EU Databases: One Evaluation on Recitals through the Look of the Court

Albena Dobreva

1 University of National and World Economy, Law Faculty, Sofia, 1000, Student town, Bulgaria

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Abstract: Abstract: In February 2022, the European Commission published the proposal of the Data Act, Art. 35 which deals with the sui generis right of database manufacturers. The Database Directive 1996/9/EC has survived again and is about to enter the EU cloud federation almost intact. This fact received several academic headlines while almost overshadowing a landmark decision of the Court of Justice of the European Union. It is the decision in the case C-762/19 – SIA “CV-Online Latvia” v SIA “Melons”, which signals the beginning of a significant change in the existing jurisprudence and has the potential to focus the blurred image of The Directive. The Court attached great importance to recital 42 from her, which gives rise to well-founded interest. This is because the qualitative and quantitative weight of recitals in the jurisprudence of the Court of Justice of the EU is little studied and not at all in the field of the legal protection of databases. It is precisely some selected aspects of the place and the meaning of recitals in the judgments of the Court of Justice of the EU in proceedings on preliminary rulings that occupy a central area in the present study.

1. INTRODUCTION

Recitals are a mandatory part of the structure (preamble) of the legal acts of the Union, the content of which motivates the main provisions of the enacting terms of the act and which do not contain provisions of a normative nature. In an attempt to demystify their legal nature, an opinion is expressed that the reason why recitals are binding may be a political one based upon a need for reassurance (Klimas & Vaiciukaitė, 2008). According to the Court of Justice of the European Union (hereinafter CJEU), “the undoubted legal value of the recitals is to give the parties to a dispute the opportunity to defend their interests and to enable the Court of Justice of the European Union to exercise its power of review” (see Case 24/62 Germany v Commission; Case C-367/95 P Commission v Sytraval and Brink’s France, paragraph 63; Case C-413/06 P Bertelsmann and Sony v Impala, paragraph 166; Case 2/56 Geitling v High Authority; Case 73/74 Groupement des fabricants de papiers peints de Belgique and Others v Commission (“Papiers peints”), paragraph 30 and Case C-439/11 P Ziegler SA v European Commission, paras 81 and 82). The same – and according to Joint Practical Guide of the European Parliament, the Council and the Commission for persons involved in the drafting of European Union legislation (para 10.2) (European Union, 2015). Whether and how in specific court cases the recitals have justified this purpose is the main subject of the present study. For this purpose, a quantitative and qualitative study of the recitals in the judicial acts of the CJEU at References for preliminary rulings was conducted on the basis of Article 267 of the Treaty on the Functioning of the EU. The judicial acts were issued in connection with the implementation of Directive 96/9/EC of the European Parliament and the Council of March 11, 1996 on the legal protection of databases (hereinafter and only Directive, Database Directive) in the period 2004-2021.
2. DISCUSSION

The following court cases were studied, listed here chronologically: Case C-338/02, Fixtures Marketing Ltd v. Svenska Spel AB, ECLI:EU:C:2004:696; Case C-46/02, Fixtures Marketing Ltd v. Oy Veikkaus Ab, ECLI:EU:C:2004:694; Case C-444/02, Fixtures Marketing Ltd v. Organismos prognostikon agonon podsosfairou AE (OPAP), ECLI:EU:C:2004:697; Case C-203/02, The British Horseracing Board and Others v. and Others v William Hill Organisation Ltd, ECLI:EU:C:2004:697; Case C-304/07 Directmedia Publishing GmbH v. Albert-Ludwigs-Universität Freiburg, ECLI:EU:C:2008:552; Case C-545/07, Apis-Hristovich EOOD v. Lakorda AD, ECLI:EU:C:2009:132; Case C-604/10, Football Dataco Ltd and Others v. Yahoo! UK Ltd and Others, ECLI:EU:C:2012:642; Case C-173/11 Football Dataco Ltd and Others v. Sportradar GmbH, Sportradar AG, ECLI:EU:C:2012:642; Case C-202/12 – Innoweb v. Wegener ICT Media BV, Wegener Mediaventions BV, ECLI:EU:C:2013:850; Case C-30/14 – Ryanair Ltd PR Aviation BV, ECLI:EU:C:2015:10; Case C-490/14 – Freistaat Bayern v. Verlag Esterbauer GmbH, ECLI:EU:C:2015:735; Case C-762/19 – „CV-Online Latvia“ SIA v. „Melons“ SIA, ECLI:EU:C:2021:434. The occasion for this study is the circumstance that a specific recital became the starting point for amendment in the practice of the CJEU. In the context of the Database Directive, the significant legal value of the recitals is emphasized without downplaying their political importance. The occasion for the ruling of the CJEU with a judgment is the request for a preliminary ruling of Rīgas apgabaltiesas Civillietu tieas kolegija (The referring court), which, by rejecting the Acte clair doctrine in the specific case, referred the following question to the Court of the EU: “(1) Should the defendant’s activities, which consist in using a hyperlink to redirect end users to the applicant’s website, where they can consult a database of job advertisements, be interpreted as falling within the definition of “re-utilisation” in Article 7(2)(b) of Directive 96/9, more specifically, as the re-utilisation of the database by another form of transmission? (2) Should the information containing the meta tags that is shown in the defendant’s search engine be interpreted as falling within the definition of “extraction” in Article 7(2)(a) of Directive 96/9, more specifically, as 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?” The Court of Justice of the EU subsequently opened the case C-762/19 CV-Online Latvia v. Melons and, after reformulating the questions put to it by the referring court, delivered its judgment on 3 June 2021. This decision is noted as important because it "introduces the raison d’être of database protection into the infringement test" (Derclaye & Husovec, 2022). The essence of this consists of the following. First, extraction and reuse (within the meaning of Article 7(2)(a) and (b) of the Directive) without the consent of the person who created them is prohibited by Article 7(1) of Directive 96/9, provided have the effect of depriving that person of income intended to enable him or her to redeem the cost of that investment (paragraph 37 of the decision). Second, the main criterion for balancing the legitimate interests at stake must be the potential risk to the substantial investment of the maker of the database concerned, namely the risk that that investment may not be redeemed (paragraph 44 of the decision). Therefore, the Court concludes (paragraph 46 of the judgment) the referring jurisdiction in the main proceedings must check not only has been made whether a substantial investment for the obtaining, verification or presentation of the contents of the database, but also secondly (and here is the change in the previous judicial practice), whether the extraction or re-utilisation in question constitutes a risk to the possibility of redeeming that investment. Thus it alter the trajectory of the protection in Derclaye's words, which the Court justified mainly with recital 42 of the Directive. The text of the recital is as follows: “Whereas the special right to prevent unauthorized extraction and/or re-utilization relates
to acts by the user which go beyond his legitimate rights and thereby harm the investment; whereas the right to prohibit extraction and/or re-utilization of all or a substantial part of the contents relates not only to the manufacture of a parasitical competing product but also to any user who, through his acts, causes significant detriment, evaluated qualitatively or quantitatively, to the investment”.

The quantitative study carried out on the judicial acts of the CJEU on preliminary rulings based on Article 267 TFEU on issues concerning the application of the Database Directive gives the following results, shown in Table 1.

**Table 1. Results of a quantitative study of recitals in the judicial practice concerning preliminary rulings on Directive 96/9/EC**

<table>
<thead>
<tr>
<th>Case</th>
<th>Recitals</th>
<th>Count</th>
</tr>
</thead>
<tbody>
<tr>
<td>1. Case C-46/02, Fixtures Marketing Ltd</td>
<td>7, 9, 10, 12, 19, 39, 40</td>
<td>7</td>
</tr>
<tr>
<td>2. C-338/02, Fixtures Marketing Ltd</td>
<td>7, 9, 10, 12, 19, 20, 39, 40, 42, 47, 43, 48, 55</td>
<td>13</td>
</tr>
<tr>
<td>3. Case C-444/0, Fixtures Marketing Ltd</td>
<td>7, 9, 10, 12, 13, 14, 17, 21, 27, 39, 40</td>
<td>11</td>
</tr>
<tr>
<td>4. C-203/02, The British Horseracing Board Ltd and Others</td>
<td>7, 9, 10, 12, 19, 39, 41, 42, 43, 44, 46, 48</td>
<td>11</td>
</tr>
<tr>
<td>5. C-304/07, Directmedia Publishing GmbH</td>
<td>7, 13, 14, 21, 38–42, 44, 47, 48</td>
<td>12</td>
</tr>
<tr>
<td>6. C-545/07, Apis-Hristovich EOOD</td>
<td>23, 38, 46</td>
<td>3</td>
</tr>
<tr>
<td>7. C-604/10, Football Dataco Ltd</td>
<td>1–4, 9, 10, 12, 15, 16, 18, 26, 27, 39, 60</td>
<td>14</td>
</tr>
<tr>
<td>8. C-173/11, Football Dataco Ltd</td>
<td>0</td>
<td></td>
</tr>
<tr>
<td>9. C-202/12, Innoweb</td>
<td>39, 42, 48</td>
<td>3</td>
</tr>
<tr>
<td>10. C-30/14, Ryanair Ltd</td>
<td>34</td>
<td>1</td>
</tr>
<tr>
<td>11. C-490/14, Freistaat Bayern</td>
<td>9, 10, 12, 14 and 17</td>
<td>5</td>
</tr>
<tr>
<td>12. C-762/19, “CV-Online Latvia” SIA</td>
<td>7, 39–42, 47, 48</td>
<td>7</td>
</tr>
</tbody>
</table>

The following is striking. In only one judgment (C-173/11, Football Dataco Ltd and Others, ECLI:EU:C:2012:642) did the Court not refer to either recital. The most recitals – 14 (fourteen) – the Court used in its judgment in the case C-604/10, Football Dataco Ltd, ECLI:EU:C:2012:642. In total, in all examined conclusions, the Court used 33 (thirty-three) of the total existing 60 recitals in the Database Directive, which is 55% usability. For the first time, the recitals appear systematically arranged at the beginning of the judgment in the section" Legal context", "European Union law", in the judgment in case C-604/10 Football Dataco Ltd and Others v Yahoo! UK Ltd and Others (paragraph 5). The Court followed the same standard of exposition in its subsequent judgment, namely: Case C-202/12 – Innoweb BV v Wegener ICT Media BV, Wegener Mediaventions BV; Case C-490/14 – Freistaat Bayern v Verlag Esterbauer GmbH and in Case C-762/19 "CV-Online Latvia" SIA v "Melons" SIA (see para 3). This may mean that the Court regards the recitals as part of Union law and not, for example, as an introduction to it. The analysis also shows the following. In one part of the judgments the Court (n.d.) refers to the recitals alone, for example:

- recital 17 on how the expression "database" is to be understood, namely as ‘literary, artistic, musical or other collections of works or collections of other material such as texts, sound, images, numbers, facts, and data’ (judgment in Case C-490/14, ECLI:EU:C:2015:735, paragraph 14, and judgment in Fixtures Marketing, C-444/02, ECLI:EU:C:2004:697, paragraph 23);
- recital 14, which makes it clear that the protection afforded applies to both electronic and non-electronic databases (judgment in case C-490/14, ECLI:EU:C:2015:735, paragraph 14);

It should be noted that the Court's conclusions follow directly and immediately from the relevant recitals and independently justify the interpretation. This is clear also from the expressions used ("as referred to in recital", “as for recitals”, “as follows from", "as is apparent from recitals...", 379
"apparent from recital... in the preamble thereto that", "according to", "according to which", "they emphasize", "grounded an interpretation", "in the light of", “illustrate the concept”). For example:

- "Secondly, as is apparent from recital 16 of Directive 96/9, the notion of the author’s own intellectual creation refers to the criterion of originality” (Case C-604/10, Football Datacco Ltd and others v. Yahoo! UK Ltd And others, ECLI:EU:C:2012:115, paragraph 37) or paragraph 49 below "… as is apparent from recital 60 of Directive 96/9, Article 3 of that directive carries out a ‘harmonization of the criteria for determining whether a database is to be protected by copyright’, and further paragraph 51: “As for recitals 18, 26 and 27 of Directive 96/9, highlighted by Football Datacco and Others, those recitals note the freedom which authors of works have to decide whether to include their works in a database and the absence of effect which the incorporation of a protected piece of work in a protected database has on the rights protecting the work thus incorporated”;

- “While it is not necessary for the systematic or methodical arrangement to be physically apparent, according to the 21st recital…” (Case C-444/02, EU:C:2004:697, paragraph 30);

- “The quantitative assessment refers to quantifiable resources and the qualitative assessment to efforts which cannot be quantified, such as intellectual effort or energy, according to the 7th, 39th and 40th recitals of the preamble to the directive.” (ibid., para. 44);

- "The use, in a number of the recitals in the preamble to Directive 96/9, including, in particular recitals 7 and 38, of the verb ‘to copy’ to illustrate the concept of extraction indicates that, in the mind of the Community legislature, that concept is intended, in the context of that directive, to cover acts which allow the database or the part of the database concerned to subsist in its initial medium” (Case C-304/07 Directmedia Publishing GmbH, ECLI:EU:C:2008:552, paragraph 30);

- Recital 14 in the preamble to Directive 96/9, according to which ‘protection under this Directive should be extended to cover non-electronic databases’, as well as recital 21 in the preamble to that directive, according to which the protection afforded by the directive does not require the materials contained in the database to ‘have been physically stored in an organised manner’, also supports an interpretation of the concept of extraction unencumbered, in the same way as that of databases, by formal, technical or physical criteria.” (ibid., paras 48 dnd 49);

- "Recital 38 .... seeks to illustrate the particular risk for database makers of the increasing use of digital recording technology. It cannot be interpreted as reducing the scope of the acts subject to the protection of the sui generis right merely to acts of copying by technical means.” (ibid., paras 48 dnd 49);

- "in the light of the 46th recital in Directive 96/9, according to which the existence of the sui generis right does not give rise to the creation of a new right in the works, data or materials themselves, it has been held moreover that the intrinsic value of the materials affected by the act of extraction and/or re-utilisation does not constitute a relevant criterion for assessment in that regard.” (Apis-Hristovich EOOD v Lakorda AD, ECLI:EU:C:2009:132, para 67).

Other recitals are used by the Court consistently together, most often the 9th, 10th and 12th recitals to clarify the purpose of the directive. “As evidenced by recitals 9, 10 and 12 in the preamble thereto, the legal protection introduced thereby is aimed at stimulating investment in data storage and processing systems in order to contribute to the development of an information market against a background of exponential growth in the amount of information generated and processed annually in all sectors of activity” – concludes the Court in the judgment in Case C-490/14, ECLI:EU:C:2015:735, paragraph 16 (see also judgments in Case C-46/02, Fixtures Marketing Ltd v Oy Veikkaus Ab, ECLI:EU:C:2004:694, paragraph 33; C-338/02, Fixtures Marketing Ltd v Svenska Spel, ECLI:EU: C:2004:696, paragraph 23; Case C-444/02
Fixtures Marketing Ltd v Organismos prognostikon aganon podosfairou AE (OPAP), ECLI:EU:C:2004:697, paragraph 39; C-203/02 – The British Horseracing Board and Others, ECLI:EU:C:2004:695, paragraph 30; Case C-604/10, Football Dataco Ltd and others v Yahoo! UK Ltd And others, ECLI:EU:C:2012:115, paragraph 34; case C-490/14 Freistaat Bayern v Verlag Esterbauer GmbH, ECLI:EU:C:2015:735, paragraph 16).

Part of the recitals are stated in a "from-to" manner, such as: "recitals 1-4" – to justify the objective of the Directive to eliminate the existing differences between national legislations from the point of view of the legal protection of databases (case 604/10, Football Dataco Ltd, ECLI:EU:C:2012:115, paragraph 48); "recitals 38-42" – on the purpose of the sui generis right (Case C-304/07 Directmedia Publishing GmbH ECLI:EU:C:2008:552, paragraph 33).

It also occurs as a reference to the recitals of the preamble in general, as one of the arguments for deriving the intention of the legislator. It is thus argued in paragraph 28 of Case C-444/02: ‘A reading of the recitals of the preamble to the directive reveals that, given the ‘exponential growth, in the Community and worldwide, in the amount of information generated and processed annually in all sectors of commerce and industry’ as the 10th recital states, the legal protection provided by the directive is intended to encourage the development of systems performing a function of ‘storage’ and ‘processing’ of information, according to the 10th and 12th recitals’.

The recitals are also used to argue the Court’s conclusions in relation to the interpretation of provisions with a normative nature. For example, to retrieve the content of the expression “investment in … the obtaining … of the contents’ of a database” in Article 7(1) of the directive the Court interpreted them in relation to recitals 9, 10 and 12 and concluded that the expression ‘investment in … the obtaining … of the contents’ be understood to refer to the resources used to seek out existing independent materials and collect them in the database, and not to the resources used for the creation as such of independent materials (In Case C-203/02, The British Horseracing Board Ltd and Others, ECLI:EU:C:2004:695 paragraph 31). Likewise in the following two paragraphs, the Court continues to support its conclusions with arguments from the recitals: "That interpretation is backed up by the 39th recital of the preamble to the directive, according to which the aim of the sui generis right is to safeguard the results of the financial and professional investment made in ‘obtaining and collection of the contents’ of a database." (paragraph 32). “The 19th recital of the preamble to the directive, according to which the compilation of several recordings of musical performances on a CD does not represent a substantial enough investment to be eligible under the sui generis right, provides an additional argument in support of that interpretation” (paragraph 33). A similar interpretive approach is often found in other decisions to answer the question referred to for a preliminary ruling. Likewise in Case C-604/10, Football Dataco Ltd and Others, ECLI:EU:C:2012:115, from the comparison of the relevant text of Article 3(1) and Article 7(1) of Directive 96/9, as well as from other provisions or recitals thereof, and in particular from Article 7(4) and recital 39 thereof, the Court reached the important conclusion that copyright and the right "sui generis" are “to two independent rights whose object and conditions of application are different” (paragraph 27). In Case C-604/10, as interpreting Article 3(2) in conjunction with Recital 15 of Directive 96/9 the Court makes an important conclusion " that the copyright protection provided for by that directive concerns the "structure" of the database, and not its "contents" nor, therefore, the elements constituting its contents" (paragraph 30). In case C-545/07 Apis-Hristovich EOOD v Lakorda AD, ECLI:EU:C:2009:132, the Court interpreted the concept of “extraction” in relation to recital 38: “As is confirmed by the 38th recital in Directive 96/9, it is also immaterial, for the purposes
of interpreting the concept of extraction, that the transfer of the contents of a protected database to another medium result in an arrangement or an organisation of the material concerned which is different from that in the original database” (paragraph 47).

We come to the case in which the Court gave great weight to one recital that could be interpreted as a change to the infringement test. As stated at the beginning, it is a judgment in case C‑762/19 CV-Online Latvia SIA v. Melons SIA. Recital 42 became the basic argument for the Court to rule that the main criterion for balancing the legitimate interests at stake must be the potential risk to the substantial investment of the maker of the database concerned, namely the risk that that investment may not be redeemed (paragraph 44). This paragraph of the decision is sufficient to highlight three new points compared to the previous practice of the Court: the available legitimate interests (database creators, users and competitors) must be assessed with a view to a fair balance between them; the possible impact on the essential investment is raised as a main criterion; if the extraction and/or re-utilisation in question poses a risk to the return potential of that investment, then the criterion is met. It turns out that if it does not pose such a risk, there is no violation, even if all the other conditions are present. In practice, this means that law enforcement authorities in the Union have to check a wider range of circumstances in each specific case. And for the litigants – especially for the database makers, who are most often in their procedural quality as plaintiffs – the burden of proof becomes Sisyphean and one might even say hypothetically. This is because proving the existence of a risk, as well as whether the risk is direct or eventual, means proving a wide range of facts and/or the degree of their likely manifestation and the causal relationships between them. However, the evaluation of this change in the infringement test is not the subject of the study, but only in its context highlighting the importance of the recitals in the legal acts of the Union. And finally, the analysis shows that, notwithstanding the above, the Court does not consider that the recitals have an independent normative value. The following is an example from the judgment of the Court In Case C-304/07: “That is why Article 13 of Directive 96/9, which confers normative value on the statement, contained in recital 47 in the preamble to that directive, that the provisions of that directive ‘are without prejudice to the application of Community or national competition rules’, states that that directive is to be without prejudice to provisions concerning inter alia laws on restrictive practices and unfair competition.” (paragraph 56).

3. CONCLUSION

This analysis is not intended to be exhaustive, but sufficient to support the conclusions. Recitals as a mandatory element of the preamble of Union acts are often more numerous than normative provisions. For example, in Directive 96/9, the preamble contains 60 recitals and only 16 normative provisions. This is a 3.75:1 ratio. This quantitative preponderance of recitals is also observed in other directives. This is an interesting phenomenon against the background of the requirement that the recitals be concise and motivate the individual provisions of the act, while there is no requirement to justify each provision separately. In its judgments in proceedings under Art. 267 of the TFEU in the field of database protection, the EU court generously draws a variety of arguments from the recitals in the preamble to Directive 96/9/EU, which is also seen in other areas and directives. In order to draw more adequate conclusions about the exact role of recitals in the interpretation of EU law, more comprehensive and long-term studies are needed. However, it is clear: recitals should more often be the focus of scholarly interest, not only as a phenomenon unique to EU law. But also to clarify their actual and potential role in relation to their vectors of impact in the legal acts of the Union.
References


