

**Parties to the main proceedings**

*Appellant in the appeal proceedings and defendant:* UPC Telekabel Wien GmbH, Vienna

*Respondents in the appeal proceedings and plaintiffs:* Constantin Film Verleih GmbH, Munich, Wega Filmproduktionsgesellschaft mbH

**Questions referred**

1. Is Article 8(3) of Directive 2001/29/EC <sup>(1)</sup> (the Information Directive) to be interpreted as meaning that a person who makes protected subject-matter available on the internet without the rightholder's consent (Article 3(2) of the Information Directive) is using the services of the access providers of persons seeking access to that protected subject-matter?
2. If the answer to the first question is in the negative: Are reproduction for private use (Article 5(2)(b) of the Information Directive) and transient and incidental reproduction (Article 5(1) of the Information Directive) permissible only if the original of the reproduction was lawfully reproduced, distributed or made available to the public?
3. If the answer to the first question or the second question is in the affirmative and an injunction is therefore to be issued against the user's access provider in accordance with Article 8(3) of the Information Directive: Is it compatible with Union law, in particular with the necessary balance between the parties' fundamental rights, to quite simply prohibit an access provider from allowing its customers access to a certain website (without ordering specific measures) as long as the material available on that website is provided exclusively or predominantly without the rightholder's consent, if the access provider can avoid incurring preventive penalties for breach of the prohibition by showing that it had nevertheless taken all reasonable measures?
4. If the answer to the third question is in the negative: Is it compatible with Union law, in particular with the necessary balance between the parties' fundamental rights, to require an access provider to take specific measures to make it more difficult for its customers to access a website containing material that is made available unlawfully if those measures require not inconsiderable costs and can easily be circumvented without any special technical knowledge?

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<sup>(1)</sup> Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society (OJ 2001 L 167, p. 10).

**Reference for a preliminary ruling from the Handelsgericht Wien (Austria) lodged on 9 July 2012 — Novontech-Zala Kft v LOGICDATA Electronic & Software Entwicklungs GmbH**

(Case C-324/12)

(2012/C 303/24)

*Language of the case:* German

**Referring court**

Handelsgericht Wien

**Parties to the main proceedings**

*Appellant and defendant:* Novontech-Zala Kft

*Respondent and applicant:* LOGICDATA Electronic & Software Entwicklungs GmbH

**Questions referred**

1. Does the failure on the part of a party's lawyer to comply with the time limit for opposing a European order for payment constitute fault on the part of the defendant for the purposes of Article 20(1)(b) of Regulation (EC) 1896/2006 of the European Parliament and of the Council of 12 December 2006 creating a European order for payment procedure? <sup>(1)</sup>
2. If fault on the part of the lawyer representing the defendant is not to be regarded as fault on the part of the defendant itself, is the failure of the former to take note of the correct date of expiry of the time limit for opposing a European order for payment to be regarded as an extraordinary circumstance within the meaning of Article 20(2) of Regulation 1896/2006?

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<sup>(1)</sup> OJ 2006 L 399, p. 1.

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**Reference for a preliminary ruling from the Finanzgericht Düsseldorf (Germany) lodged on 10 July 2012 — Rita van Caster, Patrick van Caster v Finanzamt Essen-Süd**

(Case C-326/12)

(2012/C 303/25)

*Language of the case:* German

**Referring court**

Finanzgericht Düsseldorf

**Parties to the main proceedings**

*Applicant:* Rita van Caster, Patrick van Caster

*Defendant:* Finanzamt Essen-Süd

### Question referred

Does the flat-rate taxation of income from so-called ‘intransparent’ (domestic and) foreign investment funds under Paragraph 6 of the Law on Investment Tax (Investment-steuergesetz) infringe European Community law (Article 56 EC) because it amounts to a disguised restriction on the free movement of capital (Article 58(3)) EC)?

### Reference for a preliminary ruling from the Bundesgerichtshof (Germany) lodged on 11 July 2012 — Ralph Schmidt (in his capacity as liquidator in respect of the assets of Aletta Zimmerman) v Lilly Hertel

(Case C-328/12)

(2012/C 303/26)

*Language of the case: German*

### Referring court

Bundesgerichtshof

### Parties to the main proceedings

*Applicant:* Ralph Schmidt (in his capacity as liquidator in respect of the assets of Aletta Zimmerman)

*Defendant:* Lilly Hertel

### Question referred

The following question regarding the interpretation of Article 3(1) of Council Regulation (EC) No 1346/2000 on insolvency proceedings <sup>(1)</sup> is to be referred to the Court of Justice of the European Union for a preliminary ruling:

Do the courts of the Member State within the territory of which insolvency proceedings regarding the debtor's assets have been opened have jurisdiction to decide an action to set a transaction aside by virtue of insolvency that is brought against a person whose place of residence or registered office is not within the territory of a Member State?

<sup>(1)</sup> OJ 2000 L 160, p. 1.

### Action brought on 13 July 2012 — European Commission v Portuguese Republic

(Case C-335/12)

(2012/C 303/27)

*Language of the case: Portuguese*

### Parties

*Applicant:* European Commission (represented by: A. Caeiros, Agent)

*Defendant:* Portuguese Republic

### Form of order sought

The Commission claims that the Court should:

— declare that, as a result of the refusal of the Portuguese authorities to make available a sum of EUR 785 078,50 corresponding to levies on surplus stocks of non-exported sugar, following the accession of Portugal to the European Community, the Portuguese Republic has failed to fulfil its obligations resulting from Article 10 EC, Article 254 of the Act of Accession, <sup>(1)</sup> Article 7 of Decision 85/257/EEC, Euratom, <sup>(2)</sup> Articles 4, 7 and 8 of Regulation (EEC) No 579/86, <sup>(3)</sup> Article 2 of Regulation (EEC) No 1697/79 <sup>(4)</sup> and Articles 2, 11 and 17 of Regulation (EEC, Euratom) No 1552/89; <sup>(5)</sup>

— order the Portuguese Republic to pay the costs.

### Pleas in law and main arguments

According to the information provided by the Portuguese authorities, the undertaking William Hinton & Sons did not provide proof of having exported the surplus sugar stocks in its possession. On 3 December 1990, the Portuguese authorities notified that undertaking that it had to pay an additional sum of EUR 785 078,50. The undertaking challenged that decision before the Supreme Tribunal Administrativo (Supreme Administrative Court; ‘STA’), which referred a number of questions to the Court of Justice for a preliminary ruling. On 11 October 2001, the Court of Justice delivered an order in Case C-30/00 *William Hinton & Sons*, <sup>(6)</sup> in which it stated that those questions ‘arose in the context of a dispute between William Hinton & Sons Lda ... and Fazenda Pública with regard to the post-clearance recovery of charges levied on surplus stocks of sugar held by William Hinton’. On 8 May 2002, the STA annulled the notice of assessment of the additional sum, because that sum was notified at a time when it was already time-barred.

Earlier case-law of the Court of Justice, namely the judgments of 7 December 2004 in Case T-240/02 *Koninklijke Coöperatie Cosun v Commission*, and of 26 October 2006 in Case C-68/05 P *Koninklijke Coöperatie Cosun v Commission*, suggests that the sum of EUR 785 078,50 referred to above could not continue to be classed as a ‘levy’ as it was in the order of the Court of Justice in Case C-30/00, but may continue to be classed as ‘own resources’ of the Communities.

Although that case-law concerns the levy of a sum under Article 3(1) of Regulation No 2670/81, <sup>(7)</sup> since a given quantity of C sugar was not exported outside of the Community, the fact remains that the chargeable event for the levying of that sum is essentially identical to the chargeable event for the levying of the sum provided for in Article 7(1)(a) of Regulation No 579/86, at issue in the present case. That provision states that a sum is levied on the quantities of sugar which exceed the carry-over stock and which have not been exported outside of the Community, since, in accordance with Article 5(2) of Regulation No 579/86, those quantities are regarded as having been disposed of on the internal market of the Community.

Pursuant to Article 2 of Decision 85/257, revenue from levies and other duties within the framework of the common organisation of the markets in sugar constitutes own resources.