COURT OF FIRST INSTANCE [*TRIBUNAL DE PREMIERE INSTANCE*] OF BRUSSELS

Docket No. 2014/334/A

Appendices: 1 writ of summons
1 ordinance 747 § 1 of the J.C.
11 pleadings
2 court records
3 files of exhibits

File copy

Summary proceeding – Interlocutory – After full trial

COPY sent to
A. BERENBOOM, Esq.
(exempt Art. 260, 2nd Rec. Code)
Art. 792-1030 J.C.)

COPY sent to
A. JOACHIMOWICZ, Esq.
(exempt Art. 260, 2nd Rec. Code)
Art. 792-1030 J.C.)

DOCKET
No.
14/153379

JUDG-DIV

The non-profit international association EFES, European Federation of Employee Share Ownership and Participation, entered in the Enterprise Register under no. 0862.644.259, whose registered office is situated 1030 Brussels, avenue Voltaire, 135,

plaintiff,

represented by Alain BERENBOOM, Esq. and Arian JOACHIMOWICZ, Esq. attorneys, whose firm is situated 1000 Brussels, rue de Florence, 13;

versus

1. ECORYS NEDERLAND BV, a company governed by the laws of the Netherlands, KvK- nummer 24316726, Vestigingsnummer 000016199642, whose registered office is situated 3067GG Rotterdam (The Netherlands), Watermanweg, 44,

first defendant,

represented by Mélissa LUSSAN, Esq., representing Koen DEVOS, Esq. and Lieven DEVOS, Esq., attorneys, whose firm is situated 1831 Diegem, De Kleetiaan, 12a;

2. CASE CENTRUM ANALIZ SPOLECZNO-EKONOMICZNYCH, a foundation governed by the laws of Poland, whose registered office is situated 01-031 Warsaw (Poland), Aleja Jana Pawla II, 61, office 212,

second defendant,

represented by Vincent DE SMET, representing Nicolas BONBLED, Esq. and Pierre KETELOOT, Esq., attorneys, whose offices are situated 1170 Brussels, boulevard du Souverain 36;

This matter was argued and pleaded in French at the public hearing of 5 May 2004.

Following deliberations, the Presiding Judge of the French-speaking Court of First Instance rendered the following ordinance:

Considering:

- the writ of summons to a summary proceeding served on 29 October 2013 by Antoine DE COSTER, alternative bailiff, replacing Jean-Marc DEVOSSE, bailiff, 1170 Brussels, Dries, 7, representing Jacques LAMBERT, bailiff, 1050 Brussels, rue Renier Chalon, 46,
- the ordinance 747, § 1, J.C., pronounced on 22 January 2014,
- ECORYS NEDERLAND BV's pleadings filed with the clerk on 5 February 2014,
- CASE's pleadings filed with the clerk on 19 February 2014,
- EFES' pleadings filed with the clerk on 3 March 2014,
- ECORYS NEDERLAND BV's pleadings filed with the clerk on 10 March 2014,
- CASE's summary pleadings filed with the clerk on 11 March 2014,
- EFES' summary pleadings filed with the clerk on 17 March 2014,
- CASE's last summary pleadings filed with the clerk on 24 March 2014,
- ECORYS NEDERLAND BV's pleadings filed with the clerk on 24 March 2014,
- CASE's court record filed at the public hearing of 28 March 2014,
- EFES' court record filed at the public hearing of 28 March 2014,
- ECORYS NEDERLAND BV's pleadings filed at the public hearing of 7 April 2014,
- CASE's last summary pleadings filed with the clerk on 14 April 2014,
- EFES' second summary pleadings filed with the clerk on 22 April 2014,
- CASE's last summary pleadings filed with the clerk on 29 April 2014 and at the public hearing of 5 May 2014.

The arguments of the parties' counsel were heard at the afore-mentioned public hearing.

The action

1. The non-profit international association EFES brought a summary proceeding before the Court pursuant to Articles 12 *quater*, 12 *quinquies* and 12 *sexies* of the Law of 31 August 1998 transposing into Belgium law the European Directive of 11 March 1996 on the legal protection of databases.

It prays the Court to:

- declare that by substantially using the content of its database without its authorisation, in the study entitled "Employee Financial Participation in Companies' Proceeds" produced for the European Parliament, published in September 2012 (ref. PE 475.098), Ecorys Nederland BV (hereinafter referred to as "Ecorys") and the foundation governed by Polish law, Case-Centrum Analiz Spoleczno-Ekonomicznych (hereinafter referred to as "Case"), infringed the rights of the producer of the data and were guilty of a violation of Article 4 of the Law of 31 August 1998,

- consequently, order Ecorys and Case to:

- cease any and all infringing uses of EFES' database,

- cease or cause to cease the dissemination, in particular on the site of the European Parliament, offering for sale, promotion, distribution, whether for payment or free of charge, of the study in dispute, inclusive of all editions, even reviews or completed, containing the excerpts infringing EFES' rights as producer of the data, and in particular the excerpts used on pages 14, 21, 28-30, 37, 48-49 and 117 of the study and, in general, enjoin them from disseminating or causing to be disseminated, without authorisation, in any manner whatsoever and on any media whatsoever (paper, digital, Internet, newsletters, etc.), the excerpts of the study infringing its rights as producer of the data,

- subject to penalties,

- have the judgement to be entered published on various Internet sites, at their expense,

- order it to pay the provisional sum of 97,500 euros, *ex aequo* and *bono*,

- communicate to it the amounts they have collected for the realisation of the study, subject to penalty,

- the whole by provisionally enforceable judgement, notwithstanding any recourse and without provision of any security, nor deposit.

2. In the alternative Ecorys prays that Case be ordered to guarantee it against any awards that may be ordered against it, in principal, interest and costs.

Factual context

3. Since 2006 EFES has produced a database that is updated annually, regarding employee shareholding and financial participation in European companies.

4. Case and Ecorys are part of a consortium with which the European Parliament entered into a framework agreement on 6 December 2010.

Within this context, on 28 October 2011 the European Parliament requested that the consortium carry out a study on the financial participation of employees in their employer's products.

The objectives of the study were the following:

– to provide an overall view of the various types of workers' financial participations within the European Union and identify the benefits and disadvantages,
– to furnish an overall view of the policies carried out at the national level and incitations put into place, as well as the extent to which they are effective,
– to discuss concrete cases indicating those cases in which financial participations proved to be successful,
– to establish conclusions and recommendations for the European Parliament.

Thus, on 27 March 2012 Case entered into an agreement with Mr. J. Lowitzsch. This agreement entrusted the latter with the task of project head for the study to be carried out in consideration for remuneration of 11,250 euros (exhibit 4 filed by Case).

5. The European Parliament published the study in dispute in September 2012.

The European Parliament inserted it on its internet site under the address:

http://www.europarl.europa.eu/committees/en/studies.htlm.

At the time of the hearing of 28 March 2014 I was able to ascertain that this link is still active, and provided direct access to the text of the study in dispute (see report of the hearing).

6. EFES considers that the study made use of its data bank without its consent being indicated. It furthermore considers that the data was manipulated or used incorrectly.

By letter of 4 July 2013 it requested that the European Parliament publish a correcting text on its Internet site. By letter of 6 September 2013, the European Parliament refused such request.

At the same time, on 5 July 2013, EFES sent a formal notice to Ecorys and Case.

Case replied thereto by letter of 23 July 2013, contesting any unlawful use of EFES' data bank.

In connection with the proceeding at bar, it makes reference to the agreement for access to EFES' database entered into on 9 August 2011 with Mr. J. Lowitzsch, as well as the invoice for 500 euros sent to the latter (exhibit 5 filed by Case).

7. EFES has an Internet site listing all of the works connected to its purpose. The documents therein are classified either by theme or by date of entry.

It listed therein the study in dispute as well as the correcting text proposed to the European Parliament in vain.

At the time of the hearing of 28 March 2014, the link to the study in dispute was active and allowed for direct access to its text (the court record filed by Case on this same 28 March 2014 incorporates the screen prints relating to this situation).

8. At the time of the hearing of 5 March, 2014, Ecorys and Case, on the one hand, and EFES, on the other, stated that the Internet links to the study in dispute (cf. *supra* both concerning the link starting from the Internet site of the European Parliament as well as from EFES' Internet site) no longer allows access to the study *per se* but provides access only to a written message stating that the link is broken.

Claim for damages brought within the framework of the action for an injunction

9. Ecorys and Case raise a plea of incompetence regarding EFES' claim for damages made within the framework of the action for injunction.

In their pleadings these parties assert that:

– a claim for damages does not come within the material scope of application of an action for injunction specified at Articles 12 *quinquies* and 12 *sexies* of the Law of 31 August 1998 transposing into Belgian law the European Directive of 11 March 1996 on the legal protection of databases,

– but that this is up to the judge of the merits (distinct from the judge acting in connection with an action "for summary proceedings").

Case raised this plea *in limine litis* in its first pleadings filed on 19 February 2014.

10. EFES makes reference to the text of Article 589 *bis* of the [Belgian] Judicial Code which provides that the Presiding Judge of the Court is competent to entertain claims referred to at Articles 12 *quater* and 12 *sexies* of the Law of 31 August 1998.

It concludes therefrom that it made its claim for compensation to the right judge.

11. The problem raised consists in a question relating to the allocation of cases within the Court of First Instance and not a problem relating to the competence *sensu stricto* of the Court of First Instance, including the jurisdiction of the Presiding Judge ruling in summary proceedings.

C. Dalcq and S. Uligh[1] discuss this, making reference to the judge for injunctions who acts "in summary proceedings":

– what is involved is a special jurisdiction, in derogation to common law and therefore to strict interpretation, and

– judges for injunctions must be denied the right to entertain claims other than those for which their competence had been created.

There is the question of the material error that slipped into Article 589 *bis* of the [Belgian] Judicial Code in that, in the law regarding the legal protection of data banks, Article 12 *sexies* makes reference solely to actions for injunctions *per se*, that is to say, the action specified at Article *quinquies* and not the action for damages (which is referred to Article 12 *quater*).

[1] C. Dalcq and S. Uligh, "Towards and for a general theory of 'summary proceedings': the point on crosscutting issues of competence and procedure", in x, Actions for injunctions, Larcier, CUP, 2006, pp. 39 (footnote, page 94) and 53

12. Whenever a procedural incident concerning allocation is raised and in order to avoid an abuse of process, the Court has no other choice than to apply Article 88, § 2 of the [Belgian] Judicial Code.

Accordingly:

– the claims must be separated, so as to split off the dispute connected to the claim for damages from the other claims made within the framework of this action for injunction, and

– Article 88, § 2 of the [Belgian] Judicial Code must be applied to the dispute connected to the claim for damages - such legal provision establishing a specific procedure for settling the issue of knowing who, within the Court of First of Instance, shall entertain such case: the Presiding Judge or a trial chamber having general jurisdiction, or even any other chamber having such mission considering the rules of internal allocation.

13. Accordingly, while awaiting the decision to be made based on Article 88, § 2 of the [Belgian] Judicial Code concerning the claim for damages, and the claim for guarantee (made vis a vis Case), which is its accessory, only the other claims referred to the Court shall be settled by this decision.

Admissibility

14. Ecorys and Case raise two pleas of inadmissibility: the first based on EFES' lack of interest to act and the second in that the case at bar is moot.

Inadmissibility due to lack of interest

15. Ecorys and Case point out that at the time of the originating writ of summons, EFES was still providing complete access to the study in dispute via its Internet site, without any direct link to the request for rectification it had sent to the European Parliament.

They conclude therefrom that the case is not admissible due to lack of interest to act.

16. Interest consists in the pecuniary and/or moral benefit that the plaintiff counts on deriving from the action he initiates.[2]

17. EFES asserts being the producer of a database, confronted by third parties who extracted and reused a part of the content of its database, within the meaning of the

[2] G. Closset-Marchal, Examination of case law (2002 to 2012) - private judicial law, RCJB, 2014/1, p. 181, no. 141.

afore-cited Law of 31 August 1998, all without having obtained its consent in this regard.

The fact that EFES had indeed created, via its Internet site, a direct link to the text of the study in dispute and that, furthermore, such link was still active on the day of the originating writ of summons, does not allow for a conclusion being drawn that it did not present the required interest within the meaning of Articles 17 and 18 of the [Belgian] Judicial Code for bringing this action for injunction concerning the acts of which Ecorys and Case are accused.

Examination of the existence or scope of the subjective right invoked by EFES does not involve the admissibility of the case but rather its basis.[3]

Plea that the case is moot

18. Ecorys and Case note that at least since 5 May 2014 there is no longer any direct link, accessible by the Internet site of the European Parliament, to the text of the study in dispute.

They conclude therefrom that the case is inadmissible in that it is moot.

19. Such reasoning cannot be followed as examination of admissibility is made at the time of service of the writ.

The study in dispute was indeed still accessible by the Internet at such time.

For the remainder, it has not been maintained that the study in itself no longer exists.

The case cannot be alleged to be inadmissible in that it is moot.

Holding

20. The producer of a database has the right to prohibit the extraction and/or reuse of all of part, whether qualitatively or quantitatively substantial, of the content of such database (Art. 4, para. 1 of the Law of 31 August 1998).

21. There is no dispute that EFES is a producer of a database within the meaning of the Law of 31 August 1998.

[3] See, in particular, Cass. 26 February 2004, *J.T.*, 2005, no. 6186, p. 437.

On the contrary, there is a dispute with respect to whether the use made by Ecorys and Case of the elements of this database are protected by this same Law.

22. The Law of 31 August 1998 defines extraction and reuse as follows:

- extraction: "*a permanent or temporary transfer of all or a substantial part of the content of a database to another medium by any means or in any form whatsoever; public lending is not an act of extraction*",

- reuse: "*any form of making available to the public of all or a substantial part of the content of the database by distribution of copies, leasing, on-line transmission or in any other form; public lending is not an act of reuse"* (Articles 2.2° and 3°).

In a decision pronounced on 2 April 2009, the Court of Appeals [*Cour d'appel*] of Brussels states, relying on the case law of the Court of Justice of the European Union, that:

"19. (…) *The notions of extraction and reuse must be interpreted in the light of the objective pursued by the* sui generis *right. Such right aims at protecting the person who constituted the database 'from acts of the user exceeding his legitimate rights thereby causing prejudice to the investment' of such person, as indicated in the forty-second recital of the Directive.*

In order to assess the scope of protection of the sui generis *right it is of no import that the purpose of the extraction and/or reuse is the constitution of another database, whether or not competing with the original base, whose size is identical or different therefrom, or that such act comes within the context of an activity other than the constitution of a database (...).*

22. (…) The fact that the elements contained in a database are not reused in another database until following a critical assessment of the perpetrator of the act is not an obstacle to the finding of the existence of a t*ransfer of elements from the first database to the second.* (...)"[4]

[4] Brussels (9th), 2 April 2009, Practical Directory of Commerce and Competition, 2009, p. 810.

23. In the case at bar Ecorys and Case:

– analysed the figures of EFES' database,

– selected the figures that interested them for the purpose of the study to be drafted,

– globalised the selected figures resulting from the database, and

– integrated the globalised figures into the study in dispute, by proposing a more or less detailed analysis thereof depending on the excerpts involved (see pages 14, 21, 28-30, 37, 48-49 of the study in dispute – exhibit 1 filed by EFES) – contrary to EFES' assertion, page 117 of the study does not contain reuse of the database,

– this integration into the study in dispute was systematically accompanied by reference to the source that was used (in the case at hand, EFES' database, cf. the above cited pages of the study).

Accordingly, there was a transfer of a part of the content of the database to another medium and not merely consultation of EFES' database.

Thus, the reference at §46 of the decision pronounced on 19 December 2013 by the Court of Justice of the European Union is irrelevant as the facts of the two cases are distinct.

The fact that Ecorys and Case also analysed and integrated figures coming from sources other than EFES' database is irrelevant.

Moreover, the fact that the content of the database is in a modified form in the study in dispute is also irrelevant.[5]

24. In order that there be extraction within the meaning of Article 2.2° of the Law of 31 August 1998, it is necessary that the transfer involves all of the database – which is not demonstrated in the case at bar – or a substantial part at the least of such database, assessed in a qualitative or quantitative manner.

[5] In this regard, see B. Michaux, "The protection of databases", *JT*, 2012, no. 6500, pp. 831 *et seq.*, more particularly p. 832 and the reference cited in footnote no. 46.

The part is quantitatively substantial if significant in relation to the volume of the total content of the protected base.

It is qualitatively substantial if it required a significant investment even if not significant in terms of volume.

B. Michaux thus states, "*a quantitatively negligible part may, in fact, represent, in terms of its obtaining, verification or presentation, a significant human, technical or financial investment. If it was obtained from sources that are not accessible to the public, it is likely to be substantial in nature due to such circumstance, since the holder would have used substantial means for obtaining it. However, even if it was obtained from sources freely accessible to the public and is official in nature (for e.g., when it consists in regulatory texts), it is not, due to this fact alone, devoid of all substantial nature, since even in such hypothesis the holder could have used substantial means in obtaining, verifying or presenting it.*"[6]

In the case at hand, the database constituted by EFES is the fruit of the collection of information from some 2,500 companies, with a presentation of the results according to a systematic and detailed schema over 108 columns. EFES has processed the data since 2006, which is updated annually.

The human effort in collecting the data and introducing it into the database is necessarily substantial, especially since the information has been collected from a large number of companies. Within the framework of an exchange of e-mails sent *in tempore non suspecto*, EFES states that updating of the database necessitates six months' work (see e-mail of 27 July 2011 between EFES and Mr. Hashi – exhibit III.1 filed by EFES).

Ecorys and Case processed the figures that interested them for the purposes of the study in dispute in such way as to present global figures.

[6] B. Michaux, op. cit, pp. 831 *et seq.*, more particularly p. 832 and the reference cited under the footnotes to pages 30 to 35.

Even if the database was not used in its entirety, a substantial qualitative and quantitative part was used.

It is of no import that Ecorys and Case used 7 or 36 of the 108 columns available in the database. The part that was used meets the criteria protected by the Law.

It results from the preceding that there had been an extraction within the meaning of Article 2.2° of the Law of 31 August 1998.

25. Ecorys and Case make reference to a license granted by EFES to Mr. Lowitzsch on 9 August 2011 in order to conclude that the extraction was made with EFES' consent. Therefore there was no unlawful extraction.

Such reasoning, however, cannot be followed.

The license had been requested by Mr. Lowitzsch in his capacity of professor at the Free University of Berlin, Inter-University Centre. The contact details communicated in connection with this license request are his contact details within the Berlin University (postal address, e-mail address, Internet site).

The license in dispute states being granted (according to an unsworn translation), "*to yourself, and we hereby request that you agree to keep it for your personal use and solely for the specified use.*"

Subsequently, on 27 March 2012, Mr. Lowitzsch was hired pursuant to a remunerated service agreement in order to ensure management of the project relating to the study in dispute (exhibit 4 filed by Case). His contact details specified in the agreement for the provision of services are different from those specified in the form relating to the license. Moreover, no mention is made of the Free University of Berlin.

Even if Mr. Lowitzsch made use of EFES' database in connection with his activities for the Inter-University Centre of the Free University of Berlin, he also made use thereof in connection with his remunerated mission for Ecorys and Case.

In view of the condition relating to the use for which the license was granted to Mr. Lowitzsch on 9 August 2011, the two aspects of his professional life cannot be considered as forming a whole.

By making use of the database in connection with his services remunerated by Ecorys and Case, Mr. Lowitzsch performed services outside the scope of the license agreement granted by EFES.

26. The study in dispute is made available to the public by Ecorys and Case: the latter delivered it to the European Parliament, the sponsor of the study, which used it as it saw fit (including, in particular, by distributing "paper" versions or rendering it accessible in an electronic version), including analysing it in connection with Parliamentary work with a view to legislating at the European level.

In addition to extraction, the database was reused within the meaning of Article 2.3° of the Law of 31 August 1998,[7]the whole without Ecorys and Case being able to raise the pleas (of strict interpretation) specified at Article 7 of the Law of 31 August 1998.

27. We therefore find that there is a double violation of Article 4 of the Law of 31 August 1998.

28. The claim for enjoining these violations still has a purpose in spite of the fact that:

– the Internet site of the European Parliament no longer contains, at least since the end of March 2014, any link making direct reference to the text of the study in dispute,
– EFES, at least up until the end of March 2014, included a direct link to the text of the study in dispute on its Internet site.

As set forth above, the study in and of itself continues to exist. It may, at all times, be consulted, compared with other elements, or even constitute the basis of an additional study.

The letter sent by the European Parliament on 19 February 2014 to Messrs. Hashi and Lowitzsch (exhibit 13 filed by Case), does not allow for asserting otherwise (especially since this letter affirmed that the study in dispute was no longer accessible via its Internet site – which turned out to be inaccurate as verified at the hearing of 28 March 2014).

Consequently, EFES is quite right in its claim that injunctive measures be ordered.

The measures applied for shall be granted within the limits specified below in the operative part of this judgement.

[7]B. Michaux, op. cit, pp. 831 *et seq.*, more particularly p. 832 and the reference cited under the footnote to page 39.

However, a penalty shall not be added as it shall be especially difficult to make a distinction between the dissemination of the study made by Ecorys and Case and that made at the initiative of EFES by inserting it into its own Internet site by means of a direct link.

Furthermore, the risk of non-execution by Ecorys and Case has not been established.

Considering the facts of the case (withdrawal of the study from the Internet site of the European Parliament – no reference to the fact that it would have been accessible on the Internet sites of Ecorys and/or Case – participation in the dissemination of the study by EFES which, during several months, integrated it into its own Internet site by means of a direct link), publication of this judgement on the Internet site of the European Parliament, Ecorys and/or Case shall also not be ordered.

29. Ecorys and Case oppose provisional enforcement of this judgement.

This character is, however, automatically conferred on this decision pursuant to Article 12 *sexies*, § 1, *in fine* of the Law of 31 August 1998.

I consequently have no power of judgement in this regard.

30. I shall reserve costs while awaiting the decision to be entered by the District Court [*tribunal d'arrondissement*] (cf. supra).

ON THESE GROUNDS,

I, A. Dessy, Judge, appointed to replace the Presiding Judge of the French-speaking Court of First Instance of Brussels;

Assisted by M. Andolina, delegated clerk;

Considering the Law of 15 June 1935 on the use of languages in judicial matters;

Ruling in summary proceedings, after full trial;

1.
Declares that the claims shall be separated.

2.
Concerning the claim for damages made by the non-profit association EFES and the claim for guarantee made by Ecorys Nederland BV vis a vis the foundation governed by the laws of Poland, Centrum Analiz Spolecznoekonomicznych, abbreviated as Case.

Declares that Article 88, § 2 of the [Belgian] Judicial Code shall apply.

3.
Concerning the other main claims made by the non-profit association EFES:

Admits them and declares them founded to the following extent:

Finds that Ecorys Nederland BV and the foundation governed by the laws of Poland, Case, without the authorisation of the non-profit association EFES:

– in connection with their work in preparing the study entitled “Employee Financial Participation in Companies' Proceeds” produced for the European Parliament, made extractions from the database of the non-profit association EFES within the meaning of Article 2.2° of the Law of 31 August 1998,

– reused, within the meaning of Article 2.3° of the Law of 31 August 1998, its database, on pages 14, 21, 28-30, 37 and 48-49 of said study, published in September 2012, bearing reference PE 475.098.

Finds, consequently, that Ecorys Nederland BV and the foundation governed by the laws of Poland, Case, infringed EFES' data producer's rights as referred to at Article 4 of the Law of 31 August 1998.

Consequently,

Orders Ecorys Nederland BV and the foundation governed by the laws of Poland, Case, to cease any infringing use of the database of the non-profit association EFES.

Orders Ecorys Nederland BV and the foundation governed by the laws of Poland, Case, to cease or cause to cease the dissemination, offering for sale, promotion, distribution (for payment or free of charge) of the study entitled “Employee Financial Participation in Companies' Proceeds”, inclusive of all editions, even reviews or completed, to the extent that such study contains passages relating to the non-profit association EFES, used on pages 14, 21, 28-30, 37 and 48-49.

Enjoins Ecorys Nederland BV and the foundation governed by the laws of Poland, Case, from disseminating or causing to disseminate in any manner whatsoever and on any medium whatsoever (paper, digital, Internet, newsletter, etc.), excerpts relating to the non-profit association EFES referred to at pages 14, 21, 28-30,37 and 48-49 of the study entitled “Employee Financial Participation in Companies' Proceeds”.

Declares that this judgement shall be provisionally enforceable, notwithstanding any recourse and without the provision of any security.

Thus judged and pronounced at the French-speaking summary proceedings hearing held in open court on 6 June 2014.

[signature] [signature]
ANDOLINA DESSY