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

In Case C-444/02, REFERENCE for a preliminary ruling under Article 234 EC, from the Monomeles Protodikio Athinon (Greece), made by decision of 11 July 2002, received at the Court on 9 December 2002, in the proceedings

Fixtures Marketing Ltd

v

Organismos prognostikon agonon podosfairou AE (OPAP),

THE COURT (Grand Chamber),

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

Advocate General: C. Stix-Hackl,

Registrars: M. Múgica Arzamendi and M.-F. Contet, Principal Administrators, having regard to the written procedure and further to the hearing on 30 March 2004, after considering the observations submitted on behalf of:

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Fixtures Marketing Ltd, by K. Giannakopoulos, dikigoros,

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Organismos prognostikon agonon podosfairou AE, by F. Christodoulou, K. Christodoulou, A. Douzas, L. Maravelis and C. Pampoukis, dikigoroï,

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the Greek Government, by E. Mamouna and I. Bakopoulos and V. Kyriazopoulos, acting as agents,

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the Belgian Government, by A. Snoecx, acting as agent, and P. Vlaeminck, advocaat,

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

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

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the Finnish Government, by T. Pynnä, acting as agent,

–

the Commission of the European Communities, by K. Banks and M. Patakia, acting as Agents,

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

## Judgment

1

This reference for a preliminary ruling concerns the interpretation of the provisions of Directive 96/9/EC of the European Parliament and of the Council of 11 March 1996 on the legal protection of databases (OJ 1996 L 77, p. 20, ‘the directive’).

2

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

## Legal background

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

4

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

5

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

### ‘Object of protection

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

2. For the purposes of this Chapter:

(a)

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

(b)

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

Public lending is not an act of extraction or re-utilisation.

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

4. The right provided for in paragraph 1 shall apply irrespective of the eligibility of that database for protection by copyright or by other rights. Moreover, it shall apply irrespective of eligibility of the contents of that database for protection by copyright or by other rights.

Protection of databases under the right provided for in paragraph 1 shall be without prejudice to rights existing in respect of their content.

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

6

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

The main proceedings and the questions referred for a preliminary ruling

7

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

8

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

9

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

10

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

'1.

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

2.

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

3.

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

The questions referred

Admissibility

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

12

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

13

The information provided in orders for reference must not only be such as to enable the Court to reply usefully but must also enable the governments of the Member States and other interested parties to submit observations pursuant to Article 23 of the Statute of the Court of Justice. It is the Court's duty to ensure that that possibility is safeguarded, bearing in mind that, by virtue of the abovementioned provision, only the orders for reference are notified to the interested parties (Albany, cited above, paragraph 40).

14

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

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

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

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

The merits

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

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

19

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

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

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

22

Although the proposal for a Council Directive on the legal protection of databases (OJ 1992 C 156, p. 4), presented by the Commission on 15 April 1992 concerned exclusively electronic databases according to the definition of database contained in Article 1(1) of that proposal for a Directive, it was agreed in the course of the legislative process, that 'protection under this Directive should be extended to cover non-electronic databases', according to the 14th recital of the preamble to the directive.

23

According to the 17th recital of the preamble to the directive, 'the term "database" should be understood to include literary, artistic, musical or other collections of works or collections of other material such as texts, sound, images, numbers, facts, and data'. The fact that the data or information at issue relate to a sporting activity thus does not preclude the database from being recognised as such in the terms of the directive.

24

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

25

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

26

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

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

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

29

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

30

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

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

32

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

33

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

34

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

35

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

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

The scope of the sui generis right

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

38

Article 7(1) of the directive reserves the protection of the sui generis right to databases which meet a specific criterion, namely to those which show that there has been qualitatively and/or quantitatively a substantial investment in the obtaining, verification or presentation of their contents.

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

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

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

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

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The expression 'investment in ... the ... verification ... of the contents' of a database must be understood to refer to the resources used, with a view to ensuring the reliability of the information contained in that database, to monitor the accuracy of the materials collected when the database was created and during its operation. The expression 'investment in ... the ... presentation of the contents' of the database concerns, for its part, the resources used for the purpose of giving the database its function of processing information, that is to say those used for the systematic or methodical arrangement of the materials contained in that database and the organisation of their individual accessibility.

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

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

46

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

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

48

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

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Finding and collecting the data which make up a football fixture list do not require any particular effort on the part of the professional leagues. Those activities are indivisibly linked to the creation of those data, in which the leagues participate directly as those responsible for the organisation of football league fixtures. Obtaining the contents of a football fixture list thus does not require any investment independent of that required for the creation of the data contained in that list.

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

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

52

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

53

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

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

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

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

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

Costs

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Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds, the Court (Grand Chamber) rules as follows:

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

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

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

Signatures.

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Language of the case: Greek.