OPINION OF ADVOCATE GENERAL STIX-HACKL
delivered on 8 June 2004 [1]

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.

1 — Original language: German.

2 — Proceedings Cases C-203/02, C-338/02 and C-444/02, judgments of 9 November 2004, ECR I-10415, pp. 10497 and 10549 in which I am also delivering my Opinion today.

3 — OJ 1996 L 77, p. 20.

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. Before its amendment by Directive 96/9/EC, Paragraph 49(1) of the copyright law (34/1991) provided that lists, tables, programmes and other similar works in which a large quantity of data is combined may not be reproduced without the consent of the author during a period of 10 years from the year in which the work is published.

7. Law 250/1998 of 3 April 1998 was adopted in order to bring into force the database directive by amending Paragraph 49 (1) of the copyright law, which now states:

The author

(1) of lists, tables, programmes or other similar works in which a large quantity of data is combined, or

(2) of a database, the obtaining, verification or presentation of which required substantial input,

has the exclusive right to stipulate the use of the whole or a substantial part, evaluated qualitatively or quantitatively, of the contents of the work by reproducing it and placing it at the disposal of the public.

III — Facts and main proceedings

A — *General facts*

8. In England professional football in the top divisions is organised by the Football Asso-

ciation 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.

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

B — *Specific facts*

10. This reference for a preliminary ruling is made in the course of proceedings brought by Fixtures against Veikkaus Ab ('Veikkaus'). According to the referring court, for the reference period 1998-1999 Veikkaus used each week for its pools activities (vakioveikkaus, tulosveto, pitkäveto and moniveto) on average about a quarter of the matches to be played in the Premier League and in the other divisions. For vakioveikkaus and pitkäveto it used each week mainly information relating to the Premier league and Division One and occasionally also matches from lower divisions. The quantity of data used each week varied between approximately two thirds for the Premier league and one third for Division One. In tulosveto and moniveto only a few matches were used on each occasion. During the period in question Veikkaus used each week for the purposes of the pools around 80 matches, made up of matches played in England, but also football matches from elsewhere in Europe, ice hockey matches, etc.

11. As objects of the pools betting Veikkaus used all matches during the football season in the Premier league and in Division One and occasionally other matches. Around 200 matches are used each week for the purposes of betting. As a basis for selecting the objects of the pools betting, data is obtained each week regarding around 400 matches, inter alia from the internet, newspapers or directly

from the football clubs. Veikkaus checks from various sources the correctness of the match data chosen and, if need be, makes changes to the matches selected. Changes may also be made during the week in which the matches are played. Veikkaus' annual turnover from betting on football matches in England amounts to several tens of millions of euros.

12. In its judgment (S 94/8994) the Vantaan käräjäoikeus held that the fixture list was a list which contained a large quantity of data within the meaning of Paragraph 49(1) of the copyright law, as then in force. The Käräjäoikeus also held that the protection of lists only prevented reproduction. The pools coupons had to be considered as a whole when determining whether a substantial part of the fixture list had been used. The Käräjäoikeus held that there had been an infringement of the protection of lists and upheld the action. However, the Helsingin hovioikeus held in its judgment No 145 of 9 April 1998 (S 96/1304) that there had been no infringement of the protection of lists, because the data used in order to draw up the coupons came from various sources which were checked directly from England, because there were differences between the details given on the pools coupons and in the fixture list and, moreover, because the coupons had no further use after the match to which they related had been played. On those grounds, the Hovioikeus set aside the judgment of the Käräjäoikeus and dismissed the action. The Korkein oikeus (Supreme Court) refused leave to appeal.

13. After the database directive came into force, Fixtures brought actions both in Sweden and in Finland seeking a declaration that the fixture list is a protected database within the meaning of the directive and that the pools companies in both countries were infringing the protection of the database by using, without permission, matches from that fixture list as objects of betting.

14. The Tekijänoikeusneuvosto (Copyright Council), which was requested by the Käräjäoikeus to give its opinion, stated that is not a precondition of protection under the copyright law in force in Finland that a database should comply with the definition in Article 1(2) of the database directive. Database protection is given to databases, the obtaining, verification or presentation of which requires substantial investment. On the basis of the abovementioned decision of the Helsingin hovioikeus, the Tekijänoikeusneuvosto stated that the fixture list in question could be regarded as a database also within the meaning of Paragraph 49(1)

(2) of the copyright law, the obtaining, verification or presentation of the content of which had required a substantial investment, but that Veikkaus' action had not infringed the protection enjoyed by that database.

15. The referring court finds that the situation is unclear with regard to the question whether the fixture list at issue is a protected database, and in particular with regard to the type of action which constitutes an infringement of database protection for the purposes of the directive.

IV — The questions referred

16. The Käräjäoikeus has decided to refer the following questions to the Court of Justice:

(1) May the requirement in Article 7(1) of the directive for a link between the investment and the making of the database be interpreted in the sense that the 'obtaining' referred to in Article 7(1) and the investment directed at it refers, in the present case, to investment which is directed at the determination of the dates of the matches and the match pairings themselves and, when the criteria for granting protection are appraised, does the drawing up of the fixture list include investment which is not relevant?

(2) Is the object of the directive to provide protection in such a way that persons other than the authors of the fixture list may not, without authorisation, use the data in that fixture list for betting or other commercial purposes?

(3) For the purposes of the directive, does the use by Veikkaus relate to a substantial part, evaluated qualitatively and/or quantitatively, of the database, having regard to the fact that, of the data in the fixture list, on each occasion only data necessary for one week is used in the weekly pools coupons, and the fact that the data relating to the matches is obtained and verified from sources other than the maker of the database continuously throughout the season?

V — Admissibility

17. In the view of the Commission, the referring court has not described the factual background in sufficient detail. It is, for instance, unclear what relationship Fixtures has with the Premier League and the Football League, and, in particular, the basis and extent of Fixture's right to access to the database of the two leagues is not described satisfactorily. Further, the referring court has supplied no information as to whether Veikkaus has extracted and/or re-utilised the contents of the database. Finally, the questions referred partly concern the application of the provisions of the Directive to a specific set of facts.

18. As regards these objections by the Commission, it must be recalled that the information provided in orders for reference must 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 this possibility is safeguarded, bearing in mind that, by virtue of the abovementioned provision, only the orders for reference are notified to the interested parties. [4]

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

20. 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.

21. 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]

4 — Case C-207/01 *Altair Chimica* v *ENEL Distribuzione* [2003] ECR I-8875, paragraph 25, orders in Joined Cases C-128/97 and C-137/97 *Testa and Modesti* [1998] ECR I-2181, paragraph 6, and Case C-325/98 *Anssens* [1999] ECR I-2969, paragraph 8.

5 — Judgments in Case 36/79 *Denkavit* [1979] ECR 3439, paragraph 12, Joined Cases C-175/98 and C-177/98 *Lirussi and Bizzaro* [1999] ECR I-6881, paragraph 37, Case C-318/98 *Fornasar and Others* [2000] ECR I-4785, paragraph 31, and Case C-421/01 *Traunfellner* [2003] ECR I-11941, paragraph 21 et seq.

22. 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

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

A — *Scope* ratione materiae*: the term 'database'*

24. Veikkaus and the Belgian Government submit that there is no database within the meaning of Article 1 of the Directive in the main proceedings. The materials in it, for instance, are not independent.

25. The interpretation of the term 'database' within the meaning of Article 1(2) constitutes one of the fundamental requirements for the application of the Directive and thus for its scope *ratione materiae* altogether. That scope must be distinguished from the scope *ratione materiae* of the *sui generis* right, that is to say the 'object of protection' provided for by Article 7 of the Directive. Although that provision is connected with the legal definition of 'database' it lays down a series of additional conditions regarding the object of the *sui generis* protection. That means that not all databases within the meaning of Article 1(2) are at the same time objects of protection within the meaning of Article 7 of the Directive.

26. That distinction is also made in the recitals in the preamble to the Directive. The 17th recital concerns the term database and the 19th recital the *sui generis* right. Admittedly, the examples given there were not the best ones to illustrate the different meanings: a recording of certain artistic musical works does not even constitute a database, while a

6 — See Case C-448/01 *EVN* [2003] ECR I-14527, paragraph 59.

compilation of musical recordings does not fall within the objects of protection covered. However, that is clear from the very fact that a database does not even exist in such a case.

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

28. An initial reference point for the interpretation of the term 'database' lies in the rules of international law which serve to provide guidance. The first such rule is Article 10(2) of the Agreement on Trade-related Aspects of Intellectual Property Rights (TRIPs Agreement),[7] although that provision does not contain all the criteria in Article 1(2) of the Directive. Then there is Article 2(5) of the Berne Convention as revised. On the other hand rules of international law which are more recent than the Directive cannot provide an adequate yardstick. That is true, for example, of Article 5 of the WCT WIPO Copyright Treaty, which was not adopted until 1996. As is clear from the background to the adoption of the Directive and the Commission's documents in particular, the Directive was intended primarily to reflect the Berne Convention.

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

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

7 — OJ 1994 L 336, p. 214.

31. The intention of the Community legislature, as demonstrated by the background to the adoption of the Directive, [8] can also be cited in support of a wide interpretation.

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

33. First 'a collection of *independent* works, data or other materials' (emphasis added) is required. The question whether the main proceedings concern data or materials need not be considered in greater depth, because in practice they concern either data, in the sense of combinations of signs representing facts, that is to say, elementary statements with potentially informative content, [9] or materials as recognisable entities.

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

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

36. That criterion should be understood as meaning that the data or materials must not be linked or must at least be capable of being separated without losing their informative content, [10] which is why sound or pictures from a film are not covered. One possible approach to interpretation is to focus not only on the mutual independence of the materials from one another but on their independence within a collection. [11]

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

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

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

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

37. Second, the Directive only covers collections which have been arranged systematically or methodically. In the 21st recital it is made clear that it is not necessary for those materials to have been physically stored. That requirement serves to exclude random accumulations of data and ensure that only planned collections of data are covered, [12] that is to say, data organised according to specific criteria. [13] It is sufficient if a structure is established for the data and they are organised only following application of the appropriate search programme, [14] and thus essentially through sorting and, possibly, indexation. Both statistical and dynamic [15] databases are covered.

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

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

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

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

15 — Von Lewinski (cited in footnote 13), paragraph 6 on Article 1.

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

B — *Object of protection: Conditions (first question referred)*

40. 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.

41. 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. [16]

42. 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.

43. 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.

16 — Malte Grützmacher, *Urheber-, Leistungs- und Sui-generis-Schutz von Datenbanken*, 1999, 329; Georgios Koumantos, 'Les bases de données dans la directive communautaire', *Revue internationale du droit d'auteur 1997*, 79 (117). On the other hand, many writers see the investment as the object of protection (see, for example, Silke von Lewinski, cited in footnote 13, paragraph 3 on Article 7, and the writings cited by Grützmacher on page 329 in footnote 14).

1. 'Substantial investment'

44. 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.

45. 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. [17]

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

46. 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.

47. 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'.

48. Further, the term 'substantial' must also be construed in relative terms, first in relation to costs and their redemption [18] and secondly in relation to the scale, nature and contents of the database and the sector to which it belongs. [19]

18 — Von Lewinski (cited in footnote 13), paragraph 9 on Article 7.

19 — Koumantos (cited in footnote 16), 119.

49. Thus it is not only investments which have a high value in absolute terms that are protected. [20] 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. [21] That is implied by the 19th recital, according to which the investment must be 'substantial enough'. [22] However that threshold should probably be set low. First, that is the implication of the 55th recital [23] 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.

50. 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

20 — Von Lewinski (cited in footnote 13), paragraph 11 on Article 7.

21 — Krähn (cited in footnote 9), 138 et seq.; Leistner (cited in footnote 10), 958.

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

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

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.

51. 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.[24] 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.

52. 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.

53. 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

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

that the protection of a database depends on its purpose.

54. 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.

55. 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.

56. 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

57. One issue in the present case is whether there was any 'obtaining' within the meaning of Article 7(1) of the Directive. That provi-

sion only protects investment in the 'obtaining', 'verification' or 'presentation' of the contents of a database.

58. 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. [25]

59. 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.

60. However, if we take the umbrella-term creation, in other words the supplying of the database with content, [26] as a basis, both existing and newly created data could be covered. [27]

61. 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.

62. 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.

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

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

27 — Grützmacher (cited in footnote 16), 330 et seq.; Leistner (cited in footnote 12), 152.

63. 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.

64. 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.

65. 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.

66. 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, [28] and thus not the preparatory phase, [29] where the creation of data coincides with its collection and screening, the protection of the Directive kicks in.

67. 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. [30] That means that protection is also possible where the obtaining was initially for the purpose of an activity other

28 — Leistner (cited in footnote 12), 152.

29 — Guglielmetti (cited in footnote 25), 184; Karnell (cited in footnote 22), 993.

30 — As regards the views put forward, see Hugenholtz (cited in footnote 24), 161 (164 FN 19).

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. [31] That implies that an external database, which is derived from an internal database, should also be covered by protection.

68. 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.

69. 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

70. 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.

71. 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.

31 — Von Lewinski (cited in footnote 13), paragraph 5 on Article 7.

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

72. 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. [32]

C — *Content of the protected right*

73. 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. [33] 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.

74. 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. [34] Paragraph 5 is intended to prevent circumvention of the prohibition laid down by paragraph 1, [35] and can thus also be classified as a protection clause. [36]

75. 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.

32 — Calame (cited in footnote 26), 116.

33 — Common Position (EC) No 20/95, adopted by the Council on 10 July 1995 (cited in footnote 17), No 14.

34 — Gaster (cited in footnote 8) , paragraph 492.

35 — Oliver Hornung, *Die EU-Datenbank-Richtlinie und ihre Umsetzung in das deutsche Recht*, 1998, 116 et seq.; Leistner (cited in footnote 12), 180; von Lewinski (cited in footnote 13), paragraph 16 on Article 7.

36 — Common Position (EC) No 20/95 (cited in footnote 17), No 14.

Legal definitions of the terms 'extraction' and 're-utilisation' are given in Article 7(2) of the Directive.

76. 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.

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

(a) General observations

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

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

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

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

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

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

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

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

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

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

87. 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.

88. 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.

89. 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 [37] or whether the affected part is to be assessed in itself.

90. In that connection, it must be observed that a relative assessment would tend to disadvantage the makers of large databases [38] 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.

91. 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.

92. In a qualitative assessment, technical or economic value is relevant in any event. [39] 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.

93. The economic value of an affected part is generally measured in terms of the drop in demand [40] 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.

37 — See inter alia von Lewinski (cited in footnote 13), paragraph 15 on Article 7.

38 — Grützmacher (cited in footnote 16), 340.

39 — Gaster (cited in footnote 8), paragraph 495; Grützmacher (cited in footnote 16), 340; von Lewinski (cited in footnote 13), paragraph 15 on Article 7.

40 — Krähn (cited in footnote 9), 162.

94. 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. [41] According to the 42nd recital, the prohibition on extraction and re-utilisation is intended to prevent detriment to investments. [42]

95. 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. [43]

96. 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. [44]

97. However, the question whether a substantial part is affected may not be allowed to depend on whether there is significant detriment. [45] 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.

98. 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

41 — See Guglielmetti (cited in footnote 25), 186; Krähn (cited in footnote 9), 161, and Leistner (cited in footnote 12), 172.

42 — In that regard, on some views, a theoretical likelihood of detriment is sufficient, see Leistner (cited in footnote 12), 173; see Speyart (cited in footnote 14), 171 (174).

43 — Carine Doutrelepont, 'Le nouveau droit exclusif du producteur de bases de données consacré par la directive européenne 96/9/CE du 11 Mars 1996: un droit sur l'information?', in: *Mélanges en hommage à Michel Waelbroeck*, 1999, 903 (913).

44 — Doutrelepont (cited in footnote 43), 913; Gaster (cited in footnote 8), paragraph 496; Leistner (cited in footnote 12), 171; von Lewinski (cited in footnote 13), paragraph 15 on Article 7.

45 — See, however, Karnell (cited in footnote 22), 1000; Krähn (cited in footnote 9), 163.

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.

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

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

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

101. The right of the maker enshrined in Article 7(1) of the Directive to prevent certain acts implies a prohibition on such acts, namely extraction and/or re-utilisation. Such acts are therefore described as 'unauthorised' in a series of recitals. [46]

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

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

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

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

105. In that connection, an error in the structure of the Directive must be pointed out.[47] As the legal definition of Article 7(2) also focuses on the whole or a substantial part, it duplicates the requirement laid down by Article 7(1) unnecessarily. In combination with Article 7(5), the legal definition laid down in Article 7(2) even entails a contradiction since Article 7(5) prohibits the extraction and re-utilisation of insubstantial parts. Analysis of extraction and re-utilisation according to the legal definition in Article 7(2) yields the odd result that Article 7(5) prohibits certain acts in relation to insubstantial parts only when such acts concern the whole or substantial parts.

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

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

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

109. On that point, it must first be emphasised that the protection covers the contents

47 — See Koumantos (cited in footnote 16), 121.

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

110. As regards the protection of data which make up the content of a database of which the user of the data is unaware, it must be pointed out that the Directive prohibits only certain acts, that is to say, extraction and re-utilisation.

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

(a) The term 'extraction' in Article 7 of the Directive

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

113. The first element is the transfer of the contents of a database to another medium, such transfer being either permanent or temporary. The wording 'by any means or in any form' implies that the Community legislature gave the term 'extraction' a wide meaning.

114. It thus covers not only the transfer to a data medium of the same type [48] but also to one of another type. [49] That means that merely printing out data falls within the definition of 'extraction'.

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

48 — Von Lewinski (cited in footnote 13), paragraph 19 on Article 7.

49 — Gaster (cited in footnote 8), paragraph 512.

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

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

(b) The term 're-utilisation' in Article 7 of the Directive

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

119. By deliberately using the term 're-*utilisation*' rather than 're-*exploitation*' the Community legislature wanted to make clear that the protection was to cover acts by non-commercial users too.

120. The means of 're-utilisation' listed in the legal definition such as 'the distribution of copies, by renting, by on-line ... transmission' are to be understood simply as a list of examples, as is clear from the additional words 'or other forms of transmission'.

121. In cases of doubt, the term 'making available' is to be construed widely [50] as the use of the additional words 'any form' in Article 7(2)(b) suggests. On the other hand, mere ideas [51] or a search for information as such using a database [52] are not covered.

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

50 — Von Lewinski (cited in footnote 13), paragraph 27 on Article 7.

51 — Von Lewinski (cited in footnote 13), paragraph 31 on Article 7.

52 — Grützmacher (cited in footnote 16), 336.

123. However, even if the national court reaches the conclusion that the data are in the public domain that does not preclude parts of the database containing data in the public domain from also enjoying protection.

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

125. As the Directive does not mention the number of transactions following the first 'making available to the public' that number cannot be relevant. Thus, if a substantial part of the contents of a database is involved that is protected even if it was obtained from an independent source such as a print medium or the internet and not from the database itself. Unlike extraction, 're-utilisation' also covers indirect means of obtaining the contents of a database. The defining element 'transfer' must therefore be interpreted widely. [53]

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

127. Further to the questions referred, it must be observed that if insubstantial parts of the database were affected, it would have to be examined whether there was repeated and systematic extraction and/or re-utilisation of those insubstantial parts (see my observations on that question in my Opinions in Cases C-203/02, C-338/02 and C-444/02).

53 — Von Lewinski (cited in footnote 13), paragraph 38 on Article 7.

VII — Conclusion

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

1. The requirement in Article 7(1) of Directive 96/9/EC of the European Parliament and of the Council of 11 March 1996 on the legal protection of databases for a link between the investment and the making of the database must be interpreted in the sense that the obtaining referred to in Article 7(1) and the investment directed at it refers, in a case such as that in the main proceedings, to investment which is directed at the determination of the dates of the matches and the match pairings themselves and the drawing up of the fixture list also includes investment which is not relevant to the appraisal of the criteria for granting protection.

2. The protection provided for by the Directive against extraction and/or re-utilisation must be understood as meaning that persons other than the authors of the fixture list may not, without authorisation, use the data in that fixture list for betting or other commercial purposes.

3. A substantial part, evaluated qualitatively and/or quantitatively, of the contents of a database may also be affected where, of the data in the fixture list, on each occasion only data necessary for one week is used in the weekly pools coupons, and where the data relating to the matches is obtained and verified from sources other than the maker of the database continuously throughout the season.