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Opinion of Advocate General Stix-Hackl in Cases C-46/02, C-203/02, C-338/02 and C-444/02

Fixtures Marketing Ltd v Oy Veikkaus AB, The British Horseracing Board Ltd and Others v William Hill Organisation Ltd, Fixtures Marketing Ltd v Svenska Spel AB, Fixtures Marketing Ltd v Organismos prognostikon agonon podosfairou (OPAP)

ACCORDING TO ADVOCATE GENERAL STIX-HACKL, THE MAKER OF A DATABASE HAS A RIGHT TO PROTECTION UNDER THE DATABASE DIRECTIVE EVEN WHERE THAT DATABASE WAS CREATED PRIMARILY FOR THE PURPOSE OF ORGANISING FOOTBALL FIXTURES OR HORSERACING

Bookmakers' use of data constitutes a prohibited re-utilisation even if they do not obtain the data directly from the database but from other independent sources such as print media or the internet.

Advocate General Stix-Hackl is today delivering her Opinion in four sets of proceedings concerning what is known as the *sui generis* right under the Database Directive¹ and its scope in the area of sporting bets. The plaintiffs in the national proceedings, Fixtures Marketing Ltd and the British Horseracing Board and Others, consider that their rights as makers of databases have been infringed by other companies.

Facts of the four cases

Fixtures Marketing Ltd grants licences for the exploitation outside the United Kingdom of the fixture lists for the top English and Scottish *football leagues*, the

¹ Directive 96/9/EC of the European Parliament and of the Council of 11 March 1996 on the legal protection of databases

Premier League and the Football League. This distribution of licences is carried out on behalf of the organisers of the League games. Around 2000 matches are played each season. The fixture lists drawn up at the start of each season by the organisers of the Leagues are stored electronically and set out inter alia in printed booklets. According to Fixtures Marketing Ltd, the costs of developing and administering the fixture lists in England is about GBP 11.5 million (or EUR 17,207,840) per annum and licensing revenues in respect of the data about fixture lists in the English database are only about GBP 7 million (or EUR 10,474,337) per annum.

Oy Veikkaus AB, a Finnish pools operator, uses, inter alia, data relating to games in the Premier League and the Football League for its betting activities. In 1998/1999 it used all Premier league matches during the football season. Veikkaus did not hold a licence to do so from Fixtures Marketing. It obtains the data from the internet, newspapers or directly from the football clubs and continuously checks their correctness. Veikkaus' annual turnover from betting on football matches in England amounts to several tens of millions of Euros.

In Sweden 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. Svenska Spel uses matches from the leagues on pools coupons and in a special programme. According to Svenska Spel, the data on the pools coupons come from British and Swedish daily newspapers, from Teletext, from the football teams in question, from an information service and from the publication 'Football Annual'. Svenska Spel has no licence to exploit those data from Fixtures Marketing. According to Fixtures Marketing, the profit made by Svenska Spel in the games, for which it uses between 21% and 90% of the total number of matches in the fixture lists of the English football leagues, amounts to SEK 600 to 700 million (or EUR 65,955,809 to EUR 76,948,444) per annum in each case.

In Greece, Fixtures brought a number of actions against the limited company Organismos Prognostikon Agonon Pododfairou AE ('OPAP'). It claims that OPAP has unlawfully and without permission repeatedly extracted from the lists of football fixtures in England and Scotland a substantial amount of data regarding fixtures and transferred them to various internet sites which OPAP distributes and makes available to the Greek public.

The British Horseracing Board ('BHB'), the governing authority for the British horse racing industry, is responsible for the compilation of data related to horseracing. 'The BHB Database' contains racing information and the official document of registration of thoroughbred horses ('Stud Book') in the United Kingdom. It contains details of registered horses, jockeys, fixture lists comprising, inter alia, race conditions, entries and runners. The cost of continuing to maintain the BHB Database and keep it up to date is approximately GBP 4 million (or EUR 5,985,335) per annum and involves approximately 80 employees and extensive computer software and hardware. The racing information is made available to radio and television broadcasters, magazines and newspapers and to members of the public who follow horse racing on the morning of the day before the race. The names of all the participants in all the races in the United Kingdom are made available to the public on the afternoon before the race through newspapers and Ceefax/Teletext. On the day before a race, bookmakers

receive, through various subscriber services, a specific compilation of information without which bets could not be placed.

William Hill Organisation Ltd is one of the leading providers of odds in horseracing. In addition to traditional sales methods such as licensed betting offices and telephone betting it offers internet betting for all the major horse races in the United Kingdom. The information displayed on its internet sites comes from newspapers and from an information service for subscribers which in turn obtains its information from the BHB Database. Neither the newspapers nor the information service have any right to sublicense William Hill to use any information derived from the BHB Database on its internet site. The information on the William Hill internet site only covers a small part of the whole of the BHB Database and is arranged in a different way. If the customer requires any other information to arrive at an informed view of the horse's chances of success, such information can be found elsewhere, for example, in the newspapers.

Fixtures Marketing and the BHB and Others consider that the companies which are using their data for the purposes of taking bets on football matches or horseracing have infringed their *sui generis* right under the Database Directive. The Finnish Vantaan Käräjäoikeus, the Court of Appeal of England and Wales, the Swedish Högsta Domstolen and the Greek Monomeles Protodikeio Athinon before which these proceedings are pending have referred several questions to the Court of Justice on the subject of the effect of the *sui generis* right under the Database Directive.

Opinion

Advocate General Stix-Hackl takes the view, first, that the term database, as the fundamental criterion for the applicability of the Directive, should be interpreted widely. Thus, for example, lists of football fixtures are also covered.

The right provided for by the Directive allows the maker of a database to prevent the use of the data it contains under certain circumstances. It is intended to protect databases or their contents without protecting the information they contain as such. It thus indirectly protects the investment involved in the making of the database.

Under the Directive the right to protection requires a substantial investment in qualitative or quantitative terms to have been involved in the making of the database. The purpose of the database is not a criterion for the assessment of the eligibility for protection of a database. It is thus irrelevant whether the databases were made by Fixtures Marketing Ltd and the British Horseracing Board solely for the purpose of organising betting and that the database was possibly only a by-product of the investment. It is for the national court to assess whether there was a substantial investment. In so doing that court would have to take account of the matters to be taken into account in drawing up the fixture lists.

Advocate General Stix-Hackl then turns to the specific object of the investment. Only investment in the obtaining, verification and presentation of the contents of a database is capable of protection. The term 'obtaining' does not cover the mere generation of data. However, where the creation of data coincides with its collection and screening, and is inseparable from it, the protection of the Directive kicks in. The term verification also includes checking whether a database is up to date.

Next, Advocate General Stix-Hackl discusses which acts the maker can prevent and which can therefore be considered to be prohibited. She finds, first, that the Directive is also intended to prohibit possible breaches consisting in the rearrangement of the contents of a database. She also takes the view that, in any event, where half of the games a database contains are involved, there will be extraction and/or re-utilisation of a substantial part of the contents of a database which is prohibited generally – that is to say, regardless of frequency or of any systematic approach. The proportion can be assessed over a week or over the season. Extraction and/or re-utilisation of insubstantial parts of the contents of a database is prohibited if it is a repeated and systematic act, that is to say, it is carried out at regular intervals, and prevents the economic exploitation of the database by the owner of the right on potential markets or damages his legitimate economic interests to a degree that goes beyond a certain threshold. Unlike extraction, however, re-utilisation does not require that the information be obtained from the database itself; rather, the prohibition on re-utilisation is also applicable if the data are taken from an independent source, such as a print medium or the internet.

Finally, the extraction and/or re-utilisation is prohibited as regards a database to the contents of which there has been a substantial change, evaluated qualitatively or quantitatively, which is thus the result of a substantial new investment, evaluated qualitatively or quantitatively. Such a change gives rise to a new database. In the case of dynamic databases the whole database and not only the changes as such enjoy a new term of protection.

Important: The Opinion of the Advocate General is not binding on the Court. Her role is to suggest to the Court, in complete independence, a legal solution to the case pending before it. The Court of Justice will now deliberate upon this case. Judgment will be delivered at a later date.

Unofficial document for media use which is not binding on the Court of Justice.

Languages available: English, French, German, Greek, Swedish and Finnish.

*For the full text of the Opinion please consult our Internet page at
www.curia.eu.int*

in principle it will be available from midday (CET) today

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