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## II.1

Bruno Mestre, Lisbon/Florence\*

### Mono Car Styling: Collective Employee Representation as a duty?

(Mono Car Styling SA, in liquidation  $\nu$  Dervis Odemis and Others, ECJ (Fourth Chamber), Judgment of 16 July 2009, C-12/08)

The ECJ had to analyse whether an employee's restriction to judicially challenge a violation of a collective redundancy procedure was compatible with Directive 98/59. The ECJ made three bold statements: firstly, it asserted that the rights enshrined in the Directive were addressed to employee representatives and not to individual employees; secondly, it stated that the restriction did not amount to a violation of the right to an effective remedy; finally, it restated its theory of consistent interpretation and delegated the responsibility of assessing the compatibility with the Directive to the national court. It appears that this ruling created incentives for representation by recognising a «duty-like» dimension to employee representation, recognised a wide margin for manoeuvre to the member states in deciding the appropriate remedies and increasingly blurred the distinction between consistent interpretation and horizontal direct effect with pernicious consequences to the principle of legal certainty.

#### (1) Facts

This ruling concerns the compatibility with the Collective Redundancies Directive (Directive 98/59) of a provision of Belgian national law that made individual employees' right to judicially challenge a collective redundancy procedure dependent of the prior expression of their representatives within the procedure for information and consultation of employees mandated in that Directive.

The ruling arose during the course of judicial proceedings that opposed Mono Car – a Belgian company – to several employees made redundant. Mono Car suffered large financial losses during the year of 2004 and the board of directors decided to study the possibility of a voluntary liquidation of the company or a substantial reduction in staff. The board of directors of the company informed the works council of the crisis situation that the company was going through and of the need to make some employees redundant. Mono Car signed a *social plan with the union representatives* that determined the conditions for collective redundancies. These conditions provid-

ed for the absence of a notice period and factors for calculating the compensation due for redundancy and non-material damages. The social plan was *ratified by a collective agreement*, which contained a clause stating that the procedure for information and consultation had been observed by Mono Car.

The employees of Mono Car gathered at a general meeting and adopted the social plan that was later ratified by the works council. Mono Car then sent the list of the 30 workers made redundant, the criteria used to select them to the competent public authority and consequently made them redundant with effect from 21 June 2004. It is worth noting that the *competent public authority stated that the information and consultation procedure had been complied with* and neither the staff representatives nor the works council raised any objections concerning the compliance with the conditions for collective redundancies laid down in art.º 66 of the Belgian Law of 13 February 1998.

The Collective Redundancies Directive was transposed into *Belgian Law* by means of the Collective Labour Agreement n.º 24 (1975) concerning the procedure for informing and consulting employees in regard to collective redundancies. This Collective Agreement was modified by the Belgian Law of 13 February 1998 on measures in favour of employment. This act laid down in a more detailed way the procedure to be observed in situations of collective redundancies, namely the competent employee representatives, the content of the information to be provided and the means to conduct the bargaining. This Act contained a *provision* – Article 67 – *that restricted employees' rights to challenge a procedure for collective redundancy*. In accordance with this provision, a redundant worker may only challenge the collective redundancy based on the non-compliance with an exhaustive enumeration of duties strictly laid down in Article 66 of the 1998 Act and made the exercise of the *right dependent of the prior objection of the employee representatives*.





After the redundancy took place, **21 workers** of Mono Car Styling **challenged the regularity of the procedure** in a Labour Court in Liège based on the irregularity of the procedure. The workers won on the first instance but Mono Car appealed claiming that the statutory procedure was lawfully complied with and that the claims of the employees had no statutory backing at the light of Article 67 of the 1998 Act. The Court of Appeal of Liège decided to stay proceedings and initiate a **preliminary ruling procedure**. The national court asked, in essence, (1) if the **restriction to challenge the procedure for collective redundancies** contained in the 1998 Act was **compatible with the Collective Redundancies Directive**, (2) if it is also compatible with the **fundamental right to an effective judicial remedy** that form part of the general principles of Community Law and (3) if the Collective Redundancies Directive was correctly implemented in Belgium as it appeared that Belgian employers had lower duties to inform and consult and consult employees.

## (2) Judgment

The ECJ began by examining the **compatibility with the Collective Redundancies Directive** of the restriction to judicially challenge the regularity of the procedure for collective redundancies by an individual employee. The Court stated that the **rights** provided for in the Directive **are intended for employee representatives and not for individual employees**.<sup>1</sup> This emphasis of the need for collective representation in order to implement the Directive effectively is not unintentional because the **right to information and consultation inherently has a collective nature**: the employee representatives are the most appropriate actors to achieve the objectives of the duty to inform and consult laid down in the Directive because they are in the best position to formulate alternative proposals in order to avoid redundancies, reduce the number of workers affected or mitigate their consequences.<sup>2</sup> This led the Court to conclude that *«the right to information and consultation (...) is intended to benefit workers as a collective group and is therefore collective in nature»*.<sup>3</sup> Considering that the limitations to challenge the procedure are addressed to individual workers and not to employee representatives (who are not bound by any limitations on the grounds to judicially contest the proceedings), the ECJ concluded that the **Collective Redundancies Directive did not oppose the limitations on the individual rights of employees**.

The ECJ then proceeded to analyse whether the restriction was compatible with the **fundamental rights** protected at the EU level. The reasoning of the Court did not differ from the former question. The ECJ began by recalling that the **principle of effective judicial protection** is a general principle of EC Law stemming from the common constitutional traditions of the member states and several other international instruments such as Articles 6 and 13 of the European Convention of Human Rights and Article 47 of the Charter of the Fundamental Rights of the EU as well as numerous case law.<sup>4</sup> Although it is for the member states to designate the courts and tribunals having jurisdiction to lay down the detailed procedural rules governing actions to safeguard the rights deriving from EC law to individuals, the principle of effective implementation commands that the national legislation does not undermine the right to effective judicial protection. As regards the compatibility of the concrete rules with this principle, the ECJ remembered that the right to information and consultation enshrined in the Directives is collective by nature; therefore, the Court concluded that national rules that allow employee representatives to challenge any violation of the procedure for information and consultation and – in addition – also recognises individual employees with a statutory right to challenge some violations of the procedure cannot be said to violate the right to information and consultation.

The ECJ ended by addressing the **(apparently) narrower scope for consultation** contained in Article 66 of the 1998 Act; the court had to analyse whether such a restriction was compatible with the Collective Redundancies Directive. This was a complex question to answer because the Belgian government claimed during the hearing that that narrower scope was more apparent than real if one read the Act as a whole. The ECJ provided a solomonic solution to the question: it began by stating that the Collective Redundancies Directive opposed a reduction in the scope of the duty to undertake a procedure for information and consultation as it was laid down in that Directive. Despite this, it was for the national court to determine whether such a reduction in the scope of the duty had taken place because this depended on an **interpretation of national law as a whole**. This does not mean – of course – the recognition of horizontal direct effect to Directives in the event that that interpretation imposed a duty upon a private party. The national court simply has to interpret national law in such a way as to give the most practical expression to the duties





contained in the Directive and all duties that may eventually come to life in the sphere of private parties will emerge from national law and not from the Directives. This is nothing but the restatement of the principle of effective implementation of EC Law incumbent upon all member state organs.

### (3) Comment

Every legal professional is aware that there are cases of an appalling simplicity of facts and of an extraordinary difficulty of analysis. This may well be one of those cases on account of the number of issues that it raises. This strikingly simple case obliges us to make some very bold statements on some complex issues such as the relationship between national models of employee representation and EC Law, the protection of fundamental rights in general and of the right to effective judicial protection in particular and of the ever-difficult distinction between the horizontal direct effect of Directives and the theory of «consistent interpretation». The following lines will attempt to shed some light over each one of these issues.

#### (a) National Models of Employee Representation and EU Law

The first part of the ruling concerns the *representation model* embodied in the Directive. The ECJ made some extremely far-reaching statements claiming that the rights recognised in the Directive were addressed to employee representatives and not to individual employees,<sup>5</sup> that the right to information and consultation is a collective right by nature<sup>6</sup> and that the right to information and consultation is exercised through employee representatives.<sup>7</sup> The importance of the statements contained in these three paragraphs should not be underestimated. Some literature in the economic analysis of Labour Law has emphasized that collective organisation is not simply a labour cartel, it is a means of reducing the asymmetry of bargaining power *vis-à-vis* employers and promoting industrial democracy by providing employees with a means of actively engaging into dialogue with their employer.<sup>8</sup> The most recent *recognition of the constitutional dimension of collective bargaining* by the Supreme Court of Canada in the ruling *Facilities Subsector Bargaining Association vs British Columbia* (2007) serves as evidence of the increasing acceptance of this conception of collective bargaining.

EU Law seems to also have embodied this conception of collective bargaining by means of several legal instruments that it has enacted for its promotion. This position of the ECJ appears to come in the line of a number of legal instruments and

cases in which the EU has been attempting to re-inforce social dialogue at the level of the company as a means of overcoming social conflicts and achieving a more democratic organisation of the enterprise. The European Social Charter provides in Articles 21 and 29 that employees are to be informed and consulted on issues concerning the substantial interests of the workforce, in particular those that affect employment to a substantial extent. The Community Charter of Fundamental Social Rights for Workers – which inspired most of the post 1989 Labour Law Directives – states in its preamble and Articles 17 and 18 that the completion of the internal market must be complemented with a social dimension in which the information, consultation and participation of workers should be promoted and implemented in accordance with national laws and practices. Finally, the Charter of Fundamental Rights states that employees should be informed in accordance with national laws and practices. The instruments of secondary EU Law also provided another push to this dimension of social dialogue within enterprises. The Directives on Collective Redundancies and Transfer of Undertakings impose detailed information and consultation procedures in order to encourage a mutually bargained exit from a crisis situation. The Directives on the European Works Council, the European Cooperative Society, the European Company Statute and Information and Consultation of Employees clearly place an emphasis on a broader range of issues subject to *company-level social dialogue*. These Directives encourage the conclusion of privately bargained arrangements for information and consultation between the employer and the employee representatives because the statutory procedure only applies as a fall-back provision; they are free to agree on co-determination but the Directives merely demand the discussion of the issues and the implementation of procedures for social dialogue at the level of the undertaking. This may also be seen in a number of rulings of the ECJ. The most important of these rulings is clearly *Junk v Kühnel* in which the ECJ stated that the parties could not simply agree on the consequences of the collective redundancy but that they also had to discuss the terms of the redundancy.<sup>9</sup> This principle was restated in the ruling *G. Agorastoudini v Goodyear Hellas AVEE* in which the ECJ decided that the employer could not simply terminate the activities of an undertaking without engaging in a procedure for collective redundancy allowing him to search for a real alternative even if this position touched upon the property rights of the employee protected by national constitutions.<sup>10</sup> The comb





nation of these instruments may allow us to conclude that company-level social dialogue appears to be an important element of the Social Model embodied in those Directives.<sup>11</sup>

The novelty brought about by this ruling may be the following: it seems from its reading that *collective organisation is not simply a right but equally a duty of the employees*. The construction of collective representation made by the ECJ in this ruling appears to recognise a «obligation-like» dimension to collective organisation. The ECJ fundamentally said that the protection afforded by the Directive and its complementing case law equally imposed a duty upon the employees to organise and defend their interests within the information and consultation procedure. The «collective nature» of the procedure for information and consultation and the fact that the addressees of the Directive were employee representatives and not individual employees stresses the traditional perspective of the right to *collective organisation as an individual right exercised collectively*. A more pragmatic reading of this reasoning of the ECJ points to the same conclusion. The former paragraph claimed that the EU and the ECJ have been attempting to incorporate company-level social dialogue as a means of achieving a socially responsible management of European companies. The ECJ has been protecting fiercely every attempt undertaken by States and/or companies to undermine this intention: the rulings *Commission v UK*<sup>12</sup> and *Confédération Générale du Travail*<sup>13</sup> are expressive examples of this constant intention of safeguarding the possibility of employees engaging into social dialogue with their employers: the first ruling pre-empted the principle of voluntarism that underpinned British industrial relations and the second ruling pre-empted a certain law that discriminated between workers when it came to accounting the thresholds for representation. This ruling presents the other side of the coin: collective bargaining is a tiresome and burdensome procedure that sets upon compromises, has its risks and depends of an active participation to prevent free-riding; the recognition of the possibility of individually challenging the results of the compromise is bound to undermine the intention of the Directive because the employer and/or the employees will not be so keen in reaching a compromise if they fear that the results may simply be challenged in the courts and that the final decision will belong to the industrial tribunals or judges: their incentives will be to simply delegate the solution to the courts. This ruling has the opposite effect: it creates *incentives*

*for an active bargaining*, participation and attempt to reach a compromise because the employer and the employees will be aware that they will have no other opportunity of discussing the issue. In this sense, it has the paradoxical effect of strengthening social dialogue at the level of the firm because it delegates the responsibility to reach a solution to the company level actors themselves. It is a perfect example of the conception of industrial democracy embodied in the Canadian Supreme Court ruling in which the highest jurisdiction of that country declared that «*collective bargaining is not simply an instrument for pursuing external ends....rather [it] is intrinsically valuable as an experience in self-government*».<sup>14</sup>

(b) Fundamental Rights in General and the Right to an Effective Judicial Protection in Particular

This raises some questions concerning the compatibility of this reasoning with the fundamental right to effective judicial protection. This is where the ECJ could have been expected to be bolder after the recent rulings *Unibet*<sup>15</sup> and *Kadi*;<sup>16</sup> the ECJ chose to adopt a far more cautious approach however. As a preliminary word, it must be said that the protection of fundamental rights at the EU level is currently a settled issue in EC Law. Ever since *Internationale Handelsgesellschaft*<sup>17</sup> and *Nold v Commission*,<sup>18</sup> it has been certain for everyone studying EU Law that «*fundamental rights recognised and guaranteed by the constitutions of the Member States, especially those enshrined in the European Convention on Human Rights, form an integral part of the Community legal order*». The ruling *Schmidberger* provided a more recent and by no means less far-reaching expression of this idea when it declared that «*According to settled case law, fundamental rights form an integral part of the general principles of law the observance of which the Court ensures. For that purpose, the Court draws inspiration from the constitutional traditions common to the Member States and from the guidelines supplies by international treaties for the protection of human rights on which the member states have collaborated or to which they are signatories*».<sup>19</sup> The right to an effective judicial protection is positively recognised in Article 47 of the Charter of Fundamental Rights of the EU, Article 13 of the Convention for the Protection of Human Rights and Fundamental Freedoms and numerous national constitutions.<sup>20</sup> The distinctive characteristic of the *protection of fundamental rights at the EU level* comes in the form of its *enforceability*: the EU has gone beyond the traditional distinction between directly enforceable rights and rights dependent





on the enactment of ordinary statutes towards a model of enforcement in which the fundamental rights are constructed as enforceable duties that the EU institutions must comply with under penalty of seeing their acts declared invalid.<sup>21</sup>

The question lies *not so much in the recognition* or enforceability of the right to effective judicial protection *but on its interpretation*: could this right preclude an individual's possibility of going to Court and challenge the regularity of its redundancy on account of the absence of objection by its representatives during the procedure? This is a question that is far more political than strictly legal. The ECJ has, from the outset of the Community, set up a body of *case law destined to provide individuals with effective means of challenging violations of EU Law*. The principles of direct effect of EC provisions (*Van Gend and Loos*<sup>22</sup> and *Van Duyn*<sup>23</sup>) and State liability for damages arising from the breach of EC Law (*Franco*<sup>24</sup>) are two exemplifications of a judicially construed right to an effective judicial remedy. The fundamental idea underpinning these rulings is that *an individual cannot be deprived of a certain benefit* or be imposed a certain burden *on account of the State's failure* to act. The recognition of the right to an effective remedy in the Charter of Fundamental Rights raises the question of its reach: how far may an individual go when demanding judicial protection? The rulings *Unibet*<sup>25</sup> and *Kadi*<sup>26</sup> attempted to shed some light on this question. *Unibet* concerned a company of English law that sought to challenge before the Swedish courts a Swedish regulation requiring an administrative license to pursue certain activities for breach of the freedom to provide services. The problem was that Swedish law did not recognise such an action and only allowed to invoke the violation of constitutional or European norms in the course of administrative or criminal proceedings initiated by the State. The ECJ ruled that EC Law did not demand the setting up of a distinct procedure to challenge violations of fundamental rights and EC Law; it is enough that it may be possible to challenge national laws during the existing procedures. *Kadi* concerned an individual whose assets were frozen without a prior judicial procedure on account of an EC Regulation because he was suspect of being affiliated to Al-Qaeda and supporting terrorist activities. The ECJ decided that his right to a judicial remedy had been infringed because Mr. Kadi had not been informed of the evidence adduced against them and he had not been able to defend his rights with regard to that evidence in satisfactory conditions before the Community judicature.<sup>27</sup>

How are we to understand this ruling in the light of *Unibet* and *Kadi*? It appears from these two rulings that the ECJ does not make a very strict interpretation of the right to an effective remedy. Considering the great disparity of law enforcement procedures amid the member states and the State's freedom to choose the most appropriate means of implementing EC Law within its legal system, the ECJ seems to have taken a *minimalist approach* and granted member states with a wide margin of manoeuvre in choosing the appropriate remedies. The most important thing to stress is that *there have to be some means of enforcing the rights*; the question *whether those means are appropriate* is a question that *may be answered only in a case-by-case basis*. This allows us to understand the reasoning of the ECJ in *Mono Car*: it appears from the reading of paras. 48-52 of the ruling that the rights recognised in the Collective Redundancies Directive are collective in nature and therefore are addressed to employee representatives; the fact that the member state has opted to recognise individual employees with the possibility of challenging some aspects of the procedure appears to be already an additional benefit to the employees; this led the ECJ to conclude that the recognition of procedural legitimacy to the employee representatives amounted to a sufficient implementation of the right to an effective remedy in national law. Therefore, one must conclude that the individual fundamental right to an effective remedy has not been infringed.<sup>28</sup>

#### (c) Directives and Private Litigants – Questions Unanswered

The final part of the ruling concerned the ever-present question of the interpretation of directives in disputes between private litigants. The ECJ declared that it was for the national court to determine whether the legal system as a whole provided for a sufficient transposition of the duties laid down in the Collective Redundancies Directive. Considering that the Directive was to be applied in a dispute between private litigants, this raised the *question of direct effect of directives*; the ECJ restated its previous case law that directives cannot impose duties upon individuals and that all duties set up in the legal sphere of individuals will arise from national law – interpreted in conformity with the directive – and never from the directive itself. This restatement raises some serious questions.

The rulings *Marshall*<sup>29</sup> and *Von Colson*<sup>30</sup> have been extensively discussed by EC scholars.<sup>31</sup> The first denied horizontal direct effect to directives and th





second created the *dubious category of «consistent interpretation»* whereby the immediate source of the rights and duties imposed on individuals would be national law interpreted in accordance with the provisions of the directive. These rulings deserve a closer reflection on the issue of the horizontal direct effect of directives. As a preliminary word, it must be said that the distinction between direct effect and consistent interpretation seems fundamentally flawed because the end result is the same: the substance of the directive will apply to a relationship between private parties albeit it is not directly but by means of a somewhat artificial construction derived from national law. In this sense, national law acts as a type of «*testa di ferro*» (Straw man), i.e. someone who is manipulated by another person. In addition, it may also be said that this constant refusal to recognise horizontal direct effect to directives is equally dangerous because it **endangers the principle of legal certainty**. Directives are currently published in the Official Journal like any other act of EC Law. If individuals would be allowed to claim rights based upon directives then everyone could have at least the possibility to know the source of the right. This solution of obliging the national court to make artificial constructions to reach the same result of the directive has the paradoxical result of harming legal certainty because an individual may be deprived of a constant interpretation of a provision knowing only incidentally the reason. This was exactly what happened in *Marleasing*, a case in which the Spanish national court literally had to «make up» a reason to hold a company as valid in contrast to settled case law of that country.<sup>32</sup> This is even more so if we consider that this principle of consistent interpretation is valid even in relation to those directives that do not provide for clear and enforceable rights because the State is impeded to undertake actions during the transposition period of the Directive that may compromise its substance (*Inter-Environment Wallonie*<sup>33</sup>); the principle of legal certainty can be completely emptied by these means because even the most experienced lawyers in the field cannot say beyond all reasonable doubt what will be the reasoning of the judge or administrative authorities.<sup>34</sup>

There is one final reason to doubt the solidness of this doctrine that is directly relevant to this case. The rulings *Arcaro*<sup>35</sup> and *Kofoed*<sup>36</sup> placed a limit to the possibilities of interpretation stating that the **interpretation could not go as far as to impose an obligation on an individual**. These rulings arose in the course of criminal pro-

ceedings and tax law; it is well known that these two fields of law place a considerably heavy emphasis on the principle of legality because a person cannot be held criminally liable or be deprived of part of his income without a prior law expressly authorising the State to do so. Can the same reasoning be transposed to private litigation or is it restricted to administrative and criminal procedures? If the Belgian national law effectively does not provide employee representatives with all the rights enshrined in the Collective Redundancies Directive, what will be the remedy? Can the employee representatives demand a «consistent interpretation» and invent some way of imposing a duty that is not statutorily recognised? The ECJ seems to have avoided this issue by simply delegating the responsibility to make that assessment to the national court.

#### (d) Conclusion

This ruling may allow us to extract three distinct conclusions: firstly, the ECJ maintained its emphasis on company level social dialogue as a means of overcoming social conflicts and achieving a more democratic organisation of the company as a means of «self-government»; the novelty brought about by this ruling is that employee representation appears not to be only a right but equally a duty of the employees if they want to enjoy certain rights enshrined in the Directives. The Directives are addressed to employee representatives and not to individual employees and this denial has the paradoxical effect of creating incentives for representation, social dialogue and avoiding free-riding on the bargaining of others. Secondly, the ECJ provided a very generous reading of the principle of effective judicial protection by claiming that employees simply need to have a certain procedure to enforce their rights; the effectiveness of the procedure is to be made in a case-by-case basis. Finally, as regards the effect between private parties, the ECJ restated its theory of consistent interpretation and delegated the responsibility to the private parties; this is an increasingly dangerous perspective because the distinction between horizontal direct effect and consistent interpretation is becoming increasingly blurred and is capable of seriously harming the principle of legal certainty.

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<sup>1</sup> Judgment, para. 38.

<sup>2</sup> Judgment, para. 40.





- <sup>3</sup> Judgment, para. 42.
- <sup>4</sup> The ECJ made reference to ECJ [2007] ECR I-2271 *Unibet (London) Ltd and Unibet (International) Ltd v Justitiekanslern*; and ECJ [2008] ECR I-6351 *Yassin Abdullah Kadi and Al Barakaat International Foundation v Council and Commission*.
- <sup>5</sup> Judgment, para. 39.
- <sup>6</sup> Judgment, para. 40.
- <sup>7</sup> Judgment, para. 41.
- <sup>8</sup> *Dau-Schmidt*, A Bargaining Analysis of American Labour Law and the Search for Bargaining Equity and Industrial Peace, 91 Michigan Law Review [1992] 419.
- <sup>9</sup> ECJ [2005] ECR I-885 *Irmtraud Junk v Wolfgang Kühnel*.
- <sup>10</sup> ECJ [2006] ECR I-7775 *Georgios Agorastoudis and Others v Goodyear Hellas ABEE*.
- <sup>11</sup> See *Mestre*, Corporate and Collective Bargaining (2009), v.2, Doctoral thesis from the European University Institute; see also, *Mestre*, The ruling *Akavan vs Fujitsu*. Collective Redundancies in European Groups Facilitated, ELR [2009] 388.
- <sup>12</sup> ECJ [1994] ECR I-2479 *Commission v United Kingdom of Great Britain and Northern Ireland*.
- <sup>13</sup> ECJ [2007] ECR I-611 *Confédération générale du travail (CGT) and Others v Premier ministre and Ministre de l'Emploi, de la Cohésion sociale et du Logement*.
- <sup>14</sup> A recent decision from a Portuguese Employment Court in Faro followed the same approach: it expressly stated that employee representation was a duty of the employees that they had to abide with in order to enjoy some prerogatives in Collective Redundancies procedures. We would like to thank attorney in law Filipe Azóia (Partner at PLMJ – Law Firm) for having made the decision available to us.
- <sup>15</sup> ECJ [2007] ECR I-2271 *Unibet (London) Ltd and Unibet (International) Ltd v Justitiekanslern*.
- <sup>16</sup> ECJ [2008] ECR I-6351 *Yassin Abdullah Kadi and Al Barakaat International Foundation v Council and Commission*.
- <sup>17</sup> ECJ [1970] ECR 1125 *Internationale Handelsgesellschaft mbH v Einfuhr- und Vorratsstelle für Getreide und Futtermittel*.
- <sup>18</sup> ECJ [1977] ECR 1 *J. Nold, Kohlen- und Baustoffgrosshandlung v Ruhrkohle Aktiengesellschaft*.
- <sup>19</sup> ECJ [2003] ECR I-5659 *Eugen Schmidberger, Internationale Transporte und Planzüge v Republik Österreich*, para. 71.
- <sup>20</sup> For example: Article 20 of the Portuguese Constitution; Article 24 of the Spanish Constitution; Articles 97, 101 and 103 German Constitution among many others.
- <sup>21</sup> *De Burca*, The European Court of Justice and the International Legal Order After *Kadi* (2009), Fordham Legal Studies

Research Paper, n.º 1321313; see also *Mestre*, Some preliminary comments on the opinion of Advocate-General Mengozzi in the *Laval Case*, ELR [2007] 174-185.

- <sup>22</sup> ECJ of 5 February 1963, C-26/62 *NV Algemene Transport- en Expeditie Onderneming van Gend & Loos v Netherlands Inland Revenue Administration*.
- <sup>23</sup> ECJ [1974] ECR 1337 *Yvonne van Duyn v Home Office*.
- <sup>24</sup> ECJ [1991] ECR I-5357 *Andrea Francovich and Others v Italian Republic*.
- <sup>25</sup> ECJ [2007] ECR I-2271 *Unibet (London) Ltd and Unibet (International) Ltd v Justitiekanslern*.
- <sup>26</sup> ECJ [2008] ECR I-6351 *Yassin Abdullah Kadi and Al Barakaat International Foundation v Council and Commission*.
- <sup>27</sup> ECJ [2008] ECR I-6351 *Yassin Abdullah Kadi and Al Barakaat International Foundation v Council and Commission*, paras. 333-353.
- <sup>28</sup> For a very critical perspective on this ruling, see *Reyners*, *Affaire «Mono Car»: droits individuels des travailleurs et licenciement collectif*, Journal de Droit Européen [2009] 1.
- <sup>29</sup> ECJ [1986] ECR 723 *M. H. Marshall v Southampton and South-West Hampshire Area Health Authority (Teaching)*.
- <sup>30</sup> ECJ [1984] ECR 1891 *Sabine von Colson and Elisabeth Kamann v Land Nordrhein-Westfalen*.
- <sup>31</sup> *Craig*, The legal effect of Directives: policy, rules and exceptions, in Legal Research Paper Series, n.º 24/2009, University of Oxford (available in SSRN); *Blutman*, Preclusive effect of Directives: an explanatory framework for the post-Lisbon era, in *Miskolc Journal of International Law*; *Senyucel*, The direct effect of community directives: the effect of the *Unilever* judgment, in *Ankara Law Review* (2005), v.2, n.1, pp.81-88; for a synthesis of the state of the art in the discussion see *Craig and De Búrca*, *EU Law: text, cases and materials*, OUP, pp. 202-230.
- <sup>32</sup> ECJ [1990] ECR I-4135 *Marleasing SA v La Comercial Internacional de Alimentacion SA*.
- <sup>33</sup> ECJ [1997] ECR I-7411 *Inter-Environnement Wallonie ASBL v Région wallonne*.
- <sup>34</sup> For an extremely interesting reflection on the issue of the horizontal direct effect of Directives, see *Craig*, The legal effect of Directives: policy, rules and exceptions, in Legal Research Paper Series, n.º 24/2009, University of Oxford (available in SSRN); also published in 34 *European Law Review* [2009] 349.
- <sup>35</sup> ECJ [1996] ECR I-4705 *Criminal proceedings against Luciani Arcaro*.
- <sup>36</sup> ECJ [2007] ECR I-5795 *Hans Markus Kofoed v Skatteministeriet*.

