OPINION OF ADVOCATE GENERAL
STIX-HACKL
delivered on 8 June 2004 (1)

Case C-338/02

Fixtures Marketing Ltd
v
Svenska Spel AB

(Reference for a preliminary ruling from the Högsta Domstol (Sweden))

(Directive 96/9/EC – Databases – Legal protection – Sui generis right – Beneficiaries – Substantial investment – Obtaining, verification and presentation of the contents of a database – (In)substantial part of the contents of a database – Extraction and re-utilisation – Normal exploitation – Unreasonable prejudice to the legitimate interests of the maker – Sport – Betting)

I – Preliminary observations

1. This reference for a preliminary ruling is one of four parallel sets of proceedings (2) concerning the interpretation of Directive 96/9/EC of the European Parliament and of the Council of 11 March 1996 on the legal protection of databases (3) ('the Directive'). Like the other cases, this case concerns the so-called *sui generis* right and its scope in the area of sporting bets.

II – Legal background

A – *Community law*

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

'1.

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

2.

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

3. Chapter III regulates the sui generis right in Articles 7 to 11. Article 7, which concerns the object of protection, provides inter alia:

'1.

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

…

5.

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

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

'1.

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

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

B – *National law*

6. The law relating to copyright is set out in the law (1960:729) on copyright over literary and artistic works ('the copyright law'). That law also contains provisions on related rights. A collection of data (database) can be protected by virtue of a sui generis right pursuant to Paragraph 49 of the copyright law, if the collection does not have the originality and independence required to qualify for copyright protection.

7. Under Paragraph 49(1) of the copyright law, the maker of a catalogue, a table or similar work in which a large quantity of data has been collected or which is the result of substantial investment has an exclusive right to produce copies of the work and provide public access to it. That wording of the paragraph was introduced by an amendment (SFS 1997:790), which entered into force on 1 January 1998. The purpose of the amendment was to implement the Directive. The provisions of Paragraph 49 of the copyright law were amended at the same time as regards restrictions on exclusive rights and the term of protection.

8. The 'catalogue protection' in Paragraph 49 of the copyright law in force before the amendment of the law provided that a catalogue, a table or similar work in which a large quantity of data had been collected could not be reproduced without its maker's consent. The amendment to Paragraph 49 of the copyright law provides for protection, as before, for collections of a large quantity of data and, in addition, protection for a work which is the result of a substantial investment. The scope of protection under the copyright law is thus wider than the *sui generis* protection under the database directive. The extent of the protection is the same as that applicable to works protected by copyright under Paragraph 2 of the copyright law, that is to say it confers exclusive rights to produce copies and make them available to the public. The provision is intended to implement the protection under the database directive against extraction and re-utilisation. According to the *travaux préparatoires* for the amendment to the law the protection afforded is slightly more comprehensive than is actually required by the Directive.

9. In the view of the referring court the wording of the law is not consistent with Article 7(5) of the database directive. (4) However, in the *travaux préparatoires* for the amendment the question of what is meant by insubstantial parts was raised. It is stated there that Paragraph 49 does not protect the data collected in the work, but, rather, it is the work or a substantial part of it which is the object of protection. Further, it is made clear the exclusive right does not cover copying of individual data which form part of the work. Nor does the exclusive right cover an insubstantial part of the data being made available to the public. However, a repeated use of insubstantial parts of a work may be regarded as amounting to use of a substantial part of the work.

III – Facts and main proceedings

A – *General facts*

10. In England professional football in the top divisions is organised by The Football Association Premier League Limited and The Football League Limited and in Scotland by The Scottish Football League. The Premier League and the Football League (comprising Division One, Division Two and Division Three) cover four leagues in total. Before the start of each season, fixture lists are drawn up for the matches to be played in the various divisions during the season. The data are stored electronically and are accessible individually. The fixture lists are set out inter alia in printed booklets, both chronologically and by reference to each team participating in the

relevant league. The pairs are indicated as X v Y (for example, Southampton v Arsenal). Around 2 000 matches are played during each season over a period of 41 weeks.

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

B – *Specific facts*

12. In Sweden AB Svenska Spel ('Svenska Spel') operates pools games in which bets can be placed on the results of football matches in inter alia the English and Scottish Football leagues. Matches from the leagues are used on pools coupons in the games Stryktipset and Måltipset and in a special programme in the game Oddset.

13. Fixtures Marketing Limited submits that the two databases – one for all the divisions in England and one for all the divisions in Scotland – containing data on which the fixture lists are based are protected under Paragraph 49 of the copyright law and that the use by Svenska Spel of data from the fixture lists constitutes a breach of the intellectual property rights of The F.A. Premier League Limited, The Football League Limited and The Scottish Football League.

14. Svenska Spel contends that the fixture lists do not enjoy protection under Paragraph 49 of the copyright law and that the company's use of data concerning matches did not, in any event, entail any infringement.

15. In February 1999 Fixtures brought an action against Svenska Spel before Gotlands Tingsrätt (District Court, Gotland), claiming reasonable compensation for the use of data from the fixture lists during the period from 1 January 1998 to 16 May 1999. Fixtures submitted that the databases containing data concerning the fixture lists were protected under Paragraph 49 of the copyright law and that by using the data on pools coupons Svenska Spel was extracting and/or re-utilising data in a manner which infringed the exclusive right to the databases.

16. Svenska Spel disputed the claim and contended that the fixture lists did not enjoy catalogue protection under paragraph 49 of the copyright law either as collections of a large quantity of data or as the result of a substantial investment. The investment in the form of work and costs was made in order to enable the football matches planned to be played; the possibility of exploiting the matches for various games is a by-product of the purpose of the investment. Moreover, its use of the data about matches did not entail any infringement.

17. By its judgment of 11 April 2000 the Tingsrätt dismissed the case. The Tingsrätt held that the fixture lists were covered by catalogue protection since they constituted a collection which was the result of a substantial investment, but held that Svenska Spel's use of the data from the fixture lists did not entail any infringement of the rights of Fixtures.

18. Fixtures appealed against that judgment to the Svea Hovrätt (Svea Court of Appeal). By its judgment of 3 May 2001 the Hovrätt upheld the judgment of the Tingsrätt. The Hovrätt did not expressly rule on the question whether fixture lists are protected under Paragraph 49 of the copyright law, finding that it was clear from the oral argument in the case that Svenska Spel used the same data as are included in the databases but that it was not proven that an extract of the database's contents had been obtained and the catalogue protection by which the current databases may be covered thereby infringed.

19. Fixtures appealed against the judgment of the Hovrätt to the Högsta Domstol (Supreme Court) asking the Högsta Domstol to uphold its claim. It argued that the fixture lists are protected both as a collection of a large quantity of data and as the result of a substantial investment in the form of work put in and cost, in which it is not possible to distinguish the work for the purpose of planning the game and that for the purpose of drawing up the fixture lists. The purpose of an investment is immaterial. Nor is the possibility of utilising the database for gambling a by-product of the actual purpose of the investment in the database. Fixtures drew up a statement of the time, the work and the cost which the compilation of the fixture lists required. The costs of developing and administering the fixture lists in England is claimed to be about GBP 11.5 million per annum and licensing revenues in respect of the data about fixture lists in the English database about GBP 7 million per annum. Further, in assessing whether Svenska Spel utilised the fixture lists, it is immaterial whether the data were obtained from sources other than the fixture lists since the data ultimately came from them.

20. As regards Svenska Spel's use of the data from the fixture lists, Fixtures states inter alia that, in the game Oddset, use is made of a total of 769 matches during the 1998/1999 season, which corresponds to 38 per cent of the total number of matches in the fixture lists for the English football leagues. In the game Måltipset 921 matches are used, which corresponds to 45 per cent of the total number of matches. In the game Stryktipset 425 matches are used, or 21 per cent of the matches in the English database. The proportion of matches used from the highest divisions (Premier League) in England and Scotland is higher and, as regards the Premier League in England, amounts to 90, 72 and 71 per cent in the abovementioned games. The profit made by Svenska Spel in the three games amounts to SEK 600 to 700 million per annum in each case.

21. Fixtures submits, first, that Svenska Spel is extracting a substantial part of the database by reproducing data about matches on pools coupons, and, second, that this constitutes repeated and systematic extraction from

and re-utilisation of parts of the database's content and that this conflicts with the normal exploitation of the database and has unreasonably prejudiced the interests of the football leagues.

22. Svenska Spel disputes the claims made by Fixtures and argues that the investment made relates to the drawing up of the fixture lists and not to the obtaining, verification and/or presentation of the data which the fixture lists contain. The proprietors of the databases did not need to obtain the data, verify it or present it since it was available in the form of fixture lists produced separately from and independently of the databases and following consultation between various persons involved. Nor are the databases are protected as collections of a large quantity of data. Svenska Spel had no knowledge of the current databases and the data on the pools coupons came from British and Swedish daily newspapers, from teletext, from the football teams in question and from an information service and, finally, from the publication *Football Annual*. Further, the information that two football teams are to play one another at a certain juncture is freely available to anyone and cannot be restricted either by copyright or *sui generis* rights. As regards the alleged infringement Svenska Spel argues that there is no production of copies, since what is given on the pools coupons is not the whole or a substantial part of the fixture lists. It is wrong to look at several pools coupons together in order to assess the scale of the utilisation. Finally, Svenska Spel disputes that this is an instance of re-utilisation of an insubstantial part of the work within the meaning of Article 7(5) of the Directive.

23. According to the referring court, the case turns on both the question whether the databases which contain the data on which the fixture lists are based are protected pursuant to Paragraph 49 of the copyright law and the question whether Svenska Spel's use of the data concerning the matches infringes the rights of the maker of the database.

24. The referring court considers that a preliminary ruling is necessary because the purpose of Paragraph 49 of the copyright law is to implement the Directive and it should be interpreted in the light of the Directive. The wording of the Directive does not give any unequivocal guidance for determining whether, and if so, what importance should be ascribed to the purpose or purposes of the database in assessing whether a database is protected. Nor is it clear what sort of investment in the form of work or cost can be taken into account when the question of substantial investment is to be decided. It is, further, unclear how the expressions 'extraction and/or re-utilisation of the whole or a substantial part of the database' or 'normal exploitation' and 'extraction and/or re-utilisation of insubstantial parts of the database … which unreasonably prejudice' used in the Directive should be interpreted.

IV – The questions referred

25. The Högsta Domstol seeks a preliminary ruling from the Court of Justice on the following questions:

1. In assessing whether a database is the result of a 'substantial investment' within the meaning of Article 7(1) of Council Directive 96/9/EC of 11 March 1996 on the legal protection of databases (the 'database directive') can the maker of a database be credited with an investment primarily intended to create something which is independent of the database and which thus does not merely concern the 'obtaining, verification or presentation' of the contents of the database? If so, does it make any difference if the investment or part of it nevertheless constitutes a prerequisite for the database?

AB Svenska Spel contends in this case that Fixtures Marketing Limited's investment is primarily concerned with the drawing up of the fixture lists for the English and Scottish football leagues and not with the databases where the data are stored. Fixtures Marketing Limited, for its part, argues that it is not possible to distinguish the work for the purpose of planning the game and that for the purpose of drawing up the fixture lists.

2. Does a database enjoy protection under the database directive only in respect of activities covered by the objective of the database maker in creating the database?

AB Svenska Spel contends that Fixtures Marketing Limited's creation of the database is not intended to facilitate football pools and other gaming activities but that such activities are a by-product of the purpose of the investment. Fixtures Marketing Limited, for its part, argues that the purpose of the investment is irrelevant and disputes that the possibility of exploiting the database for football pools constitutes a by-product of the actual purpose of the investment in the database.

3. What do the terms 'a substantial part, evaluated qualitatively and/or quantitatively, of the contents of that database' in Article 7(1) mean?

4. Is the directive's protection under Article 7(1) and Article 7(5) against 'extraction and/or re-utilisation' of the contents of a database limited to such use as entails a direct exploitation of the base or does the

protection also cover use in cases where the contents are available from another source (second-hand) or are generally accessible?

AB Svenska Spel contends that the company had no knowledge of the databases and obtained the data for the pools coupons from other sources and that what appeared on the pools coupons was not the whole or a substantial part of the fixture lists. Fixtures Marketing Limited, for its part, argues that it was irrelevant to the assessment whether the data were obtained from sources other than the fixture lists since the data originally came from them.

5. How should the terms 'normal exploitation' and 'unreasonably prejudice' in Article 7(5) be interpreted?

Fixtures Marketing Limited argues that AB Svenska Spel has repeatedly and systematically extracted and re-utilised the contents of the database for commercial purposes, in a manner which conflicts with a normal exploitation of that database and thereby unreasonably prejudiced the football leagues. AB Svenska Spel, for its part, contended that it is wrong to look at several pools coupons together in making an assessment and disputes that their use is in breach of Article 7(5) of the directive.

V – Admissibility

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

27. According to the settled case-law of the Court of Justice, in proceedings under Article 234 EC, which is based on a clear separation of functions between the national courts and the Court of Justice, any assessment of the facts in the case is a matter for the national court. (5)

28. The Court therefore has no jurisdiction to give a ruling on the facts in the main proceedings or to apply the rules of Community law which it has interpreted to national measures or situations, since those questions are matters for the exclusive jurisdiction of the national court. The analysis of individual events in connection with the database at issue in these proceedings thus requires a factual assessment, which it is for the national court to make. (6) That apart, the Court has jurisdiction to answer the questions referred.

VI – Assessment of the merits

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

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

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

31. In that connection, reference should be made to the legal debate on the question whether the *sui generis* right covers the creation, in the sense, essentially, of the activity of creating a database, or the outcome of that process. On that point, it must be observed that the Directive protects databases or their contents but not the information they contain as such. Ultimately it is thus a matter of protecting the product, while at the same time indirectly protecting the expenditure incurred in the process, in other words, the investment. (7)

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

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

1. 'Substantial investment'

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

35. As is clear from the structure of Article 7(1) of the Directive, the term 'substantial investment' is to be construed in relative terms. According to the preamble to the Common Position, in which that provision was given its final version, the investments used to draw up and compile the contents of a database were to be protected. (8)

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

37. It is made clear what type of investments may be covered by the 40th recital, the last sentence of which reads: 'such investment may consist of the implementation of financial resources and/or the expending of time, effort and energy.' According to the seventh recital, it is a matter of 'the investment of considerable human, technical and financial resources.'

38. Further, the term 'substantial' must also be construed in relative terms, first in relation to costs and their redemption (9) and secondly in relation to the scale, nature and contents of the database and the sector to which it belongs. (10)

39. Thus it is not only investments which have a high value in absolute terms that are protected. (11) On the other hand the criterion 'substantial' cannot be construed only in relative terms. The Directive requires an absolute lower threshold for investments worthy of protection as a sort of *de minimis* rule. (12) That is implied by the 19th recital, according to which the investment must be 'substantial enough.' (13) However that threshold should probably be set low. First, that is the implication of the 55th recital (14) in which there is no clarification as regards level. Secondly, it can be inferred from the fact that the Directive is intended to bring different systems into line. Thirdly, a lower limit that was too high would undermine the intended purpose of the Directive, which is to create incentives for investment.

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

41. In the present proceedings it must thus be clarified whether and in what way the so-called 'spin-off theory' can be of relevance to the interpretation of the Directive and in particular of the *sui generis* right. In the light of the reservations expressed in these proceedings regarding the protection of databases which are mere by-products, a demystification of the 'spin-off theory' seems called for. This theory, leaving aside its origins at national level, can be traced back, first, to the purpose implied by the 10th to 12th recitals of the Directive, which is to provide incentives for investment by improving the protection of investment. However, it is also based on the idea that investments should be repaid by profits from the principal activity. The 'spin-off theory' is also bound up with the idea that the Directive only protects those investments which were necessary to obtain the contents of a database. (15) All these arguments have their value and must be taken into account in the interpretation of the Directive. However that must not result in the exclusion of every spin-off effect solely in reliance on a theory. The provisions of the Directive are and remain the decisive factor in its interpretation.

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

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

44. Moreover, in practice there may be makers of databases who are pursuing several purposes in making a database. It may be that the investments made cannot be attributed to a certain single purpose or are not separable. In such a situation, the criterion of the purpose of a database would not provide an unequivocal solution. Either the investment would be protected independently of another purpose or it would be wholly unprotected because of the other purpose. The criterion of purpose thus proves either impracticable or

irreconcilable with the purpose of the Directive. Excluding the protection of databases which serve several purposes would run counter to the objective of providing incentives for investment. That would prove an enormous obstacle to investments in multifunctional databases.

45. The database at issue in the main proceedings is an example of a situation where the database is created for the additional purpose of organising fixture lists. Creating a separate – possibly almost identical – database would be contrary to fundamental economic principles and such a requirement cannot be inferred from the Directive.

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

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

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

48. We must base our discussion on the thrust of the protection conferred by the *sui generis* right, in other words the protection of the creation of a database. Creation can then be seen as an umbrella term for obtaining, verification and presentation. (16)

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

50. However, if we take the umbrella-term creation, in other words the supplying of the database with content, (17) as a basis, both existing and newly created data could be covered. (18)

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

52. If we start with the term 'Beschaffung', used in the German version of Article 7(1), it can only concern existing data, as it can only apply to something which already exists. In that light *Be*schaffung is the exact opposite of *Er*schaffung (creation). Analysis of the wording of the Portuguese, French, Spanish and English versions, which are all based on the Latin 'obtenere', to receive, yields the same result. The Finnish and Danish versions also suggest a narrow interpretation. The wide interpretation of the English and German versions advocated by many parties to the proceedings is therefore based on an error.

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

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

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

56. All the language versions thus allow of an interpretation according to which, although 'obtaining' within the meaning of Article 7(1) of the Directive does not cover the mere production of data, that is to say, the generation of data, (19) and thus not the preparatory phase, (20) where the creation of data coincides with its collection and screening, the protection of the Directive kicks in.

57. In that connection, it should be pointed out that the so-called 'spin-off theory' cannot apply. Nor can the objective pursued in obtaining the contents of the database be of any relevance. (21) That means that protection is also possible where the obtaining was initially for the purpose of an activity other than the creation of a database. For the Directive also protects the obtaining of data where the data was not obtained for the purposes of a database. (22) That implies that an external database, which is derived from an internal database, should also be covered by protection.

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

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

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

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

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

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

62. The object of protection of the *sui generis* right is constituted by 'obtaining' and 'verification' of the contents of a database and also by its 'presentation'. That entails not only the presentation for users of the database, that is to say, the external format, but also the conceptual format, such as the structuring of the contents. An index and a thesaurus are generally used to assist with the processing of data. As is clear from the 20th recital, such materials relating to the interrogation of the database can enjoy the protection of the Directive. (23)

B – *Content of the protected right*

63. It must first be observed that, strictly speaking, the introduction of the *sui generis* right was intended not to harmonise existing law but to create a new right. (24) That right goes beyond previous distribution and reproduction rights. That should also be taken into account in the interpretation of prohibited activities. Accordingly, the legal definition in Article 7(2) of the Directive assumes particular importance.

64. At first sight Article 7 of the Directive contains two groups of prohibitions or, from the point of view of the person entitled, that is to say the maker of a database, two different categories of right. Whereas paragraph 1 lays down a right to prevent use of a substantial part of a database, paragraph 5 prohibits certain acts relating to insubstantial parts of a database. On the basis of the relationship between substantial and insubstantial, paragraph 5 can also be understood as an exception to the exception implied by paragraph 1. (25) Paragraph 5 is intended to prevent circumvention of the prohibition laid down by paragraph 1, (26) and can thus also be classified as a protection clause. (27)

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

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

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

1. The expression 'substantial part of the contents of a database' within the meaning of Article 7(1) of the Directive

68. This question seeks an interpretation of the term 'substantial part of the contents of a database' in Article 7(1) of the Directive. In contrast with other key terms in the Directive there is no legal definition of this term. It

was removed in the course of the legislative procedure, at the stage of the Common Position of the Council, to be precise.

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

70. The quantitative alternative must be understood as requiring the amount of the part of the database affected by the prohibited act to be determined. That raises the question whether this must be assessed in relative or absolute terms. In other words whether a comparison must be made of the amount in question with the whole of the contents of the database (28) or whether the affected part is to be assessed in itself.

71. In that connection, it must be observed that a relative assessment would tend to disadvantage the makers of large databases (29) because the larger the total amount the less substantial the affected part. However, in such a case, a qualitative assessment undertaken at the same time could balance out the equation where a relatively small affected part could none the less be considered substantial in terms of quality. Equally, it would be possible to combine both quantitative approaches. On that basis even a part which was small in relative terms could be considered substantial because of its absolute size.

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

73. In a qualitative assessment, technical or economic value is relevant in any event. (30) Thus, a part which is not large in volume but is substantial in terms of value may also be covered. Examples of valuable characteristics of lists in the field of sport would be completeness and accuracy.

74. The economic value of an affected part is generally measured in terms of the drop in demand (31) caused by the fact that the affected part is not extracted or re-utilised under market conditions but in some other way. The affected part and its economic value can also be assessed from the point of view of the wrongdoer, that is to say in terms of what the person extracting it or re-utilising it has saved.

75. In the light of the objective of protecting investment pursued by Article 7 of the Directive, the investment made by the maker will always have to be taken into consideration in the assessment of whether a substantial part is involved. (32) According to the 42nd recital, the prohibition on extraction and re-utilisation is intended to prevent detriment to investments . (33)

76. Thus, investments, and in particular the cost of obtaining data, can also be a factor in the assessment of the value of the affected part of a database . (34)

77. There is no legal definition in the Directive of the point at which a part becomes substantial. The unanimous view expressed in legal writings is that the Community legislature intentionally left such demarcation to the Courts. (35)

78. However, the question whether a substantial part is affected may not be allowed to depend on whether there is significant detriment. (36) Mere reference to such detriment in a recital, that is to say at the end of the 42nd recital, cannot be sufficient to cause the threshold for protection to be set so high. It is, moreover, debatable whether 'significant detriment' can be relied on as a criterion for defining substantialness at all since the 42nd recital could also be construed as meaning that 'significant detriment' is to be seen as an additional requirement in cases in which a substantial part is affected, that is to say in cases where substantialness has already been established. Even the 'serious economic and technical consequences' of prohibited acts referred to in the eighth recital cannot justify too strict an assessment in relation to detriment. Both recitals serve, rather, to emphasise the economic necessity for protection of databases.

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

80.