates to acts by the user which go beyond his legitimate rights and thereby harm the investment; whereas the right to prohibit extraction and/or [re-utilisation] of all or a substantial part of the contents relates not only to the manufacture of a parasitical competing product but also to any user who, through his acts, causes significant detriment, evaluated qualitatively or quantitatively, to the investment;

…

(47) Whereas, in the interests of competition between suppliers of information products and services, protection by the sui generis right must not be afforded in such a way as to facilitate abuses of a dominant position, in particular as regards the creation and [distribution] of new products and services which have an intellectual, documentary, technical, economic or commercial added value; whereas, therefore, the provisions of this Directive are without prejudice to the application of [EU] or national competition rules;'

4 Under Chapter I of the Directive, entitled *'Scope'*, Article 1(1) and (2) provides:

'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.'

5 Under Chapter III of that directive, entitled *'Sui generis right'*, Article 7(1), (2) and (5) provides:

'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 European Union] by the rightholder or with his consent shall exhaust the right to control resale of that copy within [the Union]. Public lending is not an act of extraction or [re-utilisation].

…

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 Lastly, according to Article 13 of that directive: *'This Directive shall be without prejudice to provisions concerning in particular … laws on restrictive practices and unfair competition …'*

Latvian law

7 The provisions of Directive 96/9 relating to the sui generis right were transposed into Latvian law in Articles 57 to 62 of the Autortiesību likums (Law on copyright) of 6 April 2000 (Latvijas Vēstnesis, 2000, No 148/150), as amended by the Law of 22 April 2004 (Latvijas Vēstnesis, 2004, No 69).

8 Article 57(1) and (2) of that law provides that the maker of a database, in respect of which there has been qualitatively and/or quantitatively a substantial investment in either the obtaining, verification or presentation of the contents (Article 5(2)) shall mean the natural or legal person who has taken the initiative of creating the database and assumed the risk of the investment. The maker of a database shall have the right to prevent the following activities in respect of the whole or of a substantial part (evaluated qualitatively and/or quantitatively), of the contents of that database: 1) extraction: 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; 2) re-utilisation: any form of making available to the public all or a substantial part of the contents of a database, including by the distribution of copies, by renting, by online or other forms of transmission.

The dispute in the main proceedings and the questions referred for a preliminary ruling

9 CV-Online, a company incorporated under Latvian law, operates the website www.cv.lv. That website includes a database, developed and regularly updated by CV-Online, containing job advertisements published by employers.

10 The website www.cv.lv is also equipped with meta tags of the *'microdata'* type. Those tags, which are not visible when the CV-Online web page is opened, allow internet search engines to better identify the content of each page in order to index it correctly. In the case of CV-Online's website, those meta tags contain, for each job advertisement in the database, the following key words: *'job title'*, *'name of the undertaking'*, *'place of employment'* and *'date of publication of the notice'*.

11 Melons, also a company incorporated under Latvian law, operates the website www.kurdarbs.lv, which is a search engine specialising in job advertisements. That search engine makes it possible to carry out a search on several websites containing job advertisements, according to various criteria, including the type of job and the place of employment. By means of hyperlinks,

the website www.kurdarbs.lv refers users to the websites on which the information sought was initially published, including CV-Online's website. By clicking on such a link, the user can, inter alia, access the website www.cv.lv, in order to become acquainted with that site and the entirety of its contents. The information contained in the meta tags inserted by CV-Online in the programming of its website is also displayed in the list of results obtained when using the specialised search engine of Melons.

12 Taking the view that there is a breach of its sui generis right under Article 7 of Directive 96/9, CV-Online brought an action against Melons. It maintains that Melons *'extracts'* and *'re-utilises'* a substantial part of the contents of the database on the website www.cv.lv.

13 The court of first instance found that there had been a breach of that right, on the ground that there was a *'re-utilisation'* of the database.

14 Melons brought an appeal against the judgment at first instance before the Rīgas apgabaltiesas Civillietu tiesas kolēģija (Regional Court, Riga (Civil Law Division), Latvia). It maintains that its website does not provide online transmission, namely, that it does not operate *'in real time'*. Melons also claims that a distinction must be drawn between the website www.cv.lv and the database which it contains. It submits, in that regard, that it is the meta tags used by CV-Online that cause the information relating to the job advertisements to appear in the results obtained by means of the www.kurdarbs.lv search engine and that those meta tags are not part of the database. Melons claims that it was precisely because CV-Online wanted the search engines to show that information that CV-Online inserted those meta tags in the programming of its site.

15 In those circumstances, the Rīgas apgabaltiesas Civillietu tiesas kolēģija (Regional Court, Riga (Civil Law Division), Latvia) decided to stay the proceedings and to refer the following questions to the Court of Justice for a preliminary ruling:

'(1) Should the defendant's activities, which consist in using a hyperlink to redirect end users to the applicant's website, where they can consult a database of job advertisements, be interpreted as falling within the definition of 're-utilisation' in Article 7(2)(b) of [Directive 96/9], more specifically, as the re-utilisation of the database by another form of transmission? (2) Should the information containing the meta tags that is shown in the defendant's search engine be interpreted as falling within the definition of 'extraction' in Article 7(2)(a) of [Directive 96/9], more specifically, 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?'

Consideration of the questions referred

16 It should be noted as a preliminary point that, according to settled case-law, in the procedure laid down by Article 267 TFEU providing for cooperation between national courts and the Court of Justice, it is for the latter to provide the national court with an answer which will be of use to it and enable it to decide the case before it. To that end, the Court may have to reformulate the questions referred to it (judgment of 25 November 2020, SABAM, C-372/19, EU:C:2020:959, paragraph 20 and the case-law cited).

17 In the present case, it is apparent from the information in the documents before the Court that the issue raised in the main proceedings concerns the compatibility of the operation of a specialised search engine with the sui generis right set out in Article 7 of Directive 96/9. By its questions referred for a preliminary ruling, the referring court is asking, more specifically, whether, first, the display, by a specialised search engine, of a hyperlink redirecting the user of that search engine to a website, provided by a third party, where the contents of a database concerning job advertisements can be consulted, falls within the definition of *'re-utilisation'* in Article 7(2)(b) of Directive 96/9, and, second, whether the information from the meta tags of that website displayed by that search engine is to be interpreted as falling within the definition of *'extraction'* in Article 7(2)(a) of that directive.

18 The referring court submits that the judgments handed down by the Court concerning Article 7 of Directive 96/9 (see, inter alia, **the judgment of 19 December 2013, Innoweb, C-202/12, EU:C:2013:850**) do not support the conclusion that there is *'extraction'* or *'re-utilisation'*, within the meaning of that article, where, as in the present case, the operator of a specialised search engine displays, in the list of results obtained by the use of that engine, first, a hyperlink to a website, provided by a third party and containing a database, and, second, the information from meta tags which the maker of that database has inserted in the programming of its own website.

19 In that regard, it should be noted that, in the present case, the selection of job advertisements to which the hyperlinks refer is made using the specialised search engine provided by Melons. That search engine indexes and copies on its own server the content of websites with job advertisements, such as the *'www.cv.lv'* website, and then allows searches to be made of that indexed content according to criteria such as the nature of the job and the place of employment.

20 In those circumstances, it must be held that, by those two questions, which it is appropriate to examine together, the referring court is asking, in essence, whether Article 7(1) and (2) of Directive 96/9 must be interpreted as meaning that an internet search engine specialising in searching the contents of databases, which copies and indexes the whole or a substantial part of a database freely accessible on the internet and then allows its users to search that database on its own website according to criteria relevant to its content, is *'extracting'* and *'re-utilising'* the content of that database within the meaning of that provision, and that the maker of such a database is entitled to prohibit such extraction or re-utilisation of that same database.

21 In order to answer those questions, it is necessary, first of all, to define the scope and purpose of the protection of the sui generis right under Directive 96/9.

22 In this respect, it is apparent, in particular, from recitals 40 and 41 of Directive 96/9, that the purpose of the sui generis right is to ensure the protection of a substantial investment in the obtaining, verification or presentation of the contents of a database for the limited duration of the right by granting the maker of a database the possibility of preventing the unauthorised extraction and/or re-utilisation of the whole or a substantial part of the contents of the database. The Court has stated that the purpose of the right provided for in Article 7 of Directive 96/9 is to ensure that the person who has taken the initiative and assumed the risk of making a substantial investment in terms of human, technical and/or financial resources in the setting up and operation of a database receives a return on his or her investment by protecting him or her against the unauthorised appropriation of the results of that investment (**judgment of 19 December 2013, Innoweb, C-202/12, EU:C:2013:850,** paragraph 36 and the case-law cited).
23 The Court has also held, relying in particular on recitals 39, 42 and 48 of Directive 96/9, that the objective pursued by the EU legislature through the introduction of a sui generis right is therefore to stimulate the establishment of 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 (**judgment of 19 December 2013, Innoweb, C-202/12, EU:C:2013:850**, paragraph 35 and the case-law cited).
24 As regards, in the first place, the conditions under which the database may be protected by the sui generis right under Article 7 of Directive 96/9, it should be noted that, in accordance with that article, the protection of a database by that right is justified only if there has been qualitatively and/or quantitatively a substantial investment in the obtaining, verification or presentation of the contents of that database (see, to that effect, **judgment of 19 December 2013, Innoweb, C-202/12, EU:C:2013:850**, paragraph 22).
25 In accordance with the Court's settled case-law, investment in the obtaining of the contents of a database concerns 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 (**judgments of 9 November 2004, The British Horseracing Board and Others, C-203/02, EU:C:2004:695**, paragraph 31, and Fixtures Marketing, C-338/02, EU:C:2004:696, paragraph 24).
26 Next, the concept of an 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 (**judgment of 9 November 2004, The British Horseracing Board and Others, C-203/02, EU:C:2004:695**, paragraph 34).
27 Lastly, investment in the presentation of the contents of the database includes the means of giving that 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 (judgments of 9 November 2004, Fixtures Marketing, C-338/02, EU:C:2004:696, paragraph 27; **Fixtures Marketing, C-444/02, EU:C:2004:697**, paragraph 43; and Fixtures Marketing, C-46/02, EU:C:2004:694, paragraph 37).
28 Since the questions referred for a preliminary ruling are based on the premiss that CV-Online's database satisfies the condition referred to in paragraph 24 of the present judgment, it is for the referring court to examine, where appropriate, whether the conditions laid down in Article 7 of Directive 96/9 are satisfied for the grant of protection by the sui generis right, including whether the meta tags provided by CV-Online could themselves be regarded as constituting a substantial part of the protected database.
29 As regards, in the second place, the criteria for concluding that an act of the user constitutes an *'extraction'* and/or *'re-utilisation'* within the meaning of Directive 96/9, it must be borne in mind that Article 7(2)(a) thereof defines *'extraction'* 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'*. Under Article 7(2)(b) of that directive, *'re-utilisation'* covers *'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'*.
30 On the basis of the objective pursued by the EU legislature through the establishment of a sui generis right, the Court has adopted a broad interpretation of the concept of *'re-utilisation'* (see, to that effect, **judgment of 19 December 2013, Innoweb, C-202/12, EU:C:2013:850**, paragraphs 33 and 34), and of the concept of *'extraction'* (see, to that effect, judgment of 9 October 2008, Directmedia Publishing, C-304/07, EU:C:2008:552, paragraphs 31 and 32).
31 Thus, it is apparent from the Court's case-law that those concepts of *'extraction'* and *'re-utilisation'* must be interpreted as referring to any act of appropriating and making available to the public, without the consent of the maker of the database, the results of his or her investment, thus depriving him or her of revenue which should have enabled him or her to redeem the cost of that investment (**judgment of 9 November 2004, The British Horseracing Board and Others, C-203/02, EU:C:2004:695**, paragraph 51).
32 More specifically, with regard to the operation of a specialised search engine, the Court has held that the operator of a specialised meta search engine was *'re-utilising'*, within the meaning of Article 7(2)(b) of Directive 96/9, the whole or a substantial part of the contents of a database, contained in an internet site belonging to a third party, where it provided an indeterminate number of end users with a device enabling them to search the data contained in that database and thus offered access to the contents of the database by a means other than that provided for by the

maker of that database. The Court pointed out that such an activity undermines the sui generis right of the maker of the database, since it deprives that maker of income which would enable him or her to redeem the cost of his or her investment. In such a case, the user no longer has any need to proceed via the homepage and the search form of the third party's database, since he or she can explore that database directly using the service of the operator of the meta search engine (see, to that effect, **judgment of 19 December 2013, Innoweb, C-202/12, EU:C:2013:850**, paragraphs 40 to 42).
33 In the present case, it is apparent from the order for reference and the observations of the parties to the main proceedings, and from information obtained at the hearing, and highlighted by the Advocate General in point 33 of his Opinion, that a specialised search engine such as that at issue in the main proceedings does not utilise the search forms of the websites on which it enables searches to be carried out, and does not translate in real time the queries of its users into the criteria used by those forms. However, it regularly indexes those sites and keeps a copy on its own servers. Next, by using its own search form, it enables its users to carry out searches according to the criteria which it offers, such searches being carried out among the data that have been indexed.
34 While it is true that the operation of the search engine such as that at issue in the main proceedings is different from that at issue in the case which gave rise to **the judgment of 19 December 2013, Innoweb (C-202/12, EU:C:2013:850)**, the fact remains that that search engine makes it possible to explore simultaneously, by means other than that provided for by the maker of the database concerned, the entire content of several databases, including that of CV-Online, by making that content available to its own users. By providing the possibility of searching several databases simultaneously, according to criteria relevant from the point of view of jobseekers, that specialised search engine gives users access, on its own website, to job advertisements contained in those databases.
35 Thus, a search engine such as that at issue in the main proceedings makes it possible to explore all the data contained in the databases freely accessible on the internet, including CV-Online's website, and provides its users with access to the entirety of the content of those databases by a means other than that provided for by the maker of those databases. Furthermore, the making available of such data is directed at the public, within the meaning of Article 7(2)(b) of Directive 96/9, since anyone at all can use such a search engine (see, to that effect, **judgment of 19 December 2013, Innoweb, C-202/12, EU:C:2013:850**, paragraph 51).
36 Moreover, by indexing and copying the content of the websites on its own server, that search engine transfers the content of the databases that comprise those websites to another medium.
37 It follows that such a transfer of the substantial contents of the databases concerned and such a making available of those data to the public, without the consent of the person who created them, are, respectively, measures of extraction and re-utilisation of those databases, prohibited by Article 7(1) of Directive 96/9, provided that they have the effect of depriving that person of income intended to enable him or her to redeem the cost of that investment. As the Advocate General stated in point 36 of his Opinion, provision of hyperlinks to the advertisements on CV-Online's website and the reproduction of the information in the meta tags on that site are merely external manifestations, of secondary importance, of that extraction and that re-utilisation.
38 It is therefore still necessary to examine whether the acts referred to in paragraphs 35 and 36 above are such as to affect the investment of the maker of the database which has been transferred to another medium and has been made available to the public.
39 In that regard, the Court has already held that the sui generis right provided for by Article 7 of Directive 96/9 is intended to protect the maker of the database against acts by the user which go beyond the legitimate rights of that user and thereby harm the investment of the maker (see, to that effect, **judgment of 9 November 2004, The British Horseracing Board and Others, C-203/02, EU:C:2004:695**, paragraphs 45 and 46). In that context, Article 7(1) of Directive 96/9, read in conjunction with recital 42 thereof, is intended to prevent a situation in which a user, through his or her acts, causes significant detriment, evaluated qualitatively or quantitatively, to the investment (see, to that effect, **judgment of 9 November 2004, The British Horseracing Board and Others, Case C-203/02, EU:C:2004:695**, paragraph 69).
40 The Court has also held that the maker of a database enjoys protection against the activity of the operator of a specialised meta search engine which comes close to the manufacture of a parasitical competing product as referred to in recital 42 of Directive 96/9 (see, to that effect, **judgment of 19 December 2013, Innoweb, C-202/12, EU:C:2013:850**, paragraph 48). Such an activity would create a risk that database makers would lose income and thus be deprived of the revenue that should enable them to redeem their investment in setting up and operating the databases (see, to that effect, **judgment of 19 December 2013, Innoweb, C-202/12, EU:C:2013:850,** paragraphs 41 to 43).
41 In that regard, it is necessary to strike a fair balance between, on the one hand, the legitimate interest of the makers of databases in being able to redeem their substantial investment and, on the other hand, that of users and competitors of those makers in having access to the information contained in those databases and the possibility of creating innovative products based on that information.
42 It should be borne in mind that the activities of content aggregators on the internet, such as the defendant in the main proceedings, also serve to achieve the objective, referred to in paragraph 23 of the present judgment, of stimulating the establishment of data storage and processing systems in order to contribute to the development of the information market. As the Advocate General observed, in essence, in point 41 of

his Opinion, those aggregators contribute to the creation and distribution of products and services with added value in the information sector. By offering their users a unified interface enabling them to search several databases according to criteria relevant to their content, they allow the information on the internet to be better structured and to be searched more efficiently. They also contribute to the smooth functioning of competition and to the transparency of offers and prices.
43 As is apparent from paragraph 24 of the present judgment, Article 7(1) of Directive 96/9 reserves the protection conferred by the sui generis right to databases the creation or operation of which requires a qualitatively or quantitatively substantial investment.
44 It follows that, as the Advocate General observed, in essence, in points 43 and 46 of his Opinion, the main criterion for balancing the legitimate interests at stake must be the potential risk to the substantial investment of the maker of the database concerned, namely the risk that that investment may not be redeemed.
45 Finally, it should be added that, as stated in Article 13 of Directive 96/9, the provisions of that directive are without prejudice to the competition rules of EU law or that of the Member States.
46 In the main proceedings, it is therefore for the referring court, in order to rule on CV-Online's right to prohibit the extraction or re-utilisation of the whole or a substantial part of the contents of that database, to ascertain, in the light of all the relevant circumstances, first, whether the obtaining, verification or presentation of the contents of the database concerned attests to a substantial investment, and, second, whether the extraction or re-utilisation in question constitutes a risk to the possibility of redeeming that investment.
47 In the light of all the foregoing considerations, the answer to the questions referred is that Article 7(1) and (2) of Directive 96/9 must be interpreted as meaning that an internet search engine specialising in searching the contents of databases, which copies and indexes the whole or a substantial part of a database freely accessible on the internet and then allows its users to search that database on its own website according to criteria relevant to its content, is *'extracting'* and *'re-utilising'* the content of that database within the meaning of that provision, which may be prohibited by the maker of such a database where those acts adversely affect its investment in the obtaining, verification or presentation of that content, namely that they constitute a risk to the possibility of redeeming that investment through the normal operation of the database in question, which it is for the referring court to verify.

Costs

48 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 (Fifth Chamber) hereby rules:

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 must be interpreted as meaning that an internet search engine specialising in searching the contents of databases, which copies and indexes the whole or a substantial part of a database freely accessible on the internet and then allows its users to search that database on its own website according to criteria relevant to its content, is *'extracting'* and *'re-utilising'* that content within the meaning of that provision, which may be prohibited by the maker of such a database where those acts adversely affect its investment in the obtaining, verification or presentation of that content, namely that they constitute a risk to the possibility of redeeming that investment through the normal operation of the database in question, which it is for the referring court to verify.
[Signatures]
* Language of the case: Latvian.

OPINION OF ADVOCATE GENERAL
SZPUNAR
delivered on 14 January 2021 (1)
Case C-762/19
SIA *'CV-Online Latvia'*
v
SIA *'Melons'*
(Request for a preliminary ruling from the Rīgas apgabaltiesas Civillietu tiesas kolēģija (Regional Court, Riga (Civil Law Division), Latvia))
(Reference for a preliminary ruling – Legal protection of databases – Directive 96/9/EC – Article 7 – *'Sui generis'* right of makers of databases – Prevention of *'extraction'* or *'reutilisation'* by third parties, without the maker's permission, of the whole or a substantial part of the contents of the database – Database available on a website – Display by the operator of a search engine of a hyperlink to that website and of meta tags containing information present in the database)

Introduction

1. In the family of intellectual property rights, the sui generis right to protection of databases is one of the youngest members. Its introduction relates to digitisation and to the arrival of the internet. The exponential increase in the quantity of information available as a consequence of digitisation has made it particularly useful, and therefore economically advantageous, to arrange that information in databases that may be consulted online. At the same time, in the digital environment, it is particularly easy to make a copy, of perfect quality, of the data in a database at negligible cost and thus to derive an undue profit from the efforts of others. A mechanism for protection has thus been established in EU law.
2. Databases may admittedly, in the laws of the Member States, be protected by copyright. However, that protection normally requires a certain degree of originality in the selection or the layout of the data. In order to be useful, a database must, as far as possible, be exhaustive and the data must be set out in an order that

is relevant for the type of data concerned – alphabetical, chronological or other – so that the data sought are easy to find, since that is the primary purpose of a database. In most situations, therefore, neither the selection of the materials in a database, nor the way in which they are arranged, can be original. (2) Furthermore, although the structure of a database may be protected by copyright, that may not be the case for its contents, unless they themselves are original.

3. That need for protection other than solely by copyright gave rise, in EU law, to the sui generis right to protection of databases. Frequently assimilated to a right neighbouring copyright, (3) the sui generis right is intended to protect the investment made by the maker of a database in obtaining, verifying and presenting those data. Situated on the border between intellectual property law and the law on unfair competition, (4) the sui generis right requires a careful balance to be struck between, on the one hand, the legitimate interest of makers of databases in the protection of the possibilities of recouping their investment and, on the other, the interest of users and competitors of those producers in having access to raw information and in being able to create innovative products based on that information.

4. The present case, which concerns such a balancing exercise, is between a producer of a database, in this instance consisting of job advertisements (*'job ads'*), and an internet content aggregator which makes it possible to consult such advertisements on different internet sites. (5) In particular, it will be necessary to ascertain whether the solution adopted by the Court in connection with *'meta search engines'* (6) can be applied by analogy in this instance. The present case also provides the opportunity to develop and refine that solution in the light of the rules on competition, in particular the rules applicable to unfair competition and abuse of a dominant position.

Legal framework

EU law

5. Under Article 1(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: (7)

'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.'

6. Article 7 of that directive, which is found in Chapter III, entitled *'Sui generis right'*, provides:

'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 Union] by the rightholder or with his consent shall exhaust the right to control resale of that copy within [the Union].

…

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.'

7. Last, according to Article 13 of that directive:

'This Directive shall be without prejudice to provisions concerning in particular … laws on restrictive practices and unfair competition …'

Latvian law

8. The provisions of Directive 96/9 relating to the sui generis right were transposed into Latvian law in Articles 57 to 62 of the Autortiesību likums (Law on copyright) of 6 April 2000, (8) as amended by the Law of 22 April 2004. (9)

Facts, procedure and the questions referred for a preliminary ruling

9. SIA CV-Online Latvia (*'CV-Online'*), a company governed by Latvian law, operates the website *'CV.lv'*. That website includes a database, developed and regularly updated by CV-Online, containing notices of jobs published by employers.

10. The website *'CV.lv'* also has meta tags, of the microdata type, in accordance with the vocabulary established by Schema.org, a consortium of four major internet search engines. (10) Those tags are not visible when CV-Online's internet page is opened. They make it easier for internet search engines to identify the contents of each page in order to index those contents correctly, which is important in order for the page to be included in the results of a search carried out with the assistance of a search engine. In the case of CV-Online's website, those meta tags contain, for each vacancy notice in the database, the following key words: *'name of job'*, *'name of the undertaking'*, *'place of employment'* and *'date of publication of the notice'*.

11. SIA Melons, also a company governed by Latvian law, operates the website *'KurDarbs.lv'*, which is a search engine specialising in notices of employment. That search engine makes it possible to search on several websites containing employment notices, according to various criteria, including the type of job and the place of employment. By means of hyperlinks, the website *'KurDarbs.lv'* refers users to the websites on which the information sought was initially published, including CV-Online's website. The meta tags inserted by CV-Online in the programming of its website are also

displayed in the list of results obtained when Melons' website is used.
12. Taking the view that there is a breach of its sui generis right, CV-Online brought proceedings against Melons. It maintains that Melons *'extracts'* and *'reuses'* a substantial part of the contents of the database on the website *'CV.lv'*. The court of first instance found that there had been a breach of the right in question, on the ground that there was a *'reutilisation'* of the database.
13. Melons lodged an appeal before the referring court against the judgment at first instance. It maintains that its website does not provide online transmission, that is to say, that it does not operate *'in real time'*. It also claims that a distinction must be drawn between the website CV.lv and the database which it contains. It submits, in that regard, that it is the meta tags used by CV-Online that cause the information relating to the job ads to appear in the results obtained by means of the *'KurDarbs.lv'* search engine and that those meta tags are not part of the database.
14. In those circumstances, the Rīgas apgabaltiesas Civillietu tiesas kolēģija (Regional Court, Riga (Civil Law Division), Latvia) decided to stay the proceedings and to refer the following questions to the Court of Justice for a preliminary ruling:
'(1) Should the defendant's activities, which consist in using a hyperlink to redirect end users to the applicant's website, where they can consult a database of job ads, be interpreted as falling within the definition of "reutilisation" in Article 7(2)(b) of [Directive 96/9], more specifically, as the reutilisation of the database by another form of transmission?
(2) Should the information containing the meta tags that is shown in the defendant's search engine be interpreted as falling within the definition of "extraction" in Article 7(2)(a) of [Directive 96/9], more specifically, 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?'
15. The request for a preliminary ruling was received at the Court on 17 October 2019. Written observations were filed by the parties to the main proceedings, the Latvian Government and the European Commission, all of whom were represented at the hearing on 22 October 2020.

Analysis

16. The referring court has submitted two questions for a preliminary ruling, relating to both the extraction and the possible reutilisation of CV-Online's database by Melons. I fear, however, that, as formulated, those questions omit the real legal problems associated with Melons' utilisation of CV-Online's database and with the latter's refusal to tolerate that utilisation. To my mind, those questions should therefore be reformulated, in order to provide the referring court with a helpful answer. (11)
17. Furthermore, the present request for a preliminary ruling is based on the premiss that there is a database that is protected by the sui generis right, guaranteed by the provisions of Chapter III of Directive 96/9, but fails to mention any finding whatsoever to that effect on the part of the national courts. An analysis of the conditions of that protection in the circumstances of the present case might be useful for the purposes of assessing whether there has been any breach of the rights conferred by those provisions.

The existence of a protected database

18. It will be recalled that Article 1(2) of Directive 96/9 defines a 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'*. The Court has already had occasion to hold that *'independent materials'* must be understood as meaning *'materials which are separable from one another without their informative, literary, artistic, musical or other value being affected'*. (12) In other words, those materials must have *'autonomous informative value'*. (13) Furthermore, a database must include *'technical means such as electronic, electromagnetic or electro-optical processes, ... or other means, ... to allow the retrieval of any independent material contained within it'*. (14) Thus, useful material in a database is material that can be located and has autonomous informative value.
19. As regards the protection of a database by the sui generis right, such protection applies, in accordance with Article 7(1) of Directive 96/9, only where it is shown that there has been qualitatively and/or qualitatively a substantial investment in either the obtaining, verification or presentation of the contents of that database. (15) The purpose of the sui generis right is to protect the investment made by the maker of the database in creating it. (16) As that raises a question of fact, it is for the national courts to assess whether the database protection of which is sought shows that there has been such investment. However, that assessment is important from the aspect of the interpretation of Directive 96/9 and of the provisions which transpose that directive, since any breach of the sui generis right established by that directive must be analysed not by reference to the database in the abstract but by reference to that investment. (17)
20. Furthermore, although Directive 96/9 does not define *'substantial investment'*, the Court has provided certain elements of that definition. It has held that investment in the obtaining of the contents of a database concerns *'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'*. (18) Investment in the verification of the contents consists in 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'*, (19) which necessarily includes the updating of the database and the deletion of obsolete material. Last, investment in the presentation of the contents of the database includes 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'. (20) The latter category therefore encompasses investment in a search mechanism, if the database has one. 21. As regards CV-Online's database, it seems that the independent materials that form the contents of that database are job ads. Each job ad constitutes a unit of information which has autonomous informative value and is also separable from the other job ads in that database. Furthermore, each job ad in CV-Online's database is individually accessible by means of the search form which that database contains. 22. Those materials are not created by CV-Online but are provided to it by the employers. To a certain extent, CV-Online also verifies those materials and presents them, notably by providing a search form on its website. While it is for the referring court to ascertain whether CV-Online is able to show that it has made a substantial investment in creating its database, at first sight there is no reason to question the premiss that that is in fact the case.

The tenor of the questions for a preliminary ruling

23. By its first question, the referring court asks whether the fact that the user is referred, by means of a hyperlink, to a website where the contents of a database relating to job ads may be consulted comes within the definition of *'reutilisation'* in Article 7(2)(b) of Directive 96/9. 24. Even on the view that what is involved is not a reference *'to a database'*, but a reference to individual materials in that database, in this instance job ads, it seems to me that the real problem raised by this question lies not in the hyperlinks as such, (21) but in the way in which the job ads to which those links refer are selected. 25. That selection is made with the assistance of the specialist job ads search engine provided by Melons. That search engine reproduces and indexes sites containing job ads, such as the website *'CV.lv'*, and then allows searches to be made in the contents indexed (22) according to criteria such as the type of post and the place of work, which are the two most important criteria for those seeking employment. Melons' search engine is therefore one that specialises in searches in databases accessible on the internet, in this instance databases of job ads. Such search engines are often called *'content aggregators'*. It is the classification, from the aspect of Article 7 of Directive 96/9, of the results that can be obtained by users by means of that search engine that constitutes the relevant question of law for the purpose of providing a useful answer to the first question. 26. By its second question, the referring court asks whether the information originating in the meta tags of a website containing a database which the search engine displays on the internet supplied by a third party must be interpreted as meaning that it comes within the definition of *'extraction'* in Article 7(2)(a) of Directive 96/9. 27. The question whether the reproduction and making available to the public of the meta tags of a website containing a database comes within the definition of *'extraction'* of the contents of that database within the meaning of Article 7(2)(a) of Directive 96/9 is certainly interesting in itself. (23) However, it seems to me that this second question, just like the first, is part of a more general problem, namely, once again, that of the assessment of the functioning of a specialist search engine from the viewpoint of the sui generis right laid down in Article 7 of that directive.

28. For those reasons, in order to provide a helpful answer to the referring court, I propose to analyse both questions together, taking them to mean that they relate to whether under Article 7(1) and (2) of Directive 96/9 the maker of a database that is freely accessible on the internet is entitled to prevent the use of that database by an internet search engine that specialises in searching the contents of databases (a content aggregator).

The interpretation of Article 7(1) and (2) of Directive 96/9

29. When the problem is formulated as set out in point 28 of this Opinion, it is possible to see the similarities between the present case and the case that gave rise to the judgment in Innoweb, in which the Court had the opportunity to rule on the qualification, from the aspect of the sui generis right provided for in Directive 96/9, of a meta search engine that allows searches to be made in databases belonging to others. The question is therefore whether – and to what extent – the solution applied by the Court in that case can be transposed to the present case.

The Innoweb case

30. The case that gave rise to the judgment in Innoweb concerned a search engine that specialised in advertisements for used cars. That search engine, available on the internet, made it possible to search on websites of car advertisements classified as databases protected by the sui generis right provided for by Directive 96/9, using search forms specific to those websites, hence the name *'meta search engine'*. That meta search engine translated users' requests in such a way that they could be understood by the search forms of the websites containing car advertisements, thus enabling users to search on several sites simultaneously, according roughly to the same criteria as those used by those sites, namely the relevant characteristics of the used cars. The search results obtained by the meta search engine contained the advertisements available according to the criteria selected with, in particular, hyperlinks to the websites on which those advertisements were placed. (24)

31. In its judgment, the Court held that, in circumstances such as those of the main proceedings in that case, the operator of a meta search engine reutilised, within the meaning of Article 7(1) of Directive 96/9, the whole or a substantial part of the contents of a database constituted by the website on which that meta search engine allowed searches to be carried out. (25) 32. The Court considered that, by making it possible to search all of the data in a protected database, a meta search engine provided its users, which must be characterised as the public, with access to the entire contents of that database by a means other than that intended by its maker. (26) That meta search engine thus came close to a parasitical competing product as referred to in recital 42 of Directive 96/9, because it resembled a database but without itself having data. (27) Thus, the

operator of a meta search engine intentionally reutilised a substantial part of the contents, if not the entire contents, of the database in which that meta search engine carried out searches. (28) It was irrelevant, moreover, that in order to have access to all the information relating to an advertisement for the sale of a used car, it was necessary to follow the link to the original database on which that advertisement appeared. (29)

Application to the present case

33. A specialist search engine such as that provided by Melons has a different function from that of a meta search engine. It does not use the search forms of the websites on which it allows searches to be carried out and it does not translate in real time its users' requests into criteria used by those forms. Instead, it regularly indexes those sites and keeps a copy on its own servers. Next, by using its own search form, it enables users to carry out searches according to the criteria which it offers, such searches being carried out among the data that have been indexed. In doing so, Melons' search engine operates in a similar way to generalist internet search engines, such as Google. The difference is that while generalist search engines cover in principle the entire World Wide Web, going from one webpage to another by the hyperlinks contained on those pages, a specialist search engine is programmed to index only the websites of its area of specialisation, in this case sites containing job ads. Furthermore, its indexing method and its search form are optimised in order to allow searches to be made and results to be selected according to the criteria that are relevant from the viewpoint of persons seeking a job, notably the type of job and the place of work. Such a search engine therefore intentionally uses the given websites, such as CV-Online's.

34. In the judgment in Innoweb, the Court specified the characteristics of a meta search engine the functioning of which is defined as the reutilisation of the contents of databases in which that search engine allows searches to be carried out. Those characteristics are the provision of a search form which essentially offers the same characteristics as the search forms of the databases that are reutilised, the translation in real time of the queries and the presentation of the results in an order that reflects criteria comparable to those used by those databases, with the duplications found on several databases being grouped together. (30)

35. However, I do not think that that judgment can be interpreted a contrario, as meaning that any other service provided on the internet does not employ the reutilisation of a database solely because it does not have the same characteristics. The Court referred to the facts of the case in the main proceedings in order to give a precise answer to the referring court. The conclusion which the Court reached was not based on the details of the functioning of the meta search engine at issue in that case, but on the fact that that search engine made it possible to explore, in a way not envisaged by the maker of the database in question, the entire contents of that database, thus making those contents available to its own users.

36. As is apparent from the information provided in the request for a preliminary ruling and in the parties' observations, the same capacity to explore the entire contents of a database (or, more precisely, the contents of several databases at the same time) is provided by a specialist research engine, such as Melons'. That search engine makes it possible to search in several job ads websites, according to the relevant criteria and without going through those websites' own search forms. The search result gives the user access to job ads selected according to those criteria. In so far as those websites may be characterised as databases protected by the sui generis right provided for in Directive 96/9, the search engine in question makes it possible to explore the entire contents of those databases, and to reutilise those contents, in the sense given to the term *'reutilisation'* by the Court in the Innoweb judgment. Furthermore, by indexing and copying the contents of the website to its own server, Melons' search engine extracts the contents of the databases of which those websites consist. The provision of the hyperlinks to the advertisements on CV-Online's website and the reproduction of the information in the meta tags on that site, referred to in the questions for a preliminary ruling, are merely external manifestations, of secondary importance, of that extraction and that reutilisation. The situation at issue in the main proceedings is therefore not substantially different from that at issue in the case that gave rise to the Innoweb judgment.

37. It must therefore be concluded that a search engine that copies and indexes the whole or a substantial part of databases which are freely accessible on the internet and then allows its users to carry out searches in those databases according to criteria that are relevant from the aspect of their contents effects an extraction and a reutilisation of those contents, within the meaning of Article 7(2) of Directive 96/9. Nonetheless, I do not think that the analysis should end there. In fact, the right to prevent such extraction and reutilisation must in my view meet additional conditions.

The subject matter and the objective of the protection afforded by the sui generis right

38. It must be stated that, in the Innoweb judgment, the Court gave an interpretation of the concept of *'reutilisation'* that was very protective of the interests of makers of databases. (31) A meta search engine could have been analysed as the simple automatisation of a search in several databases. However, that search functionality is provided for in any event by the makers of databases. (32) The contents of a database are already made available to the public, since they constitute a database freely accessible on the internet, by its maker itself.

39. While the Court decided to grant makers of databases protection against meta search engines in situations such as that in the case that gave rise to the Innoweb judgment, it did so with the desire of preventing the creation of parasitical competing products. Such an activity would have created a risk that database makers

would lose income and thus be deprived of the revenue that should enable them to recoup their investment in setting up and operating the databases. (33) As I have already stated, (34) the protection of those investments is the ultimate ratio legis of Directive 96/9. (35) In my view, in order to attain the objectives of that directive without at the same time affecting adversely other legitimate interests, it is necessary to incorporate the concerns that guided the Court in that case in the interpretation of the sui generis right provided for in Article 7 of that directive.

40. While the sui generis right provided for in Article 7 of Directive 96/9 has as its objective to protect database makers against the creation of parasitical competing products, (36) it must not at the same time have the effect of preventing the creation of innovative products which have added value. (37) However, it may prove difficult to distinguish those two categories of products. What may seem to be parasitical to the maker of a database will represent considerable added value for users.

41. The various content aggregators on the internet are an excellent example of this. Not only do they allow the information on the internet to be better structured and to be searched more efficiently, but they also contribute to the smooth functioning of competition and to the transparency of offers and prices. They therefore allow a reduction of costs for consumers and a more efficient allocation of resources. In certain sectors, content aggregators have been at the origin of a genuine revolution on the market, for example in the passenger air transport market. Those aggregators therefore have a not insignificant role in the functioning of the internet and, more generally, in the functioning of the digital economy.

42. At the same time, it cannot be denied that those aggregators, by grafting their services on to those of internet content creators, derive a profit from the economic efforts of those creators. In doing so, they encroach, to a variable degree, on the economic models of the operators whose contents are aggregated, such as the makers of databases that are accessible on the internet. It is therefore necessary to strike a fair balance between the interests of those operators and the interests of content aggregators and their users.

43. It seems to me that, in the case of the databases protected by the sui generis right under Article 7 of Directive 96/9, the EU legislature's intention was to base that balance on the concept of the investment made by the database maker. Thus, the criterion of an adverse effect on the investment, in the sense of the risk to the possibility of recouping that investment, as a condition of the grant of protection by the sui generis right, would to my mind make it possible to attain the objectives of that right (38) without limiting disproportionately innovation on the market for information.

44. The wording of Article 7 of Directive 96/9 in my view makes it possible to have recourse to such a criterion. According to Article 7(1) of that directive, the maker of a database enjoys the right to prevent extraction or reutilisation of the whole or of a substantial part of the contents of that database where the maker shows that there has been qualitatively or quantitatively a substantial investment in either the obtaining, verification or presentation of the contents.

45. It follows from the wording of that provision that its primary objective is to limit protection by the sui generis right solely to databases the creation and functioning of which require substantial investments. That objective is in keeping with the objective of Directive 96/9, which is to protect and stimulate such investments. However, that limitation also has the function of protecting competition. The Court has already had occasion to hold that the investment in question must relate, in particular, to the gathering of the information that forms the contents of the database, to the exclusion of investments in creating that information. (39) That makes it possible to preclude the information being monopolised by the entity that created that information. (40)

46. Likewise, the protection conferred by the sui generis right should be granted only when the extraction or reutilisation in question adversely affects the investment in the creation or functioning of the database protection of which is sought, in the sense that it constitutes a risk for the possibilities of recouping that investment, notably by threatening the revenue from the exploitation of the database in question. The aim that is sought to be achieved by limiting protection solely to databases that entailed substantial investments would be only partly achieved if that protection could be invoked against conduct that does not adversely affect the investment in question.

47. The national courts should therefore verify not only whether the extraction or reutilisation of the whole or a substantial part of the contents of a database has taken place and whether it is shown that there has been a substantial investment in either the obtaining, verification or presentation of those contents, but also whether the extraction or reutilisation in question constitutes a risk to the possibilities of recouping that investment. Only where that was so should the makers of databases be entitled to prevent the extraction or reutilisation of the contents of their databases.

48. CV-Online asserts that it derives its revenue from the payments made by employers for the advertisements placed on its website. Its mode of financing is therefore different from that of the database at issue in the case that gave rise to the Innoweb judgment, which was based on advertising. According to CV-Online, the price which it is able to request from those employers depends on the number of persons visiting its website, which is falling owing to the existence of services such as Melons' search engine.

49. However, first, that assertion seems to be purely hypothetical and would need to be supported by firm evidence in order to be able to prove an adverse effect on the investment in CV-Online's database as a result of the existence of specialist search engines such as Melons'. Second, such a search engine merely replaces the search form on CV-Online's website. On the other hand, that website continues to be the necessary intermediary between jobseekers and employers, because only that site contains full information about the

job ads and also a mechanism that allows users to submit their applications directly from that site. (41) From the employers' point of view, the efficiency of CV-Online as a niche for seeking staff does not therefore seem to be affected. Third, and last, the sui generis right is intended to afford protection not against all competition but against commercial parasitism. CV-Online cannot therefore rely on that right in order to object to the existence of any other search engine for job ads. All of those aspects, however, call for factual assessments that must be carried out by the referring court.
50. Furthermore, the referring court will also have to take an additional aspect into account, namely the protection of competition.

The aspects linked to the protection of competition

51. I would point out that, according to Article 13 thereof, Directive 96/9 is to be without prejudice to provisions relating, in particular, to the law on unfair competition. That rule, which contains, moreover, a long list of areas of law to which that directive is to be without prejudice, may seem to constitute only a standard caveat, found in a large number of EU legislative texts. In the case of Directive 96/9, however, and in particular of the sui generis right which it establishes, that reference to unfair competition is of considerable significance.
52. In fact, although that sui generis right takes the form of an intellectual property right, its origin lies in the law on unfair competition. (42) Its objective is to protect makers of databases against the practice characteristic of unfair competition that is parasitism. However, it seems to me that that protection cannot lead to a different type of anticompetitive conduct, namely abuse of a dominant position. Yet the protection of database makers by the sui generis right might well lead to such practices and, moreover, the drafters of Directive 96/9 were aware of that risk. The desire to avoid that risk is therefore expressly stated as the raison d'être of the rule laid down in Article 13 that that directive is to be without prejudice to national or EU competition law. (43)
53. The Court has already had a number of occasions to rule that the use of the exclusive right protecting a database might involve abusive conduct, if that refusal related to information that was indispensable for carrying on the business in question, if it prevented the emergence of a new product for which there was a potential demand, if it was not justified by objective considerations and if it was likely to exclude all competition in a secondary market. (44)
54. It is true that that case-law concerned the refusal to grant a licence, whereas in the present case the point at issue is the reutilisation of the contents of a database without the permission of the maker of that database. However, the cases in which the Court had occasion to give a ruling concerned databases protected by copyright, which gives the holder the exclusive power to authorise or to prohibit any form of exploitation of the protected object. In the case of such a right, any encroachment on the sphere exclusively reserved for the holder of the right constitutes a breach of that right. The sui generis right provided for in Article 7 of Directive 96/9, on the other hand, does not grant an exclusive right as broad as copyright. Article 7 establishes only the power for the maker of a database to prevent the extraction or the reutilisation of the contents of that database. It is therefore the exercise of that power that must be assessed from the aspect of the prohibition of an abuse of a dominant position.
55. The website *'CV.lv'* is presented as the largest job advertisements website in Latvia. It may therefore be imagined that the utilisation of the information which it contains is indispensable for the exercise of the activity of aggregating internet job ads in that Member State. (45) Refusing access to that information would therefore impede the appearance of such services on that market. If the referring court were to find that the functioning of search engines such as Melons' does not seriously affect CV-Online's investment in its database, (46) that would remove what to my mind is the only objective justification for refusing access.
56. Last, the refusal in question is clearly likely to exclude competition from the market concerned. In the first place, CV-Online exercises its right to prevent the extraction and reutilisation of the contents of its database in a selective manner. It states itself that it had no objection to the indexing and reproduction of its website by the generalist search engines, such as Google. On the contrary, it facilitates that indexing by placing meta tags on its website in order to make such indexing more precise and to attract users who are searching for job ads via those generalist search engines. On the other hand, CV Online objects to the same conduct by specialist search engines such as Melons', because they may compete with its own business.
57. In the second place, CV-Online is active not only on the principal market for job ads on the internet, but also on the secondary market of aggregators of job ads, through its other website, *'Visidarbi.lv'*, an aggregator of job ads from different sources, including the website *'CV.lv'*. (47) It is therefore possible that the purpose of CV-Online's exercise of its right to prevent the extraction and reutilisation of the contents of its website *'CV.lv'* is in reality not to protect its investment in its database but to exclude Melons from the secondary market for job ads aggregators.
58. Of course, the criteria established in the Court's case-law are applicable in the context of Article 102 TFEU. If CV-Online's conduct does not affect trade between Member States, that article does not apply. Nonetheless, Article 13 of Directive 96/9 refers to both EU and national competition law. It is therefore in the light of Latvian competition law that the referring court will have to ascertain whether CV-Online's conduct constitutes an abuse of a dominant position. If it does, the referring court should in my view draw the conclusions which, under competition law, follow from such an abuse. Those consequences of such a finding may go as far, if the referring court finds it appropriate, as denying CV Online the benefit of protection by the sui generis right provided for in Article 7 of Directive 96/9.

The limitation of the right of the maker of a database

59. As I have said, (48) the condition that there be an adverse effect on the investment of the maker of a database should in my view play a part in the delimitation of that database maker's right to prevent the extraction and the reutilisation of the whole or a substantial part of the contents of that database. The same applies to the risk of an abuse of a dominant position, since such an abuse would indisputably be contrary to the objective of the sui generis right established by Directive 96/9. I therefore propose that Article 7(1) of that directive be interpreted as meaning that the maker of a database has the right to prevent the extraction or the reutilisation of the whole or a substantial part of the contents of that database only on condition that such extraction or reutilisation adversely affects its investment in obtaining, verifying or presenting those contents, that is to say, that it constitutes a risk for the possibilities of recouping that investment by the normal exploitation of the database in question. Nor can the prevention of such extraction or reutilisation constitute an abuse of the dominant position of the maker of the database on the market concerned or on a secondary market. It is, of course, for the competent courts to ascertain whether those conditions are satisfied.

Conclusion

60. In the light of all of those considerations, I propose that the following answer be given to the questions for a preliminary ruling referred by the Rīgas apgabaltiesas Civillietu tiesas kolēģija (Regional Court, Riga (Civil Law Division), Latvia):

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 must be interpreted as meaning that:

– a search engine which copies and indexes the whole or a substantial part of the contents of databases which are freely accessible on the internet and then allows its users to carry out searches in those databases according to criteria that are relevant from the aspect of their contents effects an extraction and a reutilisation of those contents within the meaning of that provision,

– the maker of a database is entitled to prevent the extraction or the reutilisation of the whole or a substantial part of the contents of that database only on condition that such extraction or reutilisation adversely affects its investment in obtaining, verifying or presenting those contents, that is to say, that it constitutes a risk for the possibilities of recouping that investment by the normal exploitation of the database in question, which it is for the referring court to ascertain. The national courts must ensure that the exercise of the right to prevent the extraction or the reutilisation of the whole or a substantial part of the contents of a database does not result in an abuse of a dominant position, within the meaning of Article 102 TFEU or of national competition law, of the maker of that database on the market concerned or on a secondary market.

1 Original language: French.

2 See, in particular, Derclaye, E., The Legal Protection of Databases: A Comparative Analysis, Edward Elgar Publishing, Cheltenham, 2008, pp. 44 to 47.

3 See Derclaye, E., op. cit., pp. 53 and 54.

4 See Derclaye, E., op. cit., p. 53.

5 See point 25 of this Opinion.

6 Judgment of 19 December 2013, Innoweb (C-202/12, *'the Innoweb judgment'*, EU:C:2013:850).

7 OJ 1996 L 77, p. 20.

8 Latvijas Vēstnesis, 2000, No 148/150.

9 Latvijas Vēstnesis, 2004, No 69.

10 Bing, Google, Yahoo and Yandex.

11 See point 28 of this Opinion.

12 Judgment of 9 November 2004, Fixtures Marketing (C-444/02, EU:C:2004:697, point 29).

13 Judgment of 9 November 2004, Fixtures Marketing (C-444/02, EU:C:2004:697, point 33).

14 Judgment of 9 November 2004, Fixtures Marketing (C-444/02, EU:C:2004:697, point 30).

15 The fact that the protection of a database is conditional on the existence of a substantial investment distinguishes the sui generis right established in Article 7 of Directive 96/9 from certain rights neighbouring copyright the principal objective of which is also to compensate for an investment, but which do not contain such a condition (such as the right of the phonogram producers at issue in the case that gave rise to the judgment of 29 July 2019, Pelham and Others (C-476/17, EU:C:2019:624).

16 See recitals 39 to 42 of Directive 96/9.

17 See, to that effect, judgment of 9 November 2004, The British Horseracing Board and Others (C-203/02, EU:C:2004:695, paragraph 69).

18 Judgment of 9 November 2004, Fixtures Marketing (C-338/02, EU:C:2004:696, paragraph 24).

19 Judgment of 9 November 2004, Fixtures Marketing (C-338/02, EU:C:2004:696, paragraph 27).

20 Judgment of 9 November 2004, Fixtures Marketing (C-338/02, EU:C:2004:696, paragraph 27).

21 If the Court considered that hyperlinks, including *'deep links'*, did not constitute a breach of the right to the making available to the public under Article 3 of Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society (OJ 2001 L 167, p. 10) (judgment of 13 February 2014, Svensson and Others, C-466/12, EU:C:2014:76), I see no reason why those links would constitute a breach of the right to reutilise the contents of a database accessible on the internet, as that reutilisation is defined as *'any form of making [such contents] available to the public'*.

22 According to the description of the functioning of that search engine provided at the hearing by CV-Online and not disputed by Melons.

23 In that regard, certain indications may be found in the Court's case-law. The Court has held, in particular, that the concepts of *'extraction'* and *'reutilisation'* cannot be exhaustively defined as instances of extraction and reutilisation directly from the original database or imply direct access to that database (judgment of 9 November 2004, The British Horseracing Board and Others, C-203/02, EU:C:2004:695, paragraphs 52 and 53). That, to my mind, answers Melons' main argument that the

meta tags placed on CV-Online's website are not part of its database. It remains to be determined, however, whether the information which those tags contain constitutes a substantial part of the contents of that database.

24 See the Innoweb judgment, paragraphs 9 to 11, and also 25 and 26.

25 Innoweb judgment, operative part.

26 Innoweb judgment, paragraphs 40 and 51.

27 Innoweb judgment, paragraph 48.

28 Innoweb judgment, paragraphs 52 and 53.

29 Innoweb judgment, paragraphs 44 and 45.

30 Innoweb judgment, operative part.

31 Or even too protective according to some writers. See, in particular, Husovec, M., *'The End of (Meta) Search Engines in Europe?'*, Chicago-Kent Journal of Intellectual Property, 2014, No 1, pp. 145 to 172.

32 And transforms an amalgamation of information into a database by making its materials individually accessible, as required by Article 1(2) of Directive 96/9 (see judgment of 9 November 2004, Fixtures Marketing, C-444/02, EU:C:2004:697, paragraph 31).

33 Innoweb judgment, paragraphs 41 to 43 and paragraph 48.

34 See point 19 of this Opinion.

35 See recitals 7 to 12 and 40 and 41 of that directive.

36 See recital 42 of that directive.

37 See recital 47 of that directive.

38 It is necessary to distinguish between the subject matter of the protection afforded by the sui generis right, namely the contents of the database, and the objective of that protection, namely the investment.

39 See, in particular, judgment of 9 November 2004, The British Horseracing Board and Others (C-203/02, EU:C:2004:695, first subparagraph of point 1 of the operative part).

40 See, in particular, Derclaye, E., op. cit., p. 94.

41 This mechanism is not part of the database, but is an additional service. However, it forms part of CV-Online's normal exploitation of its database. That exploitation is not affected, on this point, by the existence of Melons' search engine.

42 See Proposal for a Council Directive on the legal protection of databases, COM(92) 24 final, paragraphs 5.3.6 to 5.3.10, p. 35.

43 According to recital 47 of Directive 96/9, *'protection by the sui generis right must not be afforded in such a way as to facilitate abuses of a dominant position … therefore, the provisions of this Directive are without prejudice to the application of Community or national competition rules'*.

44 Judgment of 29 April 2004, IMS Health (C-418/01, EU:C:2004:257, paragraphs 35 and 37 and also the case-law cited).

45 In fact, such an activity is not very useful for users if the major market player is missing from the aggregated results.

46 See points 48 and 49 of this Opinion.

47 Although the representative of CV-Online, questioned about this website at the hearing, stated that he had no instructions to speak about the matter, the information on the website *'Visidarbi.lv'* clearly shows that it is an internet job ads aggregator belonging to CV-Online. The functioning of that aggregator is set out in detail by its builder at the following address: https://arkbauer.com/portfolio/building-a-brand-new-visidarbi-lv-job-portal-and-aggregator/.

48 See points 39 to 47 of this Opinion.