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 in Cases C-46/02, C-203/02 and C-444/02, (judgments of 9 November 2004, ECR I-10365, ECR I-10415, ECR I-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. The law relating to copyright is set out in the law (1960:729) on copyright over literary and artistic works ('the copyright law'). That law also contains provisions on related rights. A collection of data (database) can be protected by virtue of a *sui generis* right pursuant to Paragraph 49 of the copyright law, if the collection does not have the originality and independence required to qualify for copyright protection.

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

8. The 'catalogue protection' in Paragraph 49 of the copyright law in force before the amendment of the law provided that a catalogue, a table or similar work in which a large quantity of data had been collected could not be reproduced without its maker's consent. The amendment to Paragraph 49 of the copyright law provides for protection, as before, for collections of a large quantity of data and, in addition, protection for a work which is the result of a substantial invest-

ment. The scope of protection under the copyright law is thus wider than the *sui generis* protection under the database directive. The extent of the protection is the same as that applicable to works protected by copyright under Paragraph 2 of the copyright law, that is to say it confers exclusive rights to produce copies and make them available to the public. The provision is intended to implement the protection under the database directive against extraction and re-utilisation. According to the *travaux préparatoires* for the amendment to the law the protection afforded is slightly more comprehensive than is actually required by the Directive.

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

4 — Thus, reference is made in the academic writings to the errors in transposition of the Directive into Swedish law, see Jens-Lienhard Gaster, 'European *Sui generis* Right for Databases', *Computer und Recht. International 2001*, 74 (75); Gunnar W. G. Karnell, 'The European *Sui generis* Protection of Data Bases', *Journal of the Copyright Society of the U.S.A. 2002*, 983, (995).

III — Facts and main proceedings

A — *General facts*

10. In England professional football in the top divisions is organised by The Football Association Premier League Limited and The Football League Limited and in Scotland by The Scottish Football League. The Premier League and the Football League (comprising Division One, Division Two and Division Three) cover four leagues in total. Before the start of each season, fixture lists are drawn up for the matches to be played in the various divisions during the season. The data are stored electronically and are accessible individually. The fixture lists are set out inter alia in printed booklets, both chronologically and by reference to each team participating in the relevant league. The pairs are indicated as X v Y (for example, Southampton v Arsenal). Around 2 000 matches are played during each season over a period of 41 weeks.

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

B — *Specific facts*

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

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

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

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

16. Svenska Spel disputed the claim and contended that the fixture lists did not enjoy catalogue protection under paragraph 49 of the copyright law either as collections of a large quantity of data or as the result of a substantial investment. The investment in

the form of work and costs was made in order to enable the football matches planned to be played; the possibility of exploiting the matches for various games is a by-product of the purpose of the investment. Moreover, its use of the data about matches did not entail any infringement.

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

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

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

20. As regards Svenska Spel's use of the data from the fixture lists, Fixtures states inter alia that, in the game Oddset, use is made of a

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

21. Fixtures submits, first, that Svenska Spel is extracting a substantial part of the database by reproducing data about matches on pools coupons, and, second, that this constitutes repeated and systematic extraction from and re-utilisation of parts of the database's content and that this conflicts with the normal exploitation of the database and has unreasonably prejudiced the interests of the football leagues.

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

23. According to the referring court, the case turns on both the question whether the

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

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

IV — The questions referred

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

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

AB Svenska Spel contends in this case that Fixtures Marketing Limited's investment is primarily concerned with the drawing up of the fixture lists for the English and Scottish football leagues and not with the databases where the data are stored. Fixtures Marketing

Limited, for its part, argues that it is not possible to distinguish the work for the purpose of planning the game and that for the purpose of drawing up the fixture lists.

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

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

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

4. Is the directive's protection under Article 7(1) and Article 7(5) against 'extraction and/or re-utilisation' of the contents of a database limited to such use as entails a direct exploitation of the base or does the protection also cover use in cases where the contents are available from another source (second-hand) or are generally accessible?

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

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

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

V — Admissibility

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

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

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

VI — Assessment of the merits

29. The questions referred for a preliminary ruling by the national court relate to the interpretation of a series of provisions of the

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.

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

Directive and in the main to the construction of certain terms. The matters addressed fall within different fields and must be dealt with accordingly. While some of the questions concern the scope *ratione materiae* of the Directive, others relate to the requirements for granting the *sui generis* right and its content.

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

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

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

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

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

7 — 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, in: Michel M. Walter (Ed.), *Europäisches Urheberrecht* 2001, paragraph 3 on Article 7, and the writings cited by Grützmacher on page 329 in footnote 14).

1. 'Substantial investment'

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

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

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

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

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

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

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

10 — Koumantos (cited in footnote 7), 119.

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

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

41. In the present proceedings it must thus be clarified whether and in what way the so-called 'spin-off theory' can be of relevance to the interpretation of the Directive and in particular of the *sui generis* right. In the light of the reservations expressed in these proceedings regarding the protection of databases which are mere by-products, a demystification of the 'spin-off theory' seems called for. This theory, leaving aside its origins at national level, can be traced back, first, to the purpose implied by the 10th to 12th recitals of the Directive, which is to provide incentives for investment by improving the protection of investment. However, it is also based on the idea that investments should be repaid by profits from the principal activity. The 'spin-off theory' is also bound up with the idea that the Directive only protects those investments which were necessary to obtain the contents of a database. [15] All these arguments have their

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

12 — Josef Krähn, *Der Rechtsschutz von elektronischen Datenbanken, unter besonderer Berücksichtigung des sui-generis-Rechts*, 2001, 7, 138 et seq.; 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*, 958.

13 — Karnell (cited in footnote 4), 994.

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

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

value and must be taken into account in the interpretation of the Directive. However that must not result in the exclusion of every spin-off effect solely in reliance on a theory. The provisions of the Directive are and remain the decisive factor in its interpretation.

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

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

44. Moreover, in practice there may be makers of databases who are pursuing several purposes in making a database. It may be that the investments made cannot be attributed to a certain single purpose or are not separable. In such a situation, the criterion of the purpose of a database would not provide an unequivocal solution. Either the investment would be protected independently of another purpose or it would be wholly unprotected because of the other purpose. The criterion of purpose thus proves either impracticable or irreconcilable with the purpose of the Directive. Excluding the protection of databases which serve several purposes would run counter to the objective of providing incentives for investment. That would prove an enormous obstacle to investments in multifunctional databases.

45. The database at issue in the main proceedings is an example of a situation

where the database is created for the additional purpose of organising fixture lists. Creating a separate — possibly almost identical — database would be contrary to fundamental economic principles and such a requirement cannot be inferred from the Directive.

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

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

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

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

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

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

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

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

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

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

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

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

18 — Grützmacher (cited in footnote 7), 330 et seq. Matthias Leistner, *Der Rechtsschutz von Datenbanken im deutschen und europäischen Recht*, 2000, 53 et seq.

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

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

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

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

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

20 — Guglielmetti (cited in footnote 16), 184; Karnell (cited in footnote 4), 993.

21 — As regards the views put forward, see Hugenholtz, (cited in footnote 15), 161 (164 FN 19).

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

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

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

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

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

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

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

B — *Content of the protected right*

63. It must first be observed that, strictly speaking, the introduction of the *sui generis* right was intended not to harmonise existing law but to create a new right. [24] That right goes beyond previous distribution and reproduction rights. That should also be taken

23 — Calame (cited in footnote 17), 116.

24 — Common Position (EC) No 20/95, adopted by the Council on 10 July 1995 (cited in footnote 8), No 14.

into account in the interpretation of prohibited activities. Accordingly, the legal definition in Article 7(2) of the Directive assumes particular importance.

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

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

25 — Jens-Lienhard Gaster, *Der Rechtsschutz von Datenbanken*, 1999, paragraph 492.

26 — 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 7), paragraph 16 on Article 7.

27 — Common Position (EC) No 20/95 (cited in footnote 8), No 14.

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

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

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

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

68. This question seeks an interpretation of the term 'substantial part of the contents of a database' in Article 7(1) of the Directive. In contrast with other key terms in the

Directive there is no legal definition of this term. It was removed in the course of the legislative procedure, at the stage of the Common Position of the Council, to be precise.

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

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

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

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

73. In a qualitative assessment, technical or economic value is relevant in any event. [30] Thus, a part which is not large in volume but is substantial in terms of value may also be covered. Examples of valuable characteristics

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

29 — Grützmacher (cited in footnote 7), 340.

30 — Gaster (cited in footnote 25), paragraph 495; Grützmacher (cited in footnote 7), 340; von Lewinski (cited in footnote 7), paragraph 15 on Article 7.

of lists in the field of sport would be completeness and accuracy.

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

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

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

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

78. However, the question whether a substantial part is affected may not be allowed to depend on whether there is significant detriment. [36] Mere reference to such detriment in a recital, that is to say at the end of the 42nd recital, cannot be sufficient to cause the threshold for protection to be set so high. It is, moreover, debatable whether 'significant detriment' can be relied on as a criterion for defining substantialness at all since the 42nd recital could also be construed as meaning that 'significant detriment' is to be seen as an additional requirement in cases in which a substantial part is affected, that is to say in

31 — Krähn (cited in footnote 12), 162.

32 — See Guglielmetti (cited in footnote 16), 186; Krähn (cited in footnote 12), 161, and Leistner (cited in footnote 12), 172.

33 — In that regard, on some views, a theoretical likelihood of detriment is sufficient, see Leistner (cited in footnote 12), 173; see Herman M. H. Speyart, 'De databank-richtlijn en haar gevolgen voor Nederland', *Informatierecht — AMI 1996*, 171 (174).

34 — 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).

35 — Doutrelepont (cited in footnote 34), 913; Gaster (cited in footnote 25), paragraph 496; Leistner (cited in footnote 12), 171; von Lewinski (cited in footnote 7), paragraph 15 on Article 7.

36 — See, however, Karnell (cited in footnote 4), 1000; Krähn (cited in footnote 12), 163.

cases where substantialness has already been established. Even the 'serious economic and technical consequences' of prohibited acts referred to in the eighth recital cannot justify too strict an assessment in relation to detriment. Both recitals serve, rather, to emphasise the economic necessity for protection of databases.

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

80. 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.

81. 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 (fourth question)

82. 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. [37]

83. 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.

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

84. 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.

85. 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).

86. In that connection, an error in the structure of the Directive must be pointed out. [38] 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.

87. 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.

88. 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.

38 — See Koumantos (cited in footnote 7), 121.

89. 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.

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

91. 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.

92. 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

93. 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).

94. 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.

95. It thus covers not only the transfer to a data medium of the same type [39] but also to one of another type. [40] That means that merely printing out data falls within the definition of 'extraction'.

96. 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,

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

40 — Gaster (cited in footnote 25), paragraph 512.

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.

97. 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.

98. 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

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

100. 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.

101. 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'.

102. In cases of doubt, the term 'making available' is to be construed widely [41] as the use of the additional words 'any form' in Article 7(2)(b) suggests. On the other hand, mere ideas [42] or a search for information as such using a database [43] are not covered.

103. 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.

41 — Von Lewinski (cited in footnote 7), paragraph 27 on Article 7.
42 — Von Lewinski (cited in footnote 7), paragraph 31 on Article 7.
43 — Grützmacher (cited in footnote 7), 336.

104. 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.

105. 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'.

106. 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. [44]

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

3. Prohibitions concerning insubstantial parts of the contents of a database (fifth question)

108. As already pointed out, Article 7(5) of the Directive lays down a prohibition on the extraction and/or re-utilisation of insubstantial parts of the contents of a database. This provision differs from Article 7(1) firstly in that not every extraction or re-utilisation is prohibited but only defined instances. 'Repeated and systematic' acts are required. Secondly, the prohibition in Article 7(5) differs from that in Article 7(1) as regards its subject-matter. This prohibition applies even to insubstantial parts. Thirdly, to offset this lesser requirement of the affected part in comparison with Article 7(1), Article 7(5) requires unauthorised acts to have a specific effect. In that regard, Article 7(5) provides for two alternatives: the unauthorised acts

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

must either conflict with a normal exploitation of that database or unreasonably prejudice the legitimate interests of the maker of the database.

109. The provision on the connection between the act and its effect must be understood to mean that it is not necessary for every individual act to have one of the two effects but that the overall result of the acts must have one of the two prohibited effects. [45] The objective of Article 7(5) of the Directive and of Article 7(1) is the protection of the return on investment.

110. However, the interpretation of Article 7 generally raises a problem in that the German language final version of the Directive was formulated rather more weakly than the Common Position. It is now sufficient for the act to 'imply' ('hinausläuft') rather than 'have the result of' ('gleichkommt') one of the effects described. The other language versions are formulated more directly and essentially concern extraction and/or re-utilisation which conflicts with a normal exploitation of that database or which unreasonably prejudices the legitimate interests of the maker of the database.

111. In this connection related international law should be discussed. Both the effects mentioned in Article 7(5) of the Directive are modelled on Article 9(2) of the Berne Convention as revised and in fact on the first two stages of the three-step test laid down therein. However, that does not mean that both provisions must be interpreted in the same way.

112. First, Article 9 of the Berne Convention as revised serves a different purpose. That provision gives the parties to the Convention the authority to derogate from the strict rule of protection under the conditions in the three-step test. Provision is made for that sort of construction (that is to say, the option of exceptions for Member States) in Article 9 of the Directive.

113. Secondly, Article 9 of the Berne Convention as revised differs in that it does not formulate 'conflict with a normal exploitation' and 'unreasonable prejudice' as alternatives but as two of three cumulative defining characteristics. [46]

45 — Leistner (cited in footnote 12), 181; von Lewinski (cited in footnote 7), paragraph 18 on Article 7, FN 225.

46 — Sam Ricketson, *The Berne Convention for the Protection of Literary and Artistic Works: 1886-1986*, 1987, 482.

114. Other international rules similar to Article 7(5) of the Directive are to be found in Article 13 of the TRIPs Agreement (OJ 1994, L 336, p. 214) and certain WIPO agreements. However, as the latter were adopted after the Directive they should be left out of account.

115. As regards the interpretation of Article 13 of the TRIPs Agreement, similar reservations can be raised as in connection with the Berne Convention as revised. For Article 13, like Article 9 of the Berne Convention as revised, regulates the limits on and exceptions to the exclusive rights imposed by the Member States. However, unlike Article 9 of the Berne Convention as revised, both effects, that is to say 'conflict with a normal exploitation' and 'unreasonable prejudice', are given as alternatives as in the Directive.

116. These considerations demonstrate that the interpretation of the above rules of international law cannot be transferred to Article 7(5) of the Directive.

117. The acts of extraction and re-utilisation prohibited under the Directive and the effects of such acts regulated by it have in common that the purpose of the acts is not of decisive importance. Article 7(5) of the Directive cannot be interpreted in that way in the absence of any rule concerning purpose. If the Community legislature had wanted purpose to be taken into account it could have used in Article 7 of the Directive a formulation like that in Article 9(b) of the Directive.

(a) 'Repeated and systematic extraction and/or re-utilisation'

118. The requirement for 'repeated and systematic' acts is intended to prevent the undermining of protection by successive acts each concerning only an insubstantial part. [47]

119. On the other hand, it is unclear whether Article 7(5) lays down two alternative or two cumulative requirements. Any interpretation should begin with the wording of the provision. However, that does not yield any unequivocal result. Some language ver-

47 — Gaster (cited in footnote 25), paragraph 558.

sions link the two requirements with 'and',[48] others with 'or'.[49] Most of the language versions and the objective of the Directive, however, indicate that the two characteristics are to be understood as cumulative requirements.[50] A repeated but not systematic extraction of an insubstantial part of the contents of a database is therefore not covered.

120. There is a repeated and systematic act when it is carried out at regular intervals, for example, weekly or monthly. If the interval is less and the affected part small, the act will have to be carried out more frequently for the part affected overall to fulfil one of the two requirements laid down by Article 7(5) of the Directive.

(b) The expression 'normal exploitation' in Article 7(5) of the Directive

121. The term 'normal exploitation' in Article 7(5) of the Directive must be interpreted in the light of the objective of that protective clause. That is clear in particular from the preamble to the Directive. In the 42nd recital the prevention of detriment to investment is cited as a reason for the prohibition of certain acts. In the 48th recital the objective of the protection enshrined in the Directive is expressly described 'as a means to secure the remuneration of the maker of the database'.

122. That indicates a wide interpretation of the term 'normal exploitation'. Thus 'conflict with ... exploitation' must be understood not only in the technical sense that only effects on the technical usability of the affected database are covered. Rather, Article 7(5) also relates to purely economic effects on the maker of a database. It is a matter of protecting the economic use made of it under normal circumstances.[51]

123. Thus, Article 7(5) is applicable not only in relation to acts which result in the creation of a competing product which then conflicts with the exploitation of the database by its maker.[52]

48 — Most of the Romance languages, and the German, English and Greek versions.

49 — The Spanish, Swedish and Finnish versions.

50 — Leistner (cited in footnote 12), 181; von Lewinski (cited in footnote 7), paragraph 17 on Article 7.

51 — That is also consistent with the interpretation of Article 13 of the TRIPs Agreement by a WTO Panel (WT/DS160/R of 27 July 2000, 6.183).

52 — Leistner (cited in footnote 12), 181.

124. In individual cases Article 7(5) may cover the exploitation of potential markets not exploited by the maker of the database. Accordingly, it is, for example, sufficient, if the person extracting or re-utilising the data fails to pay licence fees to the maker of the database. If such acts were allowed, that would provide an incentive for other persons to extract or re-utilise the contents of the database without paying licence fees.[53] If there were thus the possibility of exploiting the database without charge, that would have serious implications for the value of licences, resulting in reduced income.

125. The rule is not limited to cases where the maker of the database wishes to use its contents in the same way as the person extracting or re-utilising the data. Nor is it relevant either that the maker of a database cannot exploit its contents in the same way as the person extracting or re-utilising it because of a statutory prohibition.

126. Finally 'conflict with ... exploitation' must not be interpreted so narrowly that only a total ban on exploitation would be prohibited. According to all the language versions other than the German the prohibition is applicable as soon as there is any conflict with exploitation, that is to say, even in the case of negative effects on a limited scale. That is also where the threshold lies above which detriment to the maker of the database can be assumed, thus triggering the prohibition.

127. As many of the parties have pointed out, it is for the national court to assess the specific acts and their effect on the database at issue in the proceedings on the basis of the above criteria.

(c) The expression 'unreasonably prejudice' in Article 7(5) of the Directive

128. As regards the interpretation of the term 'unreasonably prejudice' in Article 7(5) of the Directive it must first be recalled that there had already been discussion, in connection with the Berne Convention as revised, as to whether such an unspecific legal term was usable at all. Reference to the ways in which it differs from 'normal exploitation' is also crucial to the interpretation of the expression 'unreasonably prejudice'.

53 — See WT/DS160/R of 27 July 2000, 6.186.

129. As regards the scope of protection the provision at issue makes lesser demands of the expression 'unreasonably prejudice' than of 'normal exploitation' in so far as in the former case 'legitimate interests' are protected. The protection therefore goes beyond legal position and also covers interests, that is to say 'legitimate' and not only legal interests.

130. To offset this, Article 7(5) lays down stricter requirements as regards the effect of the unauthorised acts. They must 'unreasonably prejudice' and not merely prejudice. However, the term 'unreasonably' must not be interpreted too strictly. Otherwise the Community legislature would have required damage or even significant damage to the maker here too.

131. In the light of the language versions other than the German, it will have to be interpreted as requiring the acts to have damaged interests to a certain extent. In that connection the Directive focuses, here as elsewhere, on detriment to the maker. The main proceedings show very clearly that the protection of the maker's rights affects the economic interests of others. However, that does not mean that great importance can be attached, in the interpretation of Article 7(5) of the Directive, to the effects of the *sui generis* right on the interests of other persons or to any possible 'damage' to the relevant Member State as a result of possible effects on income from taxation. The Directive is intended to prevent detriment to makers of databases. Unlike the other effects, this objective is expressly enshrined in the Directive.

132. The maker's investments and the return on them constitute the core interest referred to in Article 7(5). Thus, here too, the economic value of the contents of the database is the starting point for assessment. The focus of the assessment is the effects on the actual or anticipated income of the maker of the database. [54]

133. We can use the expression 'normal exploitation' as a basis for assessing the extent of protection. If we interpret that term narrowly, as not covering the protection of potential markets, such as new ways of exploiting the contents of a database, [55] we will at least have to describe the impact on

54 — See WT/DS160/R of 27 July 2000, 6.229.

55 — Leistner (cited in in footnote 12), 182.

potential markets as prejudice to legitimate interests. Whether such prejudice is unreasonable will depend on the facts of the individual case. However, the fact that the person extracting or re-utilising the data is a competitor of the maker of the database cannot be decisive.

134. In this connection, too, it must be recalled that it is for the national court to investigate the specific facts and to ascertain whether they must be considered to 'unreasonably prejudice' the legitimate interests of the maker of the database at issue in the proceedings.

VII — Conclusion

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

1. In assessing whether a database is the result of a 'substantial investment' within the meaning of 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, the purpose of the investment is not material. Investment for the purpose of drawing up the fixture lists in a databank must also be taken into account.

2. The expression 'a substantial part, evaluated qualitatively ... of the contents of that database' in Article 7(1) of the Directive is to be interpreted as meaning that the technical or commercial value of the affected part must be taken into account. The expression 'a substantial part, evaluated quantitatively ... of the contents of that database' in Article 7(1) of the Directive is to be interpreted as meaning that the amount of the affected part is relevant. However, in both cases it is not solely the relative amount of the affected part as a proportion of the contents as a whole that is relevant.

3. The protection granted by Article 7(1) and Article 7(5) of the Directive against the 'extraction' of the contents of a database is confined to practices which entail direct exploitation of the database. The protection granted by Article 7(1) and Article 7(5) of the Directive against 're-utilisation' also covers the exploitation of the contents of a database where those contents are available from another source.

4. The expression 'normal exploitation' in Article 7(5) of the Directive must be interpreted as meaning that economic exploitation can be prevented by the owner of the *sui generis* right on potential markets too. The expression 'unreasonably prejudice' in Article 7(5) must be interpreted as referring to damage to the legitimate economic interests of the maker which goes beyond a certain threshold.