Article 27

Article 27
Workers' Right to Information and Consultation within the Undertaking
Workers or their representatives must, at the appropriate levels, be guaranteed information and consultation in good time in the cases and under the conditions provided for by Union law and national laws and practices.

Text of Explanatory Note on Article 27

This Article appears in the revised European Social Charter (Article 21) and in the Community Charter on the rights of workers (points 17 and 18). It applies under the conditions laid down by Community law and by national laws. The reference to appropriate levels refers to the levels laid down by Community law or by national laws and practices, which might include the European level when Community legislation so provides. There is a considerable Community acquis in this field:

Articles 138 and 139 of the EC Treaty, and Directives 98/59/EC (collective redundancies), 77/187/EEC (transfers of undertakings) and 94/45/EC (European works councils).

Select Bibliography

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A. Field of Application of Article 27

Article 27 is bound to be extremely relevant due to a long standing *acquis* in the field of information and consultation rights. The explanations refer to some major EU Directives in this field which were in force in 2000. This catalogue can be updated. **27.01**

At present, it needs to be complemented by the Framework Directive 2002/12 and the Recast Directive 2009/39. The 'geographical' field of application (*ratione loci*) of these intertwined rights is indicated in a very summary manner, ie 'at the appropriate levels'. The 'personal' scope (*ratione personae)* is indicated in a much more precise way. The holders of such a right are 'workers' or 'their representatives'. The provision is entirely mute on the object of information and consultation (scope *ratione materiae*).

27.02 In my view, the mutism on the object could warrant the qualification of the right to information and consultation as constituting a 'principle' in the meaning of Article 52(5) of the Charter. Hence, this right would not be judicially cognisable in absence of an implementation within EU law. In my view, this flaw is far from being problematic, since the subject matter constitutes one of the most highly developed parts of EU labour law.

27.03 According to the explanation, the 'conditions' are defined both by EU law and by national laws. In my view, this explanation is not very consistent with the main idea that the Charter is only applicable to EU institutions and to the Member States *implementing EU law*. Thus, it is more consistent to state that the appropriate levels regarding the right to information and consultation are defined by the EU Directives implementing such a right. The latter will obviously be implemented in their own right by national legislation and/or practices in the Member States. However, these conditions defined by national law should be consistent with the EU Directives. Insofar as these EU Directives refer to national law and practices, the latter might come into play.

27.04 An analysis of the applicable EU Directives amounts to the conclusion that the right to information and consultation will come into play at a variety of levels

— establishment and undertaking;
— the 'company' in the meaning of company law;
— the group of undertakings.

B. Interrelationship of Article 27 with Other Provisions of the Charter

27.05 The right to information and consultation cannot be dissociated from the exercise of the managerial prerogative. It constitutes a procedural restriction of the latter. The exercise of the managerial prerogative is deeply rooted in the freedom to conduct a business.[1] This right is recognised 'in accordance with Union law and national laws'. Many EU Directives have stressed the idea that the right to information and consultation should not affect the exercise of the managerial prerogative.[2]

27.06 The right to information and consultation needs to be distinguished from the right to 'negotiate and conclude collective agreements at the appropriate levels' of Article 28 of

[1] See Art 16 Charter of Fundamental Rights of the European Union.

[2] Part 2(c) *in fine* of the Standard Rules of the SE Directive; Point 3 *in fine* of the subsidiary requirements of the Recast Directive (EWC) 2009/38, Art 2(1)(e) of the Framework Directive 'Decisions within the scope of the employer's power'.

the Charter. Whereas the right to information and consultation precedes the adoption of a *unilateral decision* by management, the right to negotiate amounts to a legal act, ie an agreement, which will be concluded by management and labour. There is another distinction that is related to the issue of the holdership of the right. The right to negotiation is attributed to workers and employers *or* their respective organisations. The right to information and consultation is attributed solely to workers and their 'representatives'. Contrary to the provision related to the right to 'negotiate', the 'representatives' are not identified as such. It is not at all clear whether the 'representatives' involved refer to representatives designated by trade unions, or representatives which are elected by workers' representatives. In sum, whereas the right to negotiate is being construed as a trade union prerogative, the right to information and consultation is not being approached per se in such a manner. This potential dissociation in the holdership of the right to information and collective bargaining can constitute a problem, insofar as adequate information is a prerequisite for meaningful negotiations.

27.07 The question arises as to whether the right to information and consultation could be related to other provisions which help to contextualise the right to information and consultation. In cases of restructuring, the right to information and consultation could serve as a means to prevent or mitigate collective redundancies. At first sight, it seems challenging to relate the 'right to protection against *unjustified* dismissal'[3] to the right to information and consultation. In *Mono Car Styling*[4] Advocate General Mengozzi examined to what extent the violation of the right to information and consultation was intertwined with the right to protection against unjustified dismissal. The Advocate General distinguished between an employment protection aimed at combatting unjustified dismissals and employment protection related to merely irregular dismissals. He concluded that 'Breaches of Directive 98/59, on the other hand, do not appear to be such as to justify reference to Article 30 of the Charter for, given the content of the directive, it is intended that the result of such breaches will be illegality of a formal/procedural kind.'[5]

27.08 In our view, Article 31 of the Charter (the right to working conditions which respect his or her health, safety and dignity) might be relevant for the issue of information and consultation, insofar as a case could be built that worker involvement is essential to the issue of health and safety (the right to working conditions which respect his or her health, safety and dignity). Many arguments seem to plead in favour of such a case. Thus, the Community Charter of Fundamental Social Rights of Workers (1989) insists on the adoption of measures which 'take account, in particular, of the need for the training, *information, consultation and balanced participation of workers as regards the risks incurred and the steps taken to eliminate or reduce them*' in view of the right to enjoy satisfactory health and safety conditions in his working environment.[6] Article 22 of the Revised European Social Charter recognises a right to take part in the determination and improvement of the working conditions and working environment in the

[3] See Art 30 Charter of Fundamental Rights of the European Union (emphasis added).
[4] See Opinion of AG Mengozzi in Case C-12/08 *Mono Car Styling* [2009] ECR I-6653.
[5] Ibid [96].
[6] See Point 19 of the Community Charter for fundamental social rights of workers: www.aedh.eu/plugins/fckeditor/userfiles/file/Conventions%20internationales/Community_Charter_of_the_Fundamental_Social_Rights_of_Workers.pdf (emphasis added).

undertaking. Last but not least, the Framework Directive 89/391 insists in the recitals on the necessity of 'information, dialogue and balanced participation on safety and health at work'.[7] Article 11 of the Directive adopts a very progressive stance to the issue of worker involvement. As opposed to worker involvement in scenarios of restructuring, worker representatives are not only informed and consulted, but are entitled to play a more proactive role by submitting proposals to the employer. The article refers to 'participation'.

27.09 In *Commission v Netherlands*,[8] the CJEU has considered that 'the aim of the Directive is to promote balanced participation of employers and workers in activities related to protection against and prevention of occupational risks'.[9]

27.10 The Court has rejected the view that this objective is merely instrumental to the protection of health and safety. Though the Court had to rule in a dispute on the precedence which the Directive has given to the internal organisation of protective and preventive services, the considerations of the Court with regard to the aims of the Directive transcend the issue of the organisation of these services. It has considered that these aims are 'not solely improving the protection of workers against accidents at work and the prevention of occupational risks, but also intending to to introduce specific measures to organise that protection and prevention'.[10] The considerations are also relevant to assess the quintessential nature of other modalities of worker involvement, such as the role played by worker representatives.

C. Sources of Article 27 Rights

27.11 As indicated in the Explanation, two obvious sources can be put forward which have stressed the fundamental character of the right to information and consultation. Both sources are fairly recent. The Explanation refers to Article 21 of the Revised European Social Charter.[11] Article 21 states:

> With a view to ensuring the effective exercise of the right of workers to be informed and consulted within the undertaking, the Parties undertake to adopt or encourage measures enabling workers or their representatives, in accordance with national legislation and practice:
> (a) to be informed regularly or at the appropriate time and in a comprehensible way about the economic and financial situation of the undertaking employing them, on the understanding that the disclosure of certain information which could be prejudicial to the undertaking may be refused or subject to confidentiality;

[7] See Recital Council Directive 89/391/EEC on the introduction of measures to encourage improvements in the safety and health of workers at work [1989] OJ L183/1–8.

[8] Case C-441/01 *Commission v Netherlands* ECR I-5463.

[9] Ibid [54].

[10] Ibid [38].

[11] For a more comprehensive analysis of the right to information and consultation in the RESC, see in minute detail the excellent contribution of C Kollonay Lehoczky, 'The fundamental right of workers to information and consultation under the European Social Charter', in F Dorssemont and T Blanke (eds), *The Recast of the European Works Council Directive* (Antwerp, Intersentia, 2010) 3–30.

(b) to be consulted in good time on proposed decisions which could substantially affect the interests of workers, particularly on those decisions which could have an important impact on the employment situation in the undertaking.

27.12 This article dates back to the adoption of the 1988 Additional Protocol and has been integrated in the 1996 Revised European Social Charter. It is to be regretted that the explanation does not refer to the more specific Article 29 RESC, which recognises a right to information and consultation 'in situations of collective redundancies'. The article adopts a less rigorous stance on the issue of the timing of the information and consultation procedure, as opposed to EU Directive 98/59. It prescribes information and consultation 'in good time prior to such collective redundancies', whereas EU Directive 98/58 obliges an employer to inform and consult as soon as he contemplates collective redundancies. The RESC illustrates how the consequences of collective redundancies could be mitigated. In this respect, it suggests, inter alia, recourse to accompanying social measures aimed, in particular, at aid for the redeployment. EU Directive 98/59 also suggests such measures, but also mentions the idea of aid for retraining workers.

27.13 The Explanation also point to Articles 17 and 18 of the Community Charter of Fundamental Social Rights of Workers. These provisions state:

17. Information, consultation and participation for workers must be developed along appropriate lines, taking account of the practices in force in the various Member States.
This shall apply especially in companies or groups of companies having establishments or companies in several Member States of the European Community.
18. Such information, consultation and participation must be implemented in due time, particularly in the following cases:
    — when technological changes which, from the point of view of working conditions and work organisation, have major implications for the work force are introduced into undertakings;
    — in connection with restructuring operations in undertakings or in cases of mergers having an impact on the employment of workers;
    — in cases of collective redundancy procedures.

27.14 The question arises whether the right to information and consultation could possibly be related to the progressive development of the scope of Article 11 of the European Convention of Human Rights. In *National Union of Belgian Police*, the European Court of Human Rights acknowledged that a police union which was not recognised as representative for the provincial and municipal civil service, had the right 'to be heard' by the government.[12] The right of unions 'to be heard' is the first corollary right which the European Court of Human Rights has recognised as being 'necessarily inherent' in the right to form and join trade unions to 'protect' the interests of workers. The Court in fact argued that the phrase 'for the protection of his interests' is not redundant.[13] Thus the teleological coda of Article 11(1) serves as the basis for the development of corollary rights which have not been explicitly recognised. The Court ruled that a trade union has the right to make its position known to the government (as employer), to be heard and to defend the interests of its members. The union in question in fact enjoyed this right.

[12] *National Union of Belgian Police* App no 4464/70 (ECtHR, 27 October 1975).
[13] Ibid [39].

27.15 The *right to be heard* needs to be distinguished from the right to be consulted. As evidenced by the facts of the case, the trade union concerned had the right to be heard, but it did not have a right to be consulted with regard to the adoption of the regulations applicable to the municipal and provincial staff. This process needs to be distinguished from collective bargaining. The regulations were adopted through a unilateral act of the administration. They were related to the employment conditions of the entire municipal and provincial staff. Obviously, the police union was not representative at all in this respect. In contrast to several judges who issued dissenting opinions, the Court felt that the police union likewise did not have a right to be involved in the adoption of those provisions pertaining solely to police members.[14]

27.16 The precise scope of the 'right to be heard' is troublesome. In *National Union of Belgian Police,* the Court did not provide much guidance. In *Wilson* the Court reaffirmed the recognition of the right to be heard as a general principle.[15] In applying this general principle to the facts of the case, it elaborated on the existence of a 'right to seek to persuade the employer to listen to what it has to say on behalf of its members'.[16] Referring to the development of 'essential elements' in its case law, the Grand Chamber in *Demir and Baykara II* did not refer to 'a right to be heard', but solely to this more elaborated formula. Hence, there can be no doubt that these two formulas refer to an identical element considered to be inherent in the right to organise.[17]

27.17 The right to be heard has been construed as an essential element of trade union freedom. Its object remains unclear. The right to be informed and consulted goes further. It will force an employer to provide precise information in a more proactive manner, whereas he only has to receive a trade union which wants to be heard if it insists on being heard. The right to be heard does not in my view force an employer to substantiate the reasons why the observations expressed could not be taken into account. Furthermore, the right to be heard has been construed as an essential trade union prerogative, whereas the right to be informed and consulted can be exercised by workers' representatives. There is no reason to assume that the latter will have to be trade union officials.

27.18 Though it would be erroneous to suggest that information and consultation rights ought to be construed as trade union prerogatives, the attribution of those rights to elected workers' representatives might generate a risk of undermining the position of trade unions within the enterprise. Equally, however, it guarantees representation in work places where trade unions are not organised.[18]

27.19 Last but not least, the right to information and consultation has been given a constitutional status in some EU Member States.[19] As a general rule, most of the provisions which could be used as a basis to warrant that the right to information and consultation is constitutionally anchored, do not refer as such to the existence

[14] Ibid [49].

[15] *Wilson, National Union of Journalists and Others v United Kingdom* App no 15573/89 (ECtHR, 2 July 2002) [42]. See also KD Ewing, 'The implications of Wilson and Palmer' [2003] *Industrial Law Journal* 1–22.

[16] *Wilson, National Union of Journalists and Others* (n 15) [44].

[17] *Demir and Baykara v Turkey* App no 34503/97 (ECtHR, 12 November 2008) [145].

[18] Case C-382/92 *Commission v United Kingdom* [1994] ECR I-2435.

[19] See in this respect T Blanke, 'Workers' right to information and consultation within the undertaking (Article 27)' in B Bercusson (ed), *European Labour Law and the EU Charter of Fundamental Rights* (Baden-Baden, Nomos, 2006) 269–78.

of a right to information and consultation. Instead they use a more generic formula related to an idea of 'participation' of the workers in the management of the firm. Examples are legion:

— Article 46 of the Italian Constitution;
— the Preamble of the French Constitution (1946);
— Article 54 of the Portuguese Constitution (which also refers to information in an explicit way); and
— Article 19 of the Dutch Constitution.

27.20 The word 'participation' is somewhat ambiguous. It could refer to a generic concept like 'worker involvement' or to the idea that workers through their representatives have a right to co determination. This general formula was first used in the Constitution of the Weimar Republic.[20]

D. Analysis

I. General Remarks

27.21 An analysis of the *acquis* of workers' involvement Directives reveals that the European legislator regulates national as well as transnational information and consultation procedures. One can spot a certain historic fluctuation. The Collective Redundancy Directive[21] and the Transfer of Undertakings Directive[22] which came into being in the mid seventies, are primarily aimed at national restructuring operations. This does not prevent a transnational transfer of undertaking from falling within the scope of the Transfer of Undertakings Directive. The subsidiarity principle should not be explained in such a way that the European legislator must refrain from regulating purely national restructuring operations.

27.22 The interest of the European Commission in transnational issues of worker involvement issues led to a successful breakthrough only at the beginning of the 1990s, with

[20] Art 165 of the Weimar Constitution: 'Workers and employees are called to collaborate on equal footing with the entrepreneurs to the regulation of wages and working conditions as well as to the overall economic development of the productive forces. The organisations of workers and entrepreneurs and their agreements are recognised. Workers and employees will be represented for the furtherance of their social and economic interests in workers' councils as well as in district workers' councils at professional level as well as in the Federal workers' council.' (Original German: Die Arbeiter und Angestellten sind dazu berufen, gleichberechtigt in Gemeinschaft mit den Unternehmern an der Regelung der Lohn- und Arbeitsbedingungen sowie an der gesamten wirtschaftlichen Entwicklung der produktiven Kräfte mitzuwirken. Die beiderseitigen Organisationen und ihre Vereinbarungen werden anerkannt. Die Arbeiter und Angestellten erhalten zur Wahrnehmung ihrer sozialen und wirtschaftlichen Interessen gesetzliche Vertretungen in Betriebsarbeiterräten sowie in nach Wirtschaftsgebieten gegliederten Bezirksarbeiterräten und in einem Reichsarbeiterrät.)

[21] Council Directive 98/59/EC on the approximation of the laws of the Member States relating to collective redundancies [1998] OJ L225/16–21.

[22] Council Directive 2001/23/EC on the approximation of the laws of the Member States relating to the safeguarding of employees' rights in the event of transfers of undertakings, businesses or parts of undertakings or businesses [2001] OJ L82/16–20.

the adoption of the EWC Directive (in 1994).[23] A second breakthrough was the SE Directive (2001).[24] Workers' participation within the *Societas Europaea* was already at the heart of the proposal for a Council Regulation on the statute for a European limited liability company (1970).[25] The Framework Directive 2002/14[26] links up again with the concern to regulate information and consultation on a national level. The amendments and rewriting of the Collective Redundancy Directive and the Transfer of Undertakings Directive in 1992, 1998 and 2001 show that this concern has been ongoing.

27.23 As regards content, the legislator seems to have paid attention to the issue of permanent and general economic and social information (and consultation), as well as to that of information and consultation in extraordinary circumstances affecting workers' interests to a considerable extent.

27.24 The European legislator seems to have expended most of his efforts on the issue of information and consultation. The more delicate matter of participation—more delicate because it is more conditioned by national and ideological differences—remained mostly untouched. It is not consecrated by the Charter.

27.25 In 1998 and 2001, the Directives of 1975 and 1977 respectively were repealed and replaced. In this process, a remarkable recital was added.[27] In this recital, a specific reference to the Community Charter of the Rights of Workers was made. Regrettably, neither Directive refers to the Additional Protocol of the European Social Charter.

II. Scope of Application

(a) Holdership Ratione Personae

27.26 The workers' involvement Directives aim at developing a so-called right to information and consultation or participation. The Directives clearly show that workers' representatives have a natural vocation to exercise these rights. This, however, does not make them per se *holders* (in French: *titulaires*) of these rights.

27.27 In our view, the right to information and consultation are best described as *collective freedoms* (*libertés collectives*). The collective character of these freedoms stems from three factors. First, these rights do not consider their holders primarily as atomised individuals of civil society, but as members of a collective. Second, these employment rights are not only collective due to the way they are exercised, their content is of a collective nature as well. The subject of the information and consultation is fundamentally the global or collective situation of workers.

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[23] Council Directive 94/45/EC on the establishment of a European Works Council or a procedure in Community-scale undertakings and Community-scale groups of undertakings for the purposes of informing and consulting employees [1994] OJ L254/64–72.

[24] Council Directive 2001/86/EC supplementing the Statute for a European company with regard to the involvement of employees [2001] OJ L294/22–32.

[25] [1970] OJ C124/1.

[26] Directive 2002/14/EC establishing a general framework for informing and consulting employees in the European Community—Joint declaration of the European Parliament, the Council and the Commission on employee representation [2002] OJ L80/29–34.

[27] Recital 6 of the Preamble of the Collective Redundancy Directive and Recital 5 of the Preamble of the Transfer of Undertakings Directive.

27.28 However, the holders of these collective freedoms are, in our opinion, individual workers. 'The collective', the 'labour', the 'trade union' or the body representative of the workers is *not* the holder of these collective liberties.

27.29 The Community Charter construes this right to information and consultation unequivocally as a fundamental right of workers. At first sight, the wording of the Additional Protocol of the European Social Charter and the Charter of Nice is more ambiguous. The right to information and consultation is declared as a right for the benefit of workers *or* their representatives. The Explanatory Report to the Additional Protocol explains that the use of the word 'or' has no exclusive meaning. The explanation seems to indicate an inclusive use. The distinction between the legal capacity to enjoy the benefits of these rights and the legal capacity to actually exercise these rights is not emphasised.[28]

27.30 It is remarkable that the Charter only mentions the right to information and consultation of workers in the heading of Article 27. Employee representation is only mentioned in *the wording* of the fundamental right following the heading. The manner in which this fundamental right is drafted seems to indicate the exercise rather than mere enjoyment of the right. The reference to employee representatives in both declarations does not seem to be an argument to edge off the thesis that employees are the real holders of these fundamental rights. On the contrary, it seems to emphasise the importance of employee representation in the exercise of this fundamental right. Moreover, this reference seems to create a buffer against direct or atomising employee representation systems.

27.31 In the recent *Mono Car Styling*[29] judgment with regard to the Belgian transposition of the Collective Redundancies Directive, the Court of Justice considered that the right to information and consultation is addressed (*destiné*) to workers' representatives and not to employees individually. It was said to benefit the employees as a whole. The Court did consider that the right is *exercised* by workers' representatives. These elements are not at odds with the idea that employees as members of a group can be considered to be the holders of a right to information and consultation as a collective freedom. However, the Court rejected such an approach and decided to qualify the right to information and consultation as being of a 'collective nature'. It allowed Member States to deny an individual employee's access to justice in the event of a violation of information and consultation procedures. Thus, it seems the Court is unable to recognise that the right to information and consultation is being held by employees as opposed to workers' representatives. The Court did not look into the human rights instruments related to information and consultation. The judgment was merely based on a teleological and systematic interpretation of the Collective Redundancies Directive.

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[28] See 'Rapport explicatif au Protocol additionnel' in *Charte sociale européenne* (Strasbourg, Editions du Conseil d'Europe, 2001) 131: 'que les droits reconnus par ces deux dispositions peuvent être exercées par les travailleurs ou par leurs représentants, ou par les uns et les autres'.

[29] Case C-12/08 *Mono Car Styling* (n 4).

III. Specific Provisions

(a) Information

27.32 The most embryonic form of 'involvement' is the right to *information*. In a number of European Directives the content of the term 'information' is not defined.[30] The SE Directive and the Framework Directive do contain such a definition.[31] The definition of the right to information violates the *id per id* prohibition in some languages. The Dutch versions link the right to information to the provision of data by the employer to the employee representatives in order to allow them to acquire knowledge, explore a relevant subject and assess it. The emphasis is on the auxiliary function of information, as opposed to consultation.

27.33 Information does not imply the transfer of knowledge or the transfer of an opinion on certain facts. It aims at the transfer of data which constitutes the basis of knowledge and the formation of an opinion by the employee representatives.

27.34 The employer's duty to cooperate with the consultative bodies forces the former to perform this duty to inform in good faith.[32] The definitions according to the SE Directive and the Framework Directive emphasise the implications of this principle with respect to the time, the manner and content of this information.

27.35 Neither the Framework Directive's nor the SE Directive's definitions of 'information' make it clear that this information must be in writing. More specific clauses of these Directives do not mention the written character of this information, either. Article 2 of the Subsidiary Requirements of the EWC Directive mentions 'the right to meet with the central management once a year, to be informed and consulted, on the basis of a report drawn up by the central management'. The extraordinary information and consultation meeting takes place on the basis of a report (oral or written?) of the central or any another management at a more appropriate level.

27.36 Neither the European Social Charter, the Community Charter, nor the Charter of Nice mentions the oral or written nature of the information.

27.37 The Recast (EWC) Directive 2009/38 defines the concept of information as 'a transmission of data by the employer to the employees' representatives in order to enable them to acquaint themselves with the subject matter and to examine it'.[33] Furthermore, the Recast Directive indicates that 'information shall be given at such *time*, in such *fashion* and with such *content* as are appropriate *to enable employees' representatives to undertake an in-depth assessment of the possible impact and, where appropriate, prepare for consultations with the competent organ of the Community-scale undertaking or Community-scale group of undertakings*'.[34]

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[30] See, eg the Collective Redundancy Directive, the Transfer of Undertakings Directive and the EWC Directive.

[31] Art 2(i) SE Directive and Art 2(f) Framework Directive.

[32] For the implications of a pre-institutional and pre-negotiational duty to cooperate, see Case C-62/99 *Bofrost* [2001] ECR I-2579 (analysed below).

[33] Art 2(1)(f) Recast Directive.

[34] Ibid (emphasis added).

(b) Consultation

27.38 The 'right to consultation' can be defined best by contrasting it with a process of 'collective bargaining'.[35] Consultation is a procedure in which employees or their representatives can influence employers' decisions. This decision takes on the form of a unilateral expression of the will. Formally, employee representatives do not take part in this final decision. The idea of 'consultation' suggests that there is a scope of powers exercised by the employer. A number of provisions refer to this scope as the 'managerial prerogative'.[36]

27.39 The objective of collective bargaining is a meeting of the wills in a collective agreement. This implies a voluntary reduction of the unilateral managerial powers. With this procedure, certain matters are withdrawn from the scope of the *managerial prerogative*. As long as a certain collective agreement remains in force, its subject matter cannot be unilaterally changed by the employer.

27.40 The Collective Redundancy Directive, the Transfer of Undertakings Directive, the SE Directive and the Framework Directive seem to obscure the clear-cut distinction between 'consultation' and 'collective bargaining' According to the Collective Redundancy Directive and the Transfer of Undertakings Directive, the employee representatives, for instance, are consulted 'with a view to reaching an agreement' (Art 2).[37]

27.41 The SE Directive mentions consultation in the event of 'exceptional circumstances affecting the employees' interests to a considerable extent'. The Standard Rules determine that, in such circumstances, the representative body is entitled to express an opinion on 'measures significantly affecting employees' interests'. Where the competent organ decides not to act in accordance with the opinion, a further meeting will take place 'with a view to seeking agreement'.

27.42 The Framework Directive mentions the opinion of employees' representatives followed by 'a response and the reasons for that response' obtained from the employer. If this exchange of opinions or dialogue concerns 'decisions likely to lead to substantial changes in work organisation or in contractual relations', the consultation must take place 'with a view to reaching an agreement'.[38] The passage 'with a view to reaching an agreement' expresses the objective of the consultation procedure. In the EWC Directive and the Transfer of Undertakings Directive, the objective of the consultation procedure is not clarified. The use of the terminology 'with a view to reaching an agreement' is somewhat puzzling.

27.43 It would be better not to interpret the term 'agreement' as a formal collective agreement. Such an interpretation seems problematic for the following two reasons.

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[35] In this respect, see also O Kahn-Freund, *Labour and the Law* (London, Stevens & Sons, 1972) 91–92 and T Van Peijpe, 'Industrial Relations Processes' in J Malmberg (ed), *Effective Enforcement and EC Labour Law* (The Hague, Kluwer International, 2003) 78–80.

[36] Part 2(c) *in fine* of the SE Directive; Art 3 *in fine* of the EWC Directive, Art 2(1)(e) of the Framework Directives 'Decisions within the scope of the employer's power'. In this respect, see: R Blanpain, F Blanquet, F Herman and A Mouty, *Vredeling Proposal. Information And Consultation Of Employees In Multinational Enterprises* (Deventer, Kluwer, 1983) 22 and F Dorssemont, 'Richtlijn 94/45' [1995] *Revue de droit social* 462–63. See also ILO Recommendation no 94.

[37] Art 2(1) Collective Redundancy Directive and Art 7(2) Transfer of Undertakings Directive.

[38] Art 4 Framework Directive.

27.44 The terminology used in certain language versions ('akkoord', 'overeenstemming', 'accord', 'accordo', 'Einigung') is not the traditional terminology used to indicate binding collective agreements in the Member States. It is unlikely that the European legislator would have wanted the organs with traditional information and consultation obligations to obtain real power to enter into collective agreements. The Framework Directive mentions information and consultation explicitly with a view to reaching an agreement on decisions which fall within the scope of the managerial prerogative. The opposite conclusion would imply some kind of competition between employee representatives which belong to a trade union and those who do not. A number of ILO instruments emphasise the fact that information and consultation rights must not be used to undermine the position of trade unions.[39] This interpretation interferes directly with the issue of employee representation.

27.45 A more plausible and meaningful interpretation of the use of the word 'agreement' seems to be that the consultation process should not be reduced to a formal juxtaposition of a proposal for a decision from the employer's side, and the opinion on this proposal from the employees' side, after which the autocratic managerial decision process can continue. The Framework Directive indicates in a constructive way that the employer with a duty to consult must give reasons for not taking into account this opinion.

27.46 The Court of Justice, however, does not seem to accept this interpretation. In two cases of 8 June 1994, the Court did not deem the UK legislation transposing this Directive to be in conformity with the Directive. The Commission was of the opinion that the UK Employment Protection Act and the Transfer of Undertakings Regulations had not correctly implemented the duty to consult with a view to reaching an agreement. Both Acts provided only for an obligation to consult with respect to intended redundancies, the obligation to take remarks into account, reply to these remarks and motivate rejections. The Court acknowledged the critique of the Commission.[40] The Court, however, did not indicate the added value of this formula.

27.47 The EWC Directive, the SE Directive and the Framework Directive give definitions for the 'right to consultation'. The common denominator of these definitions is that consultation is indicated as a 'dialogue' or 'an exchange of points of view or thoughts'.[41]

27.48 The litmus test to assess the efficiency and 'progressiveness' of the different definitions and approaches in all of these Directives is a matter of anteriority. This matter is about the chronology of the obligation to consult. The subject and the direct cause of the obligation to consult are usually referred to as circumstances affecting the employees' interests to a considerable extent.[42] The use of the term 'circumstances' seems somewhat surprising. 'Circumstances' seems to refer to events beyond the control of the employer or undertaking, which take him by surprise or which are related to the state of affairs he happens to run into.

27.49 In reality, consultation is a process of legal acts on behalf of and at the expense of the employer. This is exactly why it is invariably stated that the information and consultation

[39] In this respect, see also Art 5 ILO Convention no 135 and ILO Recommendations nos 94 and 113.
[40] Case C-382/92 *Commission v United Kingdom* (n 19).
[41] Art 2(f) EWC Directive, Art 2(j) SE Directive and Art 2(e) Framework Directive.
[42] In this respect see Recital 3 of the Subsidiary Requirements of the EWC Directive; Part 2(c) SE Directive.

procedure does not affect the 'managerial prerogative'. In the end, the exercise of these prerogatives is the subject of the information and consultation procedure. The use of the word 'circumstances' seems to act as some kind of lightning rod. It distracts attention from the fact that in the end, the legal acts of the employer are at stake. Secondly, it puts up a smoke screen. It is not clarified at all whether consultation relates to decisions or to proposals of decisions. In this respect, the wording of Article 4 of the Framework Directive, in which the term 'decisions' is used, can only be applauded.

27.50 The Directives related to workers' involvement seem to suggest that the employer has a duty to inform and consult in circumstances affecting the employees' interests to a considerable extent. This assumption ignores the fact that the negative impact of such 'circumstances' will always be caused by a decision of the employer (collective redundancy, closure). 'Circumstances' will never affect the employees' interests to a considerable extent.

27.51 Inevitably, the question arises whether consultation should take place before or on the moment the decision is taken.

27.52 The most important international human rights instruments concerning the right to information and consultation have weighty indications that information and consultation must take place before the employer takes his decision. Article 2 of the Additional Protocol to the European Social Charter[43] mentions a 'right to be consulted in good time on proposed decisions which could substantially affect the interests of workers, particularly on those decisions which could have an important impact on the employment situation in the undertaking'. Article 18 of the Community Charter emphasises that consultation must be implemented in due time (inter alia) 'in connection with restructuring operations in undertakings or in cases of mergers having an impact on the employment of workers and in cases of collective redundancy procedures'. Article 27 of the Charter of Fundamental Rights of the EU stipulates that: 'workers or their representatives must, at the appropriate levels, be guaranteed information and consultation in good time in the cases and under the conditions provided for by Union law and national laws and practices.' It does not indicate the subject of consultation.[44] The use of the terms 'restructuring' and 'procedures' in the Community Charter is somewhat vague. It is not clear in which phase of the process consultation must start. According to the so-called Action Programme launched by the European Commission as a result of the Community Charter, information and consultation needed to be operated 'before taking any decision liable to have serious consequences for the interests of workers'.[45]

27.53 In the Collective Redundancy Directive, wording was used which removes all doubt about the fact that the consultation procedure must take place before the employer's

[43] For an analysis of this article, see: L Samuel, *Droits sociaux fondamentaux* (Strasbourg, Editions du Conseil de l'Europe, 2002) 475–77; F Van Damme, 'Les droits protégés par la Charte sociale, contenu et protée' in J-F Akandji-Kombe and S Leclerc, *La Charte sociale européenne* (Brussels, Bruylant, 2001) 24–25. See also 'Rapport Explicatif au Protocol additionnel de 1998', nos 29–44 in *Charte sociale européenne* (n 29) 131–34.

[44] G Braibant, *La Charte des droits fondamentaux de l'Union européenne* (Paris, Seuil, 2001) 171–75.

[45] COM (89) 568 final, 33.

decision. The Court of Justice has emphasised this anteriority abundantly in *Junk*[46] and recently in *Fujitsu Siemens*.[47]

27.54 The duty to consult arises from the moment the employer *contemplates* collective redundancies. The anteriority is a function of the objective of the consultation procedure since it is primarily aimed at avoiding collective redundancies. A consultation to reduce the dimensions of or mitigate the adverse effects of the decision is a second best option. It is regrettable that the legislator has abandoned such unambiguous and progressive position in the wording of the more recent Directives. In the Subsidiary Requirements of the EWC Directive, the wording is somewhat compromised. The versions preceding the final version of the Directive mention a consultation procedure for proposed decisions whilst at the same time pointing at the responsibility of the central management for the final decision. The chosen wording does not show how the anteriority issue has been solved. This vagueness is probably intentional—to make the text capable of compromise.

27.55 Whilst the Subsidiary Requirements of the Recast (EWC) Directive indicate that information and consultation must take place as soon as possible, this was omitted in the Standard Rules of the SE Directive. The general definition of the term 'consultation' indicates that consultation must take place 'at a time … which allows the employees' representatives … to express an opinion … which may be taken into account in the decision-making process.'[48]

27.56 It is our view that the decision-making process regarding restructuring is a strongly phased process. Schematically, four stages can be distinguished:

(a) the moment at which the employer actually contemplates a restructuring decision;
(b) the moment at which the employer makes this decision;
(c) the moment at which the decision is communicated to employees' representatives or third parties;
(d) the moment at which the decision is implemented.

27.57 It is completely unclear to which moment in time the chronology of the EWC and SE Directives refers.

27.58 The Framework Directive makes no reference to the chronology of the consultation procedure, either in the definition of 'consultation' or in its body text. Article 4(4) of the Framework Directive mentions in rather vague terms that consultation shall take place 'while ensuring that the timing [is] appropriate'. In the original version of this Directive, the effectiveness principle was also expressly referred to in the definition of the term 'consultation'. The definition then added 'ensuring that the timing, method and content are such that this step is effective'. The reference to effectiveness in Article 1(2) of the Framework Directive[49] will hopefully act as a catalyst for a progressive interpretation which does justice to the principle of anteriority.

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[46] Case C-188/03 *Imtraud Junk v Kühnel* [2005] ECR I-885. For an interpretation, see our annotation in (2006) 43 *Common Market Law Review* 1–17.
[47] Case C-44/08 *Akavan Erityisalojen Keskusliitto v Fujitsu Siemens Computers* [2009] ECR I-8163.
[48] Art 2 SE Directive.
[49] [1999] OJ C2.

The previous EWC Directive has defined consultation as 'the exchange of views and establishment of dialogue between employees' representatives and central management or any more appropriate level of management'.[50] The Recast Directive has added precision to this definition. Thus, consultation is being described as 'the establishment of dialogue and exchange of views between employees' representatives and central management or any more appropriate level of management, at such time, in such fashion and with such content *as* enables employees' representatives to express an opinion on the basis of the information provided *about the proposed measures to which the consultation is related, without prejudice to the responsibilities of the management,* and within a reasonable time, *which may be taken into account within* the Community-scale undertaking or Community-scale group of undertakings'.[51] **27.59**

In sum, the Recast Directive has underlined the essence of timing, form and substance for information and consultation. It correctly defines information as the transfer of data rather than of knowledge. The timing, the form and substance of the communication should allow the workers' representatives to 'undertake an indepth assessment'—to acquire knowledge. Both definitions are in line with good legislative practices expressed in the SE Directive and the Framework Directive. **27.60**

The definition of information combines elements of the definition enshrined in the latter Directives. **27.61**

IV. Limitations and Derogations

(a) Limitations of the Fundamental Right to Information and Consultation

Fundamental employment rights are hardly ever absolute rights. The right to information and consultation is no exception to this. Numerous European and international human rights instruments have already indicated these limitations. Below, these limitations are considered at this level first, and then analysed in the workers' involvement Directives. **27.62**

(b) Limitations Ratione Personae

Thresholds

Article 2(2) of the Additional Protocol of the European Social Charter (1988) gives the Contracting States the opportunity to exclude companies from the scope of application of the article if the number of employees is lower than a certain threshold determined by law or national practice.[52] **27.63**

Neither the Community Charter nor the Charter of Fundamental Rights seems to take the scale of undertakings into account in the determination of the scope of application of rights. Title X of the TFEU refers to the right to information and consultation. Article 153(2) TFEU expressly states that such Directives shall avoid imposing **27.64**

[50] Art 2(1)(f) EWC Directive.
[51] Art 2(1)(g) Recast Directive (emphasis added).
[52] In the same sense see also nos 44–46 of the Rapport Explicatif (n 29) 134.

administrative, financial and legal constraints in a way which would hold back the creation and development of small and medium-sized undertakings.

27.65 Most of the Directives scrutinised in this contribution have a minimum threshold of employment as *conditio sine qua non* for the actual enjoyment of the right to information and consultation. Some of these thresholds can be derived from the description of the substantive scope of application of these Directives. The threshold can mostly be derived from the stipulations describing the personal scope of application.

27.66 The definition of the term 'collective redundancy', for instance, implies that the Collective Redundancy Directive only applies to establishments ('établissement', 'Betrieb') normally employing more than 20 workers. This minimum threshold must relate to employment within this 'establishment'.[53] The Court of Justice[54] has clarified that this term should be given an *autonomous* Community meaning. The Framework Directive prescribes a duty to inform and consult at the level of undertakings employing at least 50 employees in any one Member State or establishments employing at least 20 employees in any one Member State. Whether this duty to inform and consult should take place at undertaking or establishment level is a matter for the Member States.

27.67 It seems that the legislator has wanted to indicate that information and consultation procedures can be organised at the level of an entity with a certain form of independence (the undertaking) or at the level of a part of the undertaking (the establishment).

27.68 The Appendix to the Additional Protocol also refers to the distinction between 'undertakings' and 'establishments'. In spite of the fact that Article 2 of the Additional Protocol mentions information and consultation at undertaking level, the Appendix clarifies that the Contracting States are equally considered as fulfilling the obligations by developing the right to information at the level of the establishments. The Explanatory Report clarifies that these are 'production units economically and legally bound to a single management centre'.[55]

27.69 The most prohibitive thresholds can be found in the EWC (Recast) Directive. The applicability of the Directive depends on a double condition regarding personnel thresholds. The effectiveness of this condition depends on whether it concerns a Community-scale undertaking or a Community-scale group of undertakings. In both cases, there must be at least 1000 employees within the Member States. The second condition is related to the transnational distribution of the work force. The second condition presupposes a 'domestic' work force threshold of 150 employees in at least two different Member States with at least 150 employees. The work force of 150 employees, however, is allocated differently, depending on whether it concerns an undertaking or a group of undertakings. In the first hypothesis the Community-scale undertaking must employ 150 employees in each of at least two Member States. Employment figures in different establishments of the Member State can be added up for the calculation of the threshold. In the second hypothesis, one undertaking with at least 150 workers must exist in at least two Member States. Adding up the number of workers of the undertakings in

[53] Art 1 of the Collective Redundancy Directive.

[54] Case C-449/93 *Rockfon A/S v Specialarbejderforbundet i Danmark* [1995] ECR I-4291. See also the analysis of C Barnard, *EU Employment Law* (Oxford, Oxford University Press, 2012) 490–92 and S Hennion-Moreau, 'La notion d'entreprise en droit social communautaire' [2001] *Droit social* 964.

[55] See no 69 of the Rapport Explicatif (n 29).

the same Member State is not allowed. A simple legal operation incorporating establishments could suffice to avoid the application of the Directive.

27.70 The Transfer of Undertakings Directive imposes the obligation to inform and consult on the transferor and transferee irrespective of the number of transferred employees, let alone the number of employees in the undertaking of the transferor and the transferee. Article 7(5), however, stipulates that Member States may limit the obligations to inform and consult to undertakings or businesses which, in terms of the number of employees, meet the conditions for the election or nomination of a collegiate body representing the employees.

27.71 In circumstances such as these, the requirement to inform the workers in good time of the date, the reasons and the implications of the transfer and measures envisaged still stands.

27.72 The Collective Redundancy Directive does not contain a similar provision. This Directive does, however, presume the existence of so-called 'workers' representatives'. In these circumstances, an employer will not be able to hide behind the fact that in that particular undertaking or establishment, the legal threshold for workers' representation was not met.

27.73 The SE Directive is the only participation Directive in which the personal scope of application is completely irrespective of the number of employees. The personal scope of application is defined in function of the capital.[56]

Tendenzschutz—Religion or Belief?

27.74 In the Appendix to the Additional Protocol, the personal scope of application is related to 'undertakings'. The provided definition has an implied limitation. It relates to a purely economic concept of undertaking.[57] Undertakings are referred to as only those entities producing goods or services for financial gain and with power to determine its own market policy. The aforementioned Appendix also leaves room for the so-called *Tendenzschutz*.[58] It states that religious communities and their institutions can be excluded from the application of Article 2 of the Additional Protocol. This exclusion is not primarily based on the assumption that these institutions have no economic activities. The Contracting States can also exclude tendency undertakings (*Tendenzbetrieb*)[59] from the scope of application as much as necessary for the safeguarding of the orientation of the undertaking protected by law.

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[56] In this respect, see also the astonishment of F Fimmano, 'Società Europea: ultimo atto' [1994] *Rivista della Società* 1035.

[57] In the same sense see also no 37 of the Rapport Explicatif (n 29) 133.

[58] *Tendenzschutz* refers to the protection of the 'tendency' of 'undertakings or establishments which pursue directly and essentially political, professional organisational, religious, charitable, educational, scientific or artistic aims, as well as aims involving information and the expression of opinions' (Art 3(2) Framework Directive 2002/14).

[59] The Appendix defines tendency undertakings as 'Establishments pursuing activities which are inspired by certain ideals or guided by certain moral concepts, ideals and concepts which are protected by national legislation'. No 68 of the Rapport explicatif (n 29) 138 clarifies that this explanation was inserted in the Appendix to achieve more conformity between the German *Betriebsverfassungsgesetz* and the Additional Protocol. (*Cf* below section D.VIII.)

27.75 This presupposes that it will have to be proven how curtailing fundamental employment rights will actually be necessary to guarantee the ideological orientation of the company. This is not self-evident, since this information and consultation procedure does not affect the essence of the economic power of decision.

27.76 The European legislator seems to have concerned himself with the so-called *Tendenzschutz* only as regards the EWC Directive. Neither the Collective Redundancy Directive nor the Transfer of Undertakings Directive contains such provisions.

27.77 The sympathy for so-called 'tendency undertakings'[60] in the EWC Directive, the EWC (Recast) Directive, the SE Directive and the Framework Directive is conditional. Members States may lay down particular provisions regarding the *Tendenzschutz* in their transposition law on the condition that, 'at the date of adoption of [the] Directive such particular provisions already exist in the national legislation.'[61] This rather conservative approach of the *Tendenzschutz* is in sharp contrast to the approach of the *Tendenzschutz* in Directive 2000/78 establishing a general framework for equal treatment in employment and occupation. Article 4(2) leaves room for maintaining national legislation as well as providing future legislation after the adoption of the Directive. In the latter hypothesis, such legislation must, however, incorporate national existing practice. At the end, the article stipulates in a positive way that the Directive shall not prejudice the requirement of individuals working for the 'tendency organisations' mentioned in it, to act in good faith and with loyalty 'to the organisation's "ethos"'.

27.78 The provisions regarding *Tendenzschutz* constitute a conflict of fundamental rights. Remarkably enough, this conflict affects two completely different collective freedoms. The collective freedom of information and consultation is weighed against the freedom of education, ideology and religion. A collective identity conditioned by labour is opposed to a collective identity conditioned by ideology or religion. The legislator does not really solve this conflict. He does, however, offer Member States the possibility to extrapolate their own assessment of this conflict of fundamental rights to the SE or the EWC and to maintain limitations of information and consultation inspired by *Tendenzschutz* at undertaking or group level. It seems that the concrete scope of 'human rights' deemed universal or fundamental, is in fact determined by cultural and national differences.

Seagoing Vessels

27.79 None of the traditional international declarations (Additional Protocol of the European Social Charter, Community Charter and Charter of Nice) with respect to the right to information and consultation exclude the crews of seagoing vessels or merchant navy crews from the scope of application.

27.80 The exclusion of 'seagoing vessels' from the scope of application of workers' involvement Directives dates from the mid-1970s. The Collective Redundancy Directive and Transfer of Undertakings Directive exclude 'the crews of seagoing vessels and seagoing

[60] G Dole, *La liberté d'opinion et de conscience en droit comparé du travail* (Paris, LGDJ, 1997) 128–42 and E Verhulp, *Vrijheid van meningsuituiting van werknemers en ambtenaren* (The Hague, SdU, 1996) 299–301, 327–28.

[61] Art 8(3) EWC Directive; Art 8(3) Recast (EWC) Directive; Art 8(3) SE Directive; Art 3 Framework Directive.

vessels' [*sic*] from their scope.[62] Since both Directives were drafted expressly as minimum standards, there is room for Member States to extend the protection provided by these Directives to these categories.

27.81 The exclusion of 'seagoing vessels' from the scope of application is terminologically somewhat unfortunate. 'Seagoing vessels' are in themselves incapable of falling within the substantive, territorial or personal scope of these Directives. The situation is different when it comes to the crew of seagoing vessels and their employer, as well as company activities developed by means of seagoing vessels.

27.82 In the proposal of the EWC Directive, the initial approach taken was different. In principle, the crew of seagoing vessels fell within the personal scope of application of this Directive. However, subject to the principles and objectives of the Directive, and as far as deemed necessary, the Member States had the possibility to adopt special provisions applicable to the crew of seagoing vessels and adjusted to the special circumstances under which these crews have to work.[63] The final version of the EWC Directive provided that the Member States can stipulate that the Directive shall not apply to merchant navy crews.[64] Neither the SE Regulation nor the SE Directive contains provisions regarding the issue of the merchant navy.

27.83 In the Framework Directive, an analogous but more nuanced wording was opted for. Article 3(3) authorises Member State to derogate from this Directive through particular provisions applicable to the crews of vessels plying the high seas. In the original proposal, there were no exclusion or limitation grounds whatsoever regarding the merchant navy.

(c) Limitations Ratione Materiae: Secrecy and Confidentiality

27.84 In exceptional situations, a conflict of interest can arise between the interest of workers being informed on the economic and financial situation of the undertaking and the interest of 'the undertaking' protecting itself against the risk of damage resulting from such information being distributed to third parties.

27.85 This field of tension is recognised by the Additional Protocol of the European Social Charter. Article 2(1) under (a) states that the disclosure of certain information which could be prejudicial to the undertaking may be refused or subject to confidentiality.

27.86 In the first hypothesis, this concerns 'secret' information which will only be known to the management. In practice, not only the content but also the existence of such information is a secret. Employees or their representatives might find out about the existence of this information at best when management refuses to answer certain questions, expressly referring to its 'secret' character.

27.87 The question whether management is *obliged* to mention the existence of secret information is inevitable. The second hypothesis concerns confidential information. The wording of the Additional Protocol seems to indicate that management *must* indicate the confidential character of the information and the legal implication that this information must not be spread amongst third parties. The Additional Protocol does

[62] Art 1(3) Transfer of Undertakings Directive and Art 1(2)(c) Collective Redundancy Directive.
[63] Art 2(3) Proposal EWC Directive [1994] OJ C135.
[64] Art 1(5) EWC Directive.

not provide a single criterion to distinguish confidential from secret information. It is not clear whether management can judge at its own discretion whether or not the company's interests need to be protected by keeping information secret or informing workers on a confidentiality basis. An argument against this discretion is that confidentiality is a less far-reaching curtailment of the right to information and consultation.

27.88 Provisions regarding secret or confidential information can be found in the EWC (Recast) Directive, the SE Directive and the Framework Directive. Neither the Collective Redundancy Directive nor the Transfer of Undertakings Directive indicates that the confidential or secret character of certain information can be used as a legitimate reason to limit the information and consultation procedure described therein. This finding can lead to only one conclusion. Such limitations must be prohibited. General provisions of domestic law regarding secret or confidential information will have to be applied in compliance with the Directives. They certainly do not apply to situations of collective redundancy or transfer of undertakings.

V. Remedies

27.89 Rights regarding involvement without efficient and dissuasive sanctioning system are normally only respected by civilised employers. Informing and consulting workers is not unrelated to a general duty to treat them with respect.[65] Denial of information and consultation procedures is an undeniable sign of contempt.[66]

27.90 Normally, the European legislator confines himself to the prescription of rights and obligations. When it comes to the sanctioning mechanism for violating these rights and obligations, he resorts to complete mutism. This can probably be explained by the mechanisms organised at Member State level. In practice, sanctions cannot be seen separately from sanctioning systems. The autonomous organisation of these systems is an emanation of the sovereignty of Member States. It is not surprising that the European legislator refrains from prescribing a certain type of sanction. The Court of Justice has stated repeatedly that Member States, when implementing Directives, must guarantee effective, proportionate and dissuasive sanctions.[67]

27.91 The fact that the European legislator, completely redundantly, reminds Member States of this rule in the body of a Directive, shows the importance and the problems of sanctioning. The use of such wording in Article 8(2) of the most recent version of the Framework Directive is remarkable. This passage reminds us of similar wording used in anti-discrimination Directives.[68]

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[65] *Cf* Art 16 of the Belgian Employment Agreement Act.

[66] In this respect, see the qualification of such behaviour as a form of 'dédain' (contempt) in the criminal case against *Louis Schweitzer* (Renault): Corr Brussels, 20 March 1998, *Journal des Tribunaux de Travail* 281, *Chroniques de droit social* 1998, 379.

[67] In this respect, see the principle of 'effective enforcement': B Fitzpatrick, 'Development of the principle of effective enforcement' in J Malmberg (ed), *Effective Enforcement and EC Labour Law* (n 36) 43–58. This principle has been entered into the Framework Directive (Framework Directive 8(2)). The EWC Directive (Art 11(3)) only mentions appropriate measures in the event of failure to comply. Art 12(2) of the SE Directive is limited to appropriate measures in the event of failure to comply.

[68] Art 15 of Directive 2000/43 and Art 17 of Directive 2000/78.

27.92 The EWC (Recast) and SE Directives only indicate the necessity of 'appropriate measures' in the event of 'failure to comply with this Directive'. The Collective Redundancy Directive and the Transfer of Undertakings Directive do not contain any provisions in that respect. It would, however, be wrong to state that the prescription of certain sanctions does not match with the choice for a Directive as legislative instrument. In the recent anti-discrimination Directives, for instance, traditional civil law sanctions had been included, such as the invalidity of contract clauses, of provisions in collective agreements and provisions in the articles of incorporation of professional organisations.[69]

27.93 The Collective Redundancy Directive contains clear sanctions for failing to comply with the duty to inform and consult. Article 4 of Directive 98/59 states that 'projected collective redundancies notified to the competent public authority shall take effect not earlier than 30 days after the notification referred to in Article 3(1) without prejudice to any provisions governing individual rights with regard to notice of dismissal'. This notification means a notification to the competent authorities of the intention of collective redundancy. This notification must provide proof that the employer has met the consultation requirement and how this was done. Without information and consultation procedure, the notification to the administrative authority will not be valid. The wording of Article 4 implies that breach of the administrative procedure and/or of the information and consultation procedure is sanctioned by the fact that the collective redundancy as legal transaction will produce no effect.

27.94 The first proposal for a Framework Directive contained an analogous sanction. Article 7(3) of the original proposal read:

> Member States shall provide that in case of serious breach by the employer of the information and consultation obligations in respect of the decisions referred to in Article 4(1)(c) of this Directive, where such decisions would have direct and immediate consequences in terms of substantial change or termination of the employment contracts or employment relations, these decisions shall have no legal effect on the employment contracts or employment relationships of the employees affected. The non production of legal effects will continue until such time as the employer has fulfilled his obligations or, if this is no longer possible, adequate redress has been established, in accordance with the arrangements and procedures to be determined by the Member.[70]

27.95 This sanction reminds us of the proposal for the SE Directive of 1991. In this proposal, a similar sanctioning mechanism was elaborated in the event of failure to comply with the information and consultation rights of the representative body.[71]

E. Evaluation

27.96 When the Charter of Fundamental Rights was adopted by the Convention, the Member States could already rely on a vast *acquis* covering information and consultation in recurring and extraordinary situation, though the Framework Directive 2002/14 had

[69] Art 14 of Directive 2000/43 and Art 16 of Directive 2000/78.
[70] [1999] OJ C2.
[71] Art 5(2)(5) Amended proposal for a Council Directive complementing the statute for a European company with regard to the involvement of employees in the European company [1991] OJ C138.

not yet been adopted. In sum, the Charter seems to consolidate and 'constitutionalise' a rich *acquis*. The reference to the Community Charter in the Agreement on Social Policy attached to the Protocol on Social Policy of the Maastricht Treaty is a prefiguration of this phenomenon of constitutionalisation. It reflects a classical paradigm of labour law as being based on the need to protect fundamental workers' rights. The adoption of the 'new' EU Directives 1998/59 (collective redundancies) and 2001/23 (transfer of undertaking) referring in an innovative manner in their recitals to a right to information and consultation is consistent with this classical conceptualisation of labour law as well. Such a constitutionalisation might be beneficial to adopt a prudent approach towards attempts to attack the *acquis* on the basis of distinct paradigms of labour law where other considerations come into play (eg a discourse related to employability, employment policies and even—*horresco referens*—better or smart regulation).

27.97 The question arises whether the recognition of the right to information and consultation inside the Charter has only a retrospective value or whether it could serve as a tool for some judicial activism. This question is hard to answer. Though the CJEU is constantly forced to interpret this impressive body of EU Directives in the field of workers' involvement, it has never referred to Article 27 to justify its interpretations. The latter certainly does not mean that the Court has not provided evidence of judicial activism in this field of EU labour law. However, the teleological method of interpretation has shown to be a sufficient technique to be on the offensive while interpreting these detailed EU Directives. One might state that there is no immediate *need* to build on the Charter to interpret the EU Directives in a progressive manner.

27.98 Article 27 might not be a perfectly adequate means to enhance a progressive interpretation of EU Directives, if an *effet utile* approach would not be sufficient to so. Indeed, the formula of Article 27 is not deprived of some major flaws. It does not reach the level of precision and clarity of the more ambitious formula of the RESC. An interpretation which is consistent with the RESC could be a way to overcome this loophole. At first sight, there are two major hurdles which complicate such an intertextual interpretation. First, the Charter does not in a general way preach such an intertextual canon of interpretation of other international human rights instruments. The only reference to such an interpretation is enshrined in Article 52(3) and refers to the European Convention on Human Rights. Neither has the Court of Justice pledged any commitment to this interpretation in a way which mirrors the Grand Chamber judgment in *Demir and Baykara*[72] of the ECtHR. Secondly, Article 27 only recognises a right to information and consultation 'under the conditions provided for by Union law and national laws and practices'. Insofar as it can be argued that the right to information and consultation results from constitutional traditions common to the Member States[73] and insofar as the RESC can be considered to be part of that tradition, that loophole could be overcome.

27.99 In a very strict reading, such a coda gives an unrestricted leeway to both the European Union and the Member States to modulate the attribution and the exercise of the right to information and consultation. In my view, such an unrestricted leeway amounts to an absurd contradiction with another major idea behind the transversal Article 52 of the Charter. Article 52(1) clearly prescribed that there is an essential hard core of the

[72] *Demir and Baykara* (n 18).
[73] See Art 52(3) of the Charter.

rights and freedoms granted in the Charter. In sum, the leeway given to the European Union and the Member States in my view should respect that hard core. In absence of more precise and clear criteria laid down in Article 27, the Revised European Social Charter might come into plain to delimit that essential content. This will be helpful in my view, to provide more clarity on the timing, the form and the quality of information and consultation procedures.

27.100 The impressive list of limitations and derogations enshrined in EU Directives seeking to promote a right to information and consultation could be challenged as not sufficiently honoring such a hard core. Some of these provisions, in fact generate a differential treatment between workers as holders of such a right. The essential hard core might be helpful to overcome divergencies between EU Directives as far as the formulation of the right to information and consultation is concerned or they could urge the EU legislator to continue the work of recasting these Directives in order to favour more recent and ambitious formulations of that right.