Database Rights in the EU's Data Strategy: A Question of Sport?

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1. THE INTRODUCTION OF THE DATABASE RIGHT

When in the early 1990s, the EU first launched plans to introduce the *sui generis* database right, Bernt Hugenholtz was one of its most vocal critics.[1] For a while, on the many occasions he was invited to speak about copyright in prestigious European and American academic institutions, for policy-makers across the globe and for thinktanks, the protection of databases seemed to be his favourite theme. Two criticisms stand out for me in his work. First, that it is unclear whether a special intellectual property right in databases is necessary to have, rather than a more modest form of protection, e.g. based in unfair competition law. And secondly, if there is a case to be made for the *sui generis* right, then surely databases that are a 'spin-off', that is, a by-product of an organisations' regular activities, should be treated differently, especially if they concern single source data.

It cannot be a coincidence – but then again, in the larger scheme of things it probably is – that the first cases brought before the European Court of Justice on the new *sui generis* database right were about sports and spin-offs. Below I shall turn to this seminal quartet of decisions concerning the use of horseracing

1. Unfortunately for non-Dutch speaking persons, Hugenholtz' most severe criticism is in Dutch: 'De Databankrichtlijn eindelijk aanvaard. Een zeer kritisch commentaar', 4 *Computerrecht* (1996), 131–138. See also P.B. Hugenholtz, 'Implementing the database directive', in P. Hugenholtz, J. Kabel and G.H.J. Mom, *Intellectual Property and Information Law: Essays in Honour of Herman Cohen Jehoram* (Kluwer Law International, The Hague, 1998), 183–200, calling the lawful user an 'especially tragic figure in the Directive's scheme of things …'.

data and fixtures of the English and Scottish football leagues.[2] For now, it is worth noting that in its first quarter century, the Database Directive's *sui generis* right was the subject of a modest thirteen judgments given on preliminary references. Three concerned the activities of specialised search engines (*Innoweb*, *Ryanair*, *CV-Online Latvia*),[3] three related to the use of government data (company register data in *Compass-Datenbank*, legal data in *Apis-Hristovich*, mapping data in *Freistaat Bayern*)[4] and one dealt with what could be labelled university research data (*Directmedia Publishing*, on the re-use of a university professor's list of important poems).[5] The remaining six were about sports data, and resulted in the four first ever judgments on the Database Directive delivered on 4 November 2004, and two more on football betting data in 2012.[6]

In 2021, the European Commission is conducting a review of the Database Directive, as part of its wider package of measures to put in place a regulatory and support framework to implement its data strategy. The 'Data Strategy' has been in the making for nearly a decade. Data is held to be an essential resource for economic growth and societal progress.[7] The European Commission states that action is required because

> a single market for data will make the EU more competitive globally and will enable innovative processes, products and services. Industrial and commercial data are key drivers of the digital economy. The European Data Strategy will make more data available for use in the economy and society, while keeping those who generate the data in control.[8]

2. CJEU 9 November 2004, case C-444/02, *Fixtures Marketing/OPAP*, CLI:EU:C:2004:697; case C-338/02, *Fixtures Marketing/Svenska Spel AB*, ECLI:EU:C:2004:696; case C-203/02, *British Horse Racing Board and others/William Hill*, ECLI:EU:C:2004:695; case C-46/02, *Fixtures Marketing/Oy Veikkaus*, ECLI:EU:C:2004:694; see M. Davison and P.B. Hugenholtz, 'Football Fixtures, Horseraces and Spin-offs: The ECJ Domesticates the Database Right', *EIPR* (2005), 113.
3. CJEU 19 December 2013, case C-202/12, *Innoweb/Wegener*, ECLI:EU:C:2013:850; CJEU 15 January 2015, case C-30/14, *Ryanair/PR Aviation*, ECLI:EU:C:2015:10; CJEU 3 June 2021, case C-762/19, *CV-Online Latvia/Melons*, ECLI:EU:C:2021:434.
4. CJEU 2 July 2012, case C-138/11, *Compass-Datenbank/Austria*, ECLI:EU:C:2012:449; C-545/07; CJEU 5 March 2009, case C-545/07, *Apis-Hristovich/Lakorda*, ECLI:EU:C:2009:132, CJEU, 29 October 2015, case C-490/14, *Freistaat Bayern/Verlag Esterbauer GmbH*, ECLI:EU:C:2015:735 (preliminary question asked concerned the definition of a database).
5. CJEU 9 October 2008, case C-304/07, *Directmedia Publishing/Albert-Ludwigs-Universität Freiburg*, ECLI:EU:C:2008:552.
6. CJEU 18 October 2012, case C-173/11, *Football Dataco and others/Sportaradar AG*, ECLI:EU:C:2012:642; CJEU 1 March 2012, case C-604/10, *Football Dataco and others/Yahoo! and others,* ECLI:EU:C:2012:115
7. European Commission. Directorate General for Communication. (2020). *The European data strategy: shaping Europe's digital future.* Publications Office. https://data.europa.eu/doi/10.2775/645928.
8. Prior policy papers include: Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions: Towards a thriving data-driven economy (COM(2014) 442 final); Communication from the Commission to the European Parliament, the Council, the European Economic and

The Data Strategy includes measures meant to promote data-sharing, ensure the free flow of (non-personal) data while safeguarding confidentiality and a return on investment, and make more public sector data available for re-use. Buzzwords include data sovereignty, data altruism and data spaces. The agenda is ambitious.

In this contribution I look at the place of the Database Directive in the wider Data Strategy, with some observations on how it plays out in sports data markets. After a few observations on sports data markets and players, some key issues are set out with respect to the applicability of the *sui generis* right to sports data. In particular, I will address the thorny issue of what counts as an investment in the collection and presentation of data, rather than in data creation, and the extent to which the use of observable data can be prevented. Moving on, this contribution sketches the main ingredients of the EU Data Strategy, its impact and relevance to database rights. It concludes with some observations on how the *sui generis* database right may be revised as a result of the Data Strategy.

2. SPORTS DATA MARKETS AND PLAYERS

Today, the global sports data market is estimated by some to be worth nearly USD 900 million annually.[9] Data are important for sports clubs and teams themselves, for purposes such as performance assessment through biometrics, monitoring player health, and analysis of competitors. But data also matter for broadcasters and their audiences, such as for prospective, real-time and post-play analysis of games, for media outlets, game developers and many other parties. The sports data market has various segments. A major distinction is between 'on field' data, which relate to sports as played and to sports players, and 'off field' data, which relate to fans/audiences, ticket sales, and so on. It is particularly the 'on field' types of data that are intensively commodified and that leagues, clubs and teams seek to control. Major companies providing data analytics and services include the likes of IBM, Oracle, SAP, SAS Institute and Sportradar AG.[10] Increasingly, the capture of data is automated. Data for sports betting remains an important segment. Betting services are becoming ever more sophisticated, using historical data and live game metrics (e.g. passes, attempts, ball possession) to provide more betting opportunities, including 'in-game' (live) betting.

Given the continued growth of sports data markets,[11] it stands to reason that control over the production, access and use of such data remains a key concern for many (private) parties. Considering the importance of sports in contemporary society, there are also public interests at stake. For the purposes of this contribution, I shall lump together leagues, clubs, teams, individual

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Social Committee and the Committee of the Regions: Building a European data economy (COM(2017) 9 final).

9. GrandView Research, *Global Sports Analytics Market Size Report 2021–2028*, April 2021.
10. See e.g. https://www.ibm.com/sports, https://www.sap.com/products/sports-one.html, https://www.sportradar.com/. The latter was a party in the dispute that led to case C-173/11 *supra* note 6.
11. T. Leonard, 'The 'Moneyball' Evolution: Artificial Intelligence, Athlete Data and The Future Of Sports Betting', *Forbes*, 7 November 2019.

players and their management, and together call these 'sports producers'. Of course, their interests do not necessarily align. This is clear from conflicts over publicity rights (see the contributions elsewhere in this volume), but also from the everlasting battles over broadcasting rights, and from the recent failed attempt by top European football clubs to start a breakaway super league.[12] However, with respect to the use of data produced as a result of their combined efforts, the various sports producers of data will generally share an interest in its use by 'secondary users', that is all the different types of stakeholders who seek access to and use of sports data to be able to provide their key services, including betting services, news and entertainment, and eGames development.

The Database Directive and its *sui generis* right will likely continue to be of importance, together with key legal mechanisms such as trademark protection, copyright and related rights, trade secrecy laws, publicity rights, and of course contract law. The latter is relevant in all parts of the data value chain, for example from the contractual obligations of broadcasters and streaming services who have acquired rights to communicate sports events to the public, to the conditions imposed on stadium visitors to manage what gets recorded in stadiums (through the 'house right', i.e., the leverage deriving from being able to control access to venues).

3. THE *SUI GENERIS* RIGHT FOR SPORTS DATA

In a nutshell, the protection offered under the Database Directive is as follows. To constitute a 'database' under the Directive there must be a 'collection of independent works, data or other materials arranged in a systematic or methodical way and individually accessible by electronic or other means' (Art. 1(1) Database Directive). Excluded from protection are computer programs used in the making or operation of databases. A database can be protected by copyright and the *sui generis* right simultaneously, if the relevant criteria are met. Copyright protection arises for such collections that 'by reason of the selection or arrangement of their contents, constitute the author's own intellectual creation' (Art. 3(1) Database Directive). No other criteria shall be applied to determine eligibility for copyright protection. Copyright does not extend to the contents. A *sui generis* right arises where 'there has been qualitatively and/or quantitatively a substantial investment in either the obtaining, verification or presentation of the contents' (Art. 7(1) Database Directive).

The *sui generis* right protects against 'extraction and/or re-utilization of the whole or of a substantial part, evaluated qualitatively and/or quantitatively, of the contents'. It can also be leveraged against repeated and systematic extraction and/or re-utilisation of insubstantial parts which conflict with a normal exploitation of a database or which unreasonably prejudice the legitimate interests of the database producer (Art. 7(5) Database Directive). Various legitimate uses exist,

12. S. Evans, 'Top European clubs announce breakaway Super League', *Reuters*, 18 April 2021 https://www.reuters.com/world/uk/top-european-clubs-announce-breakaway-super-league-2021-04-18/

which the producer cannot override by contract (Art. 8(1) Database Directive). For databases that are not protected under the Database Directive, the contractual terms can be more restrictive, depending also on national law.[13]

The initial owner of the *sui generis* right is the producer (maker),[14] that is, 'the person who takes the initiative and the risk of investing' (Recital 41 Database Directive).

In the early stages of policy-making, there was still the idea on the table that not all producers of databases need protection, especially not those where data collections are the by-product of another (main) activity ('spin-off databases'). This is often the case in the public sector, where bodies collect and maintain vast amounts of data in the exercise of public tasks. But for private actors too, databases are often a natural outcome of principal activities: the overview of houses for sale that an estate agent keeps, or stock lists of car dealers. And, ideas were floated that if there was only one source for data, a system of mandatory licensing might be good to have. In the Netherlands, Hugenholtz along with Verkade – who elsewhere in this volume proposes the introduction of a Lex Hugenholtz to protect portraits – and others had played an essential role in the development of this so-called 'spin-off doctrine'. By the time the millennium approached, a wide body of legal scholars, as well as the Dutch government, had subscribed to the spin-off doctrine, although its exact boundaries remained somewhat vague. Courts on the other hand did not recognise it (apart from the occasional district court),[15] especially not once the Database Directive was in force. The CJEU in *Fixtures Marketing/OPAP* made it clear that the fact that a database is a spin-off does not as such prevent *sui generis* rights from arising. And as is well-known, the Directive makes no distinction between databases produced in the public or private sector.

The first four preliminary references to the Court of Justice centred on the question of what type and level of investment was needed for it to be substantial, and what type of costs count. Furthermore, the Court was asked to provide guidance on what constitutes extraction of re-use of a substantial part, quantitatively or qualitatively speaking.

In those first cases, database rights were claimed in the schedules of football league competitions and in horseracing. The case of the football fixtures concerned dates, teams and places for some 2,000 matches played during each season. In the horseracing case, a betting company used certain data on races such as horses in the race, the date, time and/or name of the race, and racecourse. The ultimate source of this data was a massive database controlled by the British Horseracing Board, which has data on, inter alia, the pedigrees of some one million horses, horse owners, and data on races to be held in the UK including information on eligibility to enter the race, deadlines for entries, and prizes.

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13. Case C-30/14 (*Ryanair/PR Aviation*), *supra* note 3.
14. Art. 11 Database Directive sets out additional criteria for rightholders not based in the EU.
15. For an in-depth analysis, see A.C. Beunen, *Protection for Databases: The European Database Directive and its Effects in the Netherlands, France and the United Kingdom* (Wolf Legal Publishers, Nijmegen, 2007) https://hdl.handle.net/1887/12038.

On the right kind of investment, the Court considered that

> the expression 'investment in … the obtaining … of the contents' of a database must … be understood to refer to the resources used to seek out existing independent materials and collect them in the database, and not to the resources used for the creation as such of independent materials. The purpose of the protection by the *sui generis* right provided for by the directive is to promote the establishment of storage and processing systems for existing information and not the creation of materials capable of being collected subsequently in a database.[16]

Thus, the resources committed by the football leagues and the British Horse Racing board in creating the competition and race schedules did not count towards the substantial investment, as these went towards the creation of data, not obtaining (collecting) it. In the words of Davison and Hugenholtz: the Court 'discounts investment in collecting data that is indivisibly linked to its creation'.[17]

Much can be said about the distinction between creation and collection, but as Jacob J. pointed out in *Football Dataco v. Stan James*,[18] this soon turns into metaphysical musings. On the argument that it is the observer who creates data in the act of recording it, for example by measuring ambient temperature, Jacob says: 'The same metaphysicist might also deny that a temperature exists unless and until it is recorded. But he would feel hot in a Turkish bath even without a thermometer' (para. 34).

Suffice to say that for our purposes, the conflict is usually around the use of observable data (that is: pre-existing data) which is recorded in various ways. This was also the type of conflict central to the above-mentioned *Football Dataco* joined cases, which were ultimately decided by the Court of Appeals for England and Wales. To avoid confusion on the many Football Dataco cases: the CJEU judgment in *Football Dataco* v. *Yahoo*! *and others* originated in an earlier English dispute between partly the same parties. The preliminary questions there concerned copyright, not the *sui generis* right. The CJEU judgment in *Football Dataco and others/Sport Radar and others* was given in response to preliminary questions raised on the issue of jurisdiction of English courts to hear claims for infringement of database rights.[19]

In the case before the Court of Appeal, an important point raised by the defendants was that resources spent on obtaining in-game data should not count towards the required substantial investment, because it in fact constituted creation of data. The Court of Appeal rejected this conflation of creating and obtaining. The plaintiff did not create but obtained them by recording *observable* data, investing heavily in doing so. Football Dataco collected part of its data by sending paid persons to record data at live football matches. The person present would report goals, attempts, misses, players involved, cards given, and other

16. CJEU C-444/02, *Fixtures Marketing/OPAP*, similar in case C-46/02, *supra* note 2.
17. Davison and Hugenholtz, *supra* note 2.
18. [2013] EWCA Civ 27, *Football Dataco and others v. Stan James, Sportradar and others.*
19. [2011] EWCA Civ 330, *Football Dataco and others v. Sportradar and others*, preliminary questions resulting in CJEU case C-173/11, *supra* note 6.

observable data to Football Dataco staff during the game via mobile phone. It cost in the region of GBP 600,000 annually to populate this 'Football Live' part of the database. Sportradar has a large database which also contains a section with data on live games. The 'live' data are recorded from live broadcast games, from live streams, or, failing access to such direct sources, from secondary sources including subscribers to Football Live, such as news outlets and sports information programmes. Thus, Sportradar's Live Scores includes live statistics that are extracted at some point from Football Live. Finding there was substantial investment in the production of the database, the next question to be addressed was whether there was 'substantial taking'. Since the volume of data derived from Football Live was not large (i.e. not quantivatively a substantial part), all turned on whether there was qualitatively a substantial taking.

How to determine this, and how to view the connection between substantial investment qualitatively and substantial taking qualitatively? In the *Fixtures* and *BHB* cases the ECJ connected – as Davison and Hugenholtz observed – the criterion of substantial investment needed for a database right to exist, with the substantial taking of the contents of the database for the database producer to be able to successfully invoke infringement of the right. There is qualitatively speaking a substantial taking if the scale of the investment by the producer in the obtaining, verification or presentation of the contents taken by the user is substantial. According to the Court, the intrinsic value of the data is not a relevant factor for determining whether the taking is substantial.[20] So the Court looks to what we might call the 'production' value, not the commercial value. In *Football Dataco*, the Court of Appeal found that there was a very significant investment due to the costs of the persons recording and processing the data and the overall set-up, and that Sportradar (indirectly) extracted data on a substantial proportion of the matches in Football Live, therefore taking qualitatively a substantial part.

Fixtures and *BHB* were early cases. Recently, on the question of whether there is taking of a substantial part, the CJEU seems to be moving towards a infringement test where it is not just the production value that matters. In the 2021 judgment in *CV-Online Latvia/Melons*, the Court was called upon to yet again explain when there is extraction or re-use, this time with respect to a website with job advertisements, which is crawled by a specialised search engine. The hits are returned as hyperlinks to the source websites, and include the meta-tags (e.g. job title, place of employment) that CV-Online assigns to the advertisements to improve search results. The defendant indexes and copies the content of job advertisement websites on its own server, and provides its users access to their content. The presumption in this case is therefore that there is substantial taking.

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20. CJEU case C-203/02, *supra* note 2, para. 72. Compare however the CJEU in *Freistaat Bayern/Esterbauer*, where it held that a topographic map is a collection of data (namely, of independent elements) within the meaning of the Database Directive, *because* the elements extracted from the map (position of cycling lanes) *have informative value for the person* (publisher Esterbauer) taking them. This (curious) line of reasoning suggests that the intrinsic value for the user is a relevant factor for determining the existence of a right. That is odd. See M.M.M. Van Eechoud, 'De ontsporing van het begrip databank. Enige bedenkingen bij HvJEU Freistaat Beieren/Verlag Esterbauer', *AMI* (2016), 25–30.

Surprisingly however, the judgment allows for the conclusion that there is no *relevant* extraction or re-use, even though the taking was substantial. The Court says

> it is necessary to strike a fair balance between, on the one hand, the legitimate interest of the makers of databases in being able to redeem their substantial investment and, on the other hand, that of users and competitors of those makers in having access to the information contained in those databases and the possibility of creating innovative products based on that information [para. 41],

and 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 [para. 44].[21]

Here, the Court seems to introduce an additional harm-based threshold to be met for there to be infringement. This marks a retreat on the CJEU's previous expansive interpretation of the database right. It also complicates the coherent application of the qualitative/quantitative criterion to both investment (required for existence of the right) and extraction/re-use (required for infringement).

Ditching the distinction between quantitive and qualitative substantial taking may show the way out of the muddy waters. If taking a substantive part is judged merely on qualitative standards, that would leave room to consider the effect on the producer's ability to recoup her investment. Surely this is a matter for the legislator to consider in its review of the Database Directive. Another aspect I suggest warrants consideration, is the spin-off doctrine. This, as will be set out next, would be consistent with the idea behind database protection – stimulating the creation of databases by enabling recoupment of the necessary investments – and EU's larger data strategy. It would however not affect rights in sports data.

4. REVISITING THE SPIN-OFF DOCTRINE IN LIGHT OF THE EU DATA STRATEGY

The EU in its ambition to fuel the 'data economy' is increasingly interested in regulation that promotes the optimal use and sharing of data. Gone are the days when exclusive rights were the go-to solution to grow information markets. To understand the Data Strategy and its (potential) impact on database rights, it helps to have some idea of its constituent parts. The overall ambition is to increase production, demand and use of data and data-enabled products and services.[22]

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21. CJEU 3 June 2021, case C-762/19, *CV-Online Latvia/Melons*, ECLI:EU:C:2021:434.
22. Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, *A European Strategy for Data*, COM/2020/66 final, Brussels 19.2.20.

In terms of legal instruments, these include the 2016 General Data Protection regulation[23] and other data protection laws, which aim to ensure a high level of protection for data subjects, while enabling the flow of personal data in (and outside) the internal market. Then there is the 2018 Non-Personal Data Regulation, which restricts the imposition of data localisation requirements on public and private actors by Member States and sets out initiatives to promote data portability.[24] Another key component is the 2019 Open Data Directive,[25] formerly known as the Public Sector Information Directive.[26] It applies to databases produced by public sector bodies (including public undertakings) across all levels of Member States' legislative, judicial and administrative branches, including those of cultural heritage institutions and universities. So far, public service broadcasters remain excluded from its scope, partly as a result of successful lobbying, partly because much of their content contains third party intellectual property. Public broadcasters are of course still important sources of sports programmes, but increasingly less so where the most commodified sports are concerned.

The Open Data Directive's rules aim to ensure that public information can be re-used with as few strings attached as possible, and this includes severe limitations on the exercise of their own copyright and database rights. The Open Data Directive's implementation date is 17 July 2021; from this date public sector bodies whose databases fall within the scope of the Open Data Directive are explicitly barred from exercising their *sui generis* database rights.

As a rule, information that is the subject of private sector owned copyright and related rights is left untouched by the Open Data Directive. However, this is set to change with the introduction of the Data Governance Act.[27] The proposal for this regulation takes the Open Data Directive one step further by pushing many public sector bodies whose data are exempt from the scope of the latter, to open up data for maximum re-use nonetheless. This would also apply where third parties own intellectual property rights, although the public sector body would have to ensure it has proper authorisation.[28] Admittedly, the impact on sports data markets of this new regulation would be limited if not absent all together, also because the Data Governance Act would again exempt public service broadcasters. The impact of the proposal's other elements will likely be limited

23. Regulation (EU) No. 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data ('General Data Protection Regulation'), OJ 2016 L 119/1.
24. Regulation (EU) 2018/1807 of the European Parliament and of the Council of 14 November 2018 on a framework for the free flow of non-personal data in the European Union, OJ 2018 L 303/2.
25. Directive (EU) 2019/1024 of the European Parliament and of the Council of 20 June 2019 on open data and the re-use of public sector information, OJ 2019, L 172/56.
26. Directive 2013/37/EU of the European Parliament and of the Council of 26 June 2013 amending Directive 2003/98/EC on the re-use of public sector information, OJ 2013, L175/1.
27. Proposal for a Regulation of the European Parliament and of the Council on European data governance (Data Governance Act), COM/2020/767 final, Brussels 25.11.20.
28. M. van Eechoud, 'A Serpent Eating Its Tail: The Database Directive Meets the Open Data Directive', 52(4) *IIC* (2021), 375–378, https://doi.org/10.1007/s40319-021-01049-7.

as well. One concerns a scheme for (trusted) data intermediaries, the other the recognition of (not for profit) data-altruism initiatives. In a nutshell, service providers that seek to operate as neutral arbiters between businesses seeking to share data (for free or against remuneration) can do so in the future by going through a notification procedure secure the ability to provide their services across Europe without having to meet all kinds of local legal requirements. However, the weight of the obligations – i.e. ensuring users respect intellectual property rights and data protection standards, etc. – seem to be such that one can doubt whether the scheme will be popular. What is more, as long as sports data producers can effectively exercise control over who gets to record 'on field' data, the question is whether there will be a demand for data intermediary services to begin with. The deployment of advanced automated tools for capturing data from live games (broadcast or streamed) by third parties could change the dynamics somewhat. But for most in the value chain, having access to the pipeline controlled by sports producers will still be vital.

Another key element of the Data Governance Act proposal concerns data-altruism, whereby natural and legal persons share data on a non-commercial basis, especially for general interest purposes. Organisations would be able to register as 'Data Altruism Organisations recognised in the Union' to enhance their attractiveness. Perhaps this could be a vehicle to produce in-game statistics by sports fans watching live games in venues or online, akin to the crowd-sourced mapping of Open Street Map, or the creation of Wikipedia. But here too, the combined power of sports data producers to set conditions for the capture of data would be a barrier.

Overall, my prediction is that the EU Data Strategy will not have a profound impact on sports data markets directly. However, the fact that the mindset of EU policy makers is now so clearly on facilitating the sharing of data, as opposed to subjecting it to exclusive rights, suggests there might be significant indirect effects as a result of the coming revision of the Database Directive. One direction in which the legislator might go is to follow the CJEU's lead in *CV-Online Latvia* and introduce a harm-based criterion where infringement of the *sui generis* right is concerned. Another possibility by which the scope of the *sui generis* right might be reduced is through the introduction of a spin-off criterium, i.e. excluding *sui generis* database rights in data collections or parts of collections that result from a producer's main activities. That would tie in perfectly with the foundational notion of 're-use' as used in the Open Data Directive (not the Database Directive): if data have been produced in the context of a public task and the investment in their production has been made, subsequent use for other purposes should be possible to the maximum extent, without intellectual property rights getting in the way. The logic of this is very similar to that which underlies the spin-off doctrine: if data have been produced already in the course of an organisation's main (or other) activity – like organising a football competition – then it is not necessary to protect that data so that investments can be recouped.

Bernt Hugenholtz would perhaps regard it as poetic justice that of the two instruments that share a common history – the Database Directive and the Open

Data Directive[29] – the latter's ideas may eventually triumph. A complication of course is that database rights, as full-fledged intellectual property rights, are protected under Article 17 of the Charter of Fundamental Rights of the EU. This, I suspect will be an excellent topic for a volume in the Information Law Series celebrating the Database Directive's thirtieth anniversary.

29. For a short overview, see van Eechoud, *supra* note 28.