

The EU legal framework on equality

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Concepts in legal contexts

- ▶ Equality
- ▶ Equal rights
- ▶ Non-discrimination
- ▶ Prohibition of discrimination
- ▶ Principle of equal treatment
- ▶ Equal opportunities

Competing concepts:

Justice

Social justice?

Fairness?

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Equality, equality - ancient roots and later

Philosophical (Western world)

Do *not* the same pieces of wood or stone appear at one time equal, and at another time unequal?
Socrates (after Plato)

"...when equality is given to unequal things, the resultant will be unequal..."
Plato

"All men are by nature equal, made all of the same earth by one Workman; and however we deceive ourselves, as dear unto God is the poor peasant as the mighty prince."
Plato

The worst form of inequality is to try to make unequal things equal.
Aristotle

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Equals must be treated equally and different must be treated differently
Aristotle

HILL AND STAPLETON v REVENUE COMMISSIONERS AND DEPARTMENT OF FINANCE

²² As the Court held in Case C-279/93 *Finanzamt Köln-Altstadt v Schumacker* [1995] ECR I-225, paragraph 30, **discrimination** can arise only through the application of different rules to comparable situations or the application of the same rule to different situations.

JUDGMENT OF 17. 6. 1998 — CASE C-243/95

Formal equality v. substantive (actual) equality

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French Declaration of the Rights of Man and of the Citizen (1789)

Men are born and remain free and equal in rights. Social distinctions may be based only on considerations of the common good.

Universal Declaration of Human Rights (1948)

1 p. All human beings are born free and equal in dignity and rights. They are endowed with reason and conscience and must treat one another as brothers.

Everyone is entitled to the enjoyment of all the rights and freedoms set forth in this Declaration without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

European Convention for the Protection of Human Rights and Freedoms (1950)

Article 14

The enjoyment of the rights and freedoms recognized in this Convention shall be secured without discrimination of any kind, such as discrimination based on sex, race, colour, language, religion, political or other opinion, national or social origin, membership of a national minority, property, birth or other status.

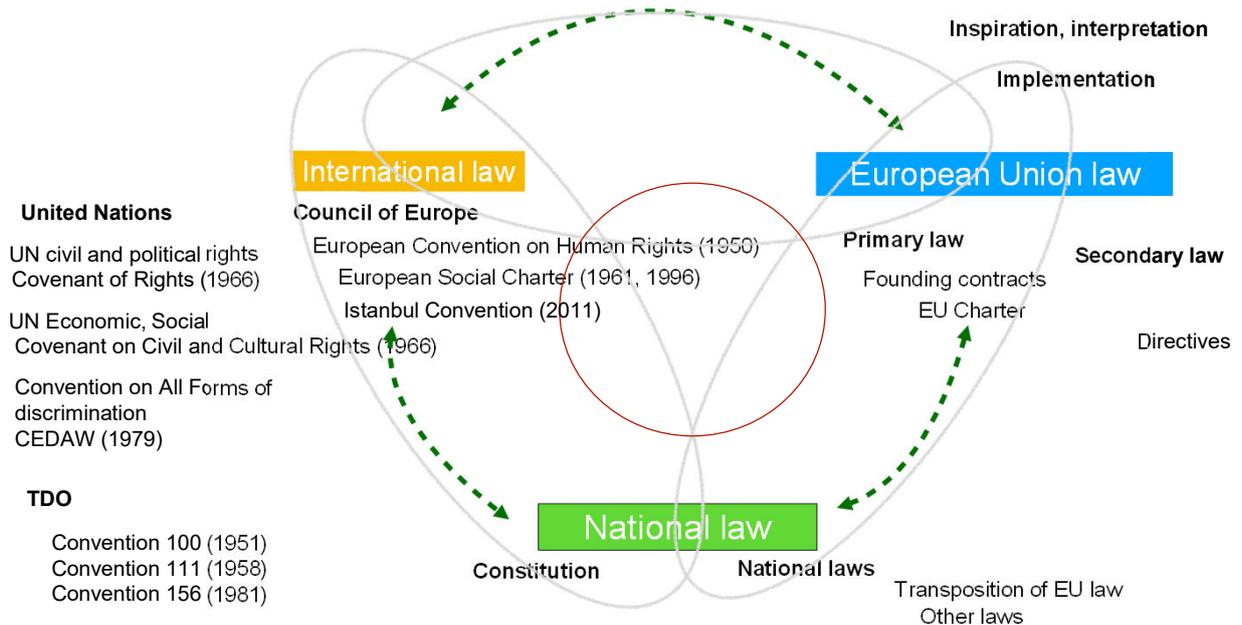
Protocol No 12 to the European Convention for the Protection of Human Rights and Freedoms (2000)

Article 1. General prohibition of discrimination

1. The enjoyment of any right provided for in the law shall be without discrimination on grounds of sex, race, colour, language, religion, political or other opinion, national or social origin, membership of a national minority, property, birth or other status.

2. No one shall be discriminated against by any public authority on any of the grounds mentioned in paragraph 1.

A global non-discrimination law 'framework'



Questions

- Is every difference discrimination? What is legal/illegal?
 - Discrimination - Differentiation (different legal regulation)
 - Positive discrimination and special protection (pregnant women, disabilities). Exceptions (religion)
- What are the instruments used to tackle inequality?
 - What are the differences between the different instruments (international law, EU, national)?
 - What are the implementation mechanisms?
- What are the differences between the different grounds of discrimination?
- Why are there different scopes?
- Is a unique national non-discrimination law possible?

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EU - historical development I

Legislation

- **1957**
 - Article 119 of the EEC Treaty - equal pay for men and women
 - Article 48 of the EEC Treaty - citizenship - free movement of workers
- Commission's **1974** Social Action Programme:
 - Directive 75/117 (equal pay - gender)
 - Directives 76/207 (employment - gender), 79/7 (social security - gender)
- **1986** Directive 1986/378 (private pensions - gender)
- **1986** Directive 1986/613 (self-employed (sex))
- **1989** Community Charter of Fundamental Rights of Workers

CJEU

- Defrenne II **1976** (43/75) - direct horizontal effect of equal pay (gender) + basis for EU legal framework
- Defrenne III **1978** (149/77) - abolition of discrimination on grounds of sex - rank of fundamental right - protection of fundamental rights - general principle of Community law
- Garland **1982** (12/81) - a very broad concept of wages
- **1986** Bilka (170/84) - indirect discrimination
- **1990** Dekker (C-177/88) - no exclusion on grounds of pregnancy
- Kalanke **1995** (C-450/93) - Unconditional priority for women not possible
- Sievers **2000** (C-270/97) - social purpose of the Community through the principle of equal pay

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The EU - Historical development II

Legislation

- **1996** Directive 96/34 Work-life balance (gender) (now Directive 2019/1158)
- **1997** Treaty of Amsterdam - new competence to prohibit discrimination (race, ethnic origin, disability, age, religion, belief, sexual orientation)
 - Age, gender
- **1997** - burden of proof (gender)
- **2000** - EU Charter of Fundamental Rights
- **2000** Directive:
 - 2000/43 - race, ethnic origin
 - 2000/78 - disability, age, religion, belief, sexual orientation
- **2004** Directive 2004/113 - Goods and services (gender)
- Directive 2022/2381 - Gender balance in the bodies of listed companies
- **2023** Directive 2023/970 - Pay (gender) transparency and implementation
- Directive 2024/1385 - Violence against women and domestic violence

CJEU

- Gruber **1999** (C-249/97) - principles for the selection of comparators
- **1999** Seymour-Smith (C-167/97) - use of statistics to prove a negative result
- **2000** Kreil (C-285/98) - women's service in the army
- **2000** Abrahamson (C-407/98) - preference for a qualified woman
- **2004** Sass (C-284/02) - principle of equal pay in collective bargaining
- **2006** Cadman (C-17/05) - age can be a ground for salary differentiation
- Palacios **2007** (C-411/05) - maximum age for employment
- Feryn **2008** (C-54/07) - hypothetical comparator possible
- **2008** Coleman (C303/06) - discrimination by association
- **2010** Murphy C-429/08 Comparison with a lower possible
- **2010** Danosa C-232/09 - pregnant company manager
- Kucukdeveci **2010** (C-555/07) - Non-application of a conflicting national rule
- **2011** Test-Achats (C-236/09) - EU act contrary to the Charter
- **2015** CHEZ (C-83/14) - discrimination based on presumption

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Challenges for the future

- Algorithmic management and artificial intelligence
- Making long-term care more efficient
- Anti-racism plan
- The limits of positive discrimination
- Disability empowerment
- Recognition of paternity in another MS
- Discrimination by association (C-303/06 Coleman)
- Discrimination addendum (C-54/07 CHEZ)
- Structural discrimination (C-246/97 Gruber)
- Multiple discrimination
- Kt.

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Primary law (treaties)

• TEU (Treaty on European Union)

- Article 2: The Union is founded on the following values: respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities. These values are common to the Member States living in a society characterised by pluralism, **non-discrimination**, tolerance, justice, solidarity and **equality between women and men**.
- 3 pp. It combats social exclusion and **discrimination** and promotes social justice and protection, **equality between women and men**, solidarity between generations and the protection of the rights of the child.

• TFEU (Treaty on the Functioning of the European Union)

- Article 8: In all its activities, the Union shall strive to **eliminate inequalities between women and men** and to promote their equality.
- Article 10: In defining and implementing its policies and actions, the Union aims to combat **discrimination** based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation.
- 19 pp. Without prejudice to the other provisions of the Treaties and within the limits of the powers conferred on the Union by them, the Council, acting unanimously in accordance with a special legislative procedure and with the consent of the European Parliament, may **take appropriate action to combat** discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation.
- Article 153: In pursuit of the objectives set out in Article 151, the Union shall support and complement the activities of the Member States in the following areas: (i) equality between women and men in terms of access to the labour market and treatment at work...
- 157 pp. Each Member State shall ensure that the principle of **equal pay for equal work or work of equal value** for both sexes is applied. The European Parliament and the Council, acting in accordance with the ordinary legislative procedure and after consulting the Economic and Social Committee, **shall take measures to ensure that** the principle of equal opportunities and equal treatment in employment and occupation for women and men and the principle of equal pay for work of equal value or equal value are applied.

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Secondary law

Areas of application and background

	Labour relations			Social insurance		Social services	Education	Private law/business		
	Salary	Other conditions	Family and work balance	Benefits	State. Pension	Private pension		Available at to business	Goods and services	Companies Bodies
Gender										
Article 157(3) TFEU	V									
Directive 2006/54,	V	V				V				
Directive 2023/970	V									
Directive 79/7					V					
Directive 2010/41			V	V				V		
Directive 2019/1158									V	
Directive 2003/114										V
Race, ethnic origin										
Directive 2000/43	V	V					V		V	
Age	V	V								
Disability	V	V								
Religion, beliefs	V	V								
Sexual orientation	V	V								
Directive 2000/78	V	V								

Part-time work (D 97/81/EC)
 Fixed-term employment contracts (D 1999/70/EC)
 Telework (Telework Agreement)
 Agency work (D 2008/104/EC)

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Introducing non-discrimination prohibitions

- Direct discrimination

"direct discrimination" is where one person is treated less favourably than another person in a similar situation because of his or her race or ethnic origin (Article 1(2)(a) of Directive 2000/43)

- Indirect discrimination

"indirect discrimination": where a manifestly neutral provision, criterion or practice is likely to put persons of one sex at a particular disadvantage compared with persons of the other sex, unless that provision, criterion or practice is objectively justified by a legitimate aim and that aim is pursued by appropriate and necessary means (Article 2(1)(b) of Directive 2006/54)

- Instruction to discriminate

- Victimisation

- Harassment

'harassment': where unwanted conduct related to a person's sex is intended to harm or undermine human dignity and is intended to create or does create an intimidating, hostile, degrading, humiliating or offensive environment (Article 2(1)(c) of Directive 2006/54)

- Sexual harassment

'sexual harassment' means any unwanted verbal, non-verbal or physical conduct of a sexual nature intended to harm or undermine human dignity, in particular by creating an intimidating, hostile, degrading, humiliating or offensive environment (Article 2(1)(d) of Directive 2006/54)

Exceptions to scope, concepts, comparison and comparative, exceptions to the rule, conditions of justification, burden of proof, standards of proof, admissible evidence, etc.

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Application

- Who are the addressees of the obligations imposed by the rules (EU, states, institutions, private individuals?)

- Types of relationships (vertical, horizontal)

- Discrimination:

- Indirect

- Direct

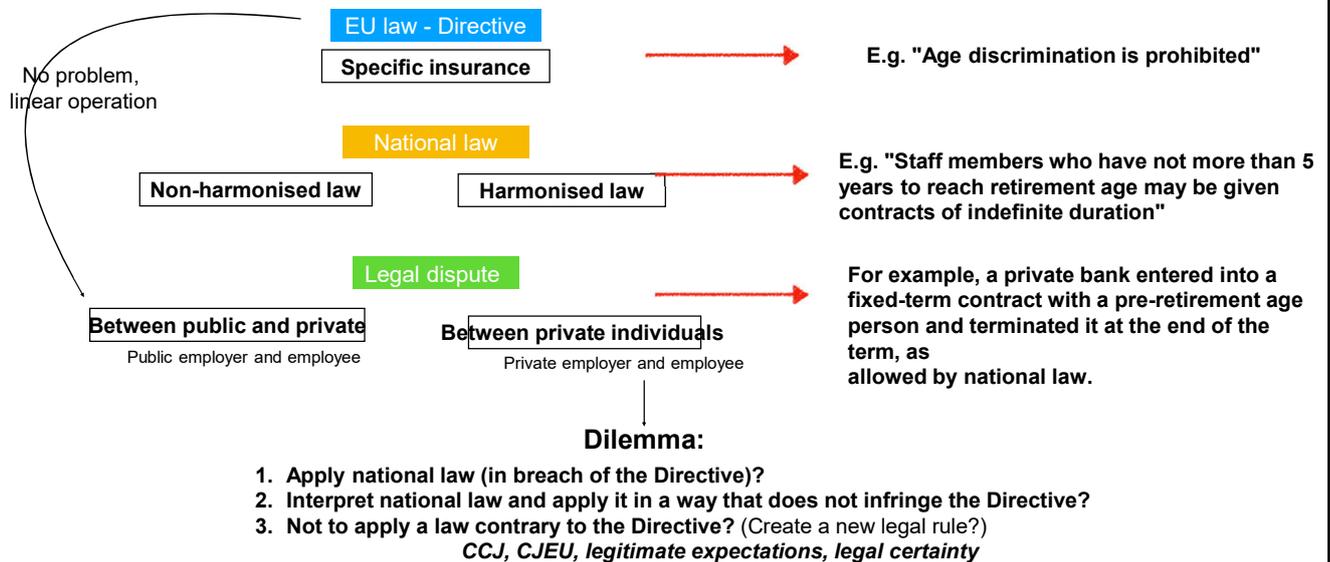
- Horizontal

E.g. direct effect of Article 157(1) TFEU (CJEU)

- Vertical

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How the application problem arises



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CJEU case law

- The Directives are not designed for direct action between private individuals, but self-executing provisions can be made against the state (public employers):
 - Directives only against public employers (Mono car styling, C-12/08)
 - Even a clear, precise and unconditional provision of the Directive that seeks to confer rights or impose obligations on private individuals cannot be applied in cases where the parties are exclusively private individuals (*Smith*, C-122/17).
- Individual fundamental rights were already recognised as general principles of the EU legal system before the Charter
 - Overlapping legal traditions
 - International obligations (ECHR, ESCH...)
- Fundamental rights - as expressed in the Charter - create additional legal effects, but ... there are conditions

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EU Charter of Fundamental Rights

TITLE III EQUALITY

Article 20

Equality before the law

Everyone is equal before the law.

Article 21

Prohibition of discrimination

1. Any discrimination, in particular on the grounds of a person's sex, race, colour, national or social origin, genetic features, language, religion or belief, political or other opinion, membership of a national minority, property, birth, disability, age, sexual orientation is prohibited.
2. Within the scope of the Treaties and without prejudice to their specific provisions, any discrimination based on a person's nationality is prohibited.

Article 23

Equality between women and men

Equality between women and men must be ensured in all areas, including recruitment, employment and pay.

The principle of equality does not preclude the adoption or adoption of measures providing for specific advantages to help the under-represented sex.

Article 25

Rights of older people

The Union recognises and respects the right of older people to live in dignity and independence and to participate in social and cultural life.

Article 33

Family and professional activities

1. Legal, economic and social protection for the family.
2. In order to reconcile family life and professional activity, everyone has the right to be protected against dismissal for reasons related to maternity, including the right to paid maternity leave and parental leave after the birth or adoption of a child.

Hazards/issues

- Cannot extend competences
- Grounds not covered by EU secondary law
- Features of socio-economic rights (*Leistungsrechte*)
- Different provisions
 1. Entity rights
 2. Principles (e.g. Articles 25, 26, 37 of the Charter)
 3. May be both rights and principles (e.g. Articles 33, 34 of the Charter)
- Implementation mechanism

Article 51

Scope of application

1. The provisions of this Charter are addressed to the institutions, bodies, offices and agencies of the Union, with due regard to the principle of subsidiarity, and to the Member States when they implement Union law. They must therefore respect the rights, observe the principles and apply them in accordance with their respective powers, without prejudice to the limits of the powers conferred on the Union by the Treaties.
2. This Charter does not extend the scope of Union law beyond the powers of the Union, nor does it create new powers or tasks for the Union, nor does it replace those laid down in the Treaties.

Article 52(5). The provisions of this Charter **defining the principles** may be implemented by legislative acts and executive acts adopted by the institutions, bodies, offices and agencies of the Union, and by the laws of the Member States which they adopt in the exercise of their powers in implementing Union law. They may be invoked in legal proceedings only in interpreting such acts and in deciding on their legality.

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Where the Charter applies

• Mangold (C-144/04) - age

"Directive 2000/78 does not enshrine the principle of equal treatment in employment and occupation. The principle of non-discrimination on grounds of age must be understood as a **general principle of Community law**.

The national courts, where the question of non-discrimination on grounds of age is at issue, must, within the scope of their jurisdiction, guarantee the legal protection afforded to individuals under Community law and ensure that it is fully effective, without applying any provision of national law which may be contrary to it.

Community law, and in particular Article 6(1) of Directive 2000/78, must be interpreted as precluding national legislation, such as that at issue in the main proceedings, which permits, in the absence of a close link with a previous open-ended employment contract with the same employer, the conclusion of fixed-term employment contracts without any restrictions if the worker is over 52 years of age."

• Kucukdeveci (C-555/07) - age

"It should be recalled, firstly, that the principle of equal treatment in employment and occupation is only **concretised, not enshrined**, in Directive 2000/78 and, secondly, that the principle of non-discrimination on the grounds of age is a **general principle of European Union law** in that it implies the specific application of the general principle of equal treatment.

In such circumstances, it is for the national court hearing a dispute concerning the principle of non-discrimination on grounds of age, which is enshrined in Directive 2000/78, to ensure, within the scope of its competence, that the legal protection afforded to individuals under EU law is fully effective and, where necessary, that no provision of national law contrary to that principle is applied" (whether before the CCJ or the ECJ).

• Dansk Industry (C-441/14) - age

"The possibility for private individuals who are the beneficiaries of subjective rights deriving from European Union law, in the present case employees, to claim damages in the event that their rights are infringed as a result of an infringement of European Union law by a Member State does not negate the obligation of the referring court to give priority to an interpretation of the national law that is compatible with Directive 2000/78, and, if that interpretation is not possible, to disapply a provision of national law contrary to the general principle of non-discrimination on grounds of age laid down in that directive, and, in the context of the dispute before it, that court cannot give priority, in the proceedings before it, to the protection of the legitimate expectations of a private individual, in the case in point, an employer, who has complied with the national law.

• Egenberger (C-414/16) - religion

"the Court of First Instance is essentially seeking to ascertain whether, in the context of a dispute between private individuals, a national court is under an obligation not to apply a provision of national law which cannot be interpreted in such a way as to bring it into line with Article 4(2) of Directive 2000/78. It is for the national courts to decide, in the light of the totality of the rules of national law and by applying the methods of interpretation recognised by that law, whether, and to what extent, a provision of national law, such as Article 9(1) of the AGG, can be interpreted in accordance with Article 4(2) of Directive 2000/78, so as to avoid the need to interpret the national law in a way which is contrary to law. It is for the referring court to ascertain whether the provision of national law at issue in the main proceedings can be interpreted in such a way as to comply with Directive 2000/78.

If it turns out that the provision of national law in question cannot be interpreted in this way ... The prohibition of any discrimination based on religion or belief is **binding as a general principle of Union law**. That prohibition, enshrined in Article 21(1) of the Charter, is sufficient in itself to confer on private individuals a right which can be invoked in disputes which fall within the scope of Union law. Given the binding effect of Article 21 of the Charter, this provision is not substantially different from the various provisions of the Founding Treaties which prohibit discrimination on various grounds, even where such discrimination arises from contracts concluded by private individuals. As is the case with Article 21 of the Charter, Article 47 of the Charter, relating to effective judicial remedies, is entirely sufficient and does not need to be supplemented by provisions of Union or national law in order to confer on private individuals a right that can be invoked. The national court should, within the limits of its powers, grant individuals the legal protection afforded to them by Articles 21 and 47 of the Charter and ensure the full effectiveness of those Articles, where necessary by disapplying any provision of national law contrary to them.

This conclusion is not undermined by the fact that, in a case between private individuals, the court may have to balance competing fundamental rights conferred on the parties by the TFEU or the Charter, and may even be obliged to ensure that the principle of proportionality is respected in the context of its mandatory review.

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Cases of other provisions

Article 31

Adequate and fair working conditions

1. Every worker has the right to safe working conditions that respect his or her health and dignity.
2. **Every worker has the right** to limitation of maximum working hours, the right to daily and weekly rest, and paid annual leave.

Max-Planck-Gesellschaft (C-684/16)

Bauer (C-569/16 and C-570/16)

The right to paid annual leave is not only essential as a principle of Union social law, but is also expressly enshrined in Article 31(2) of the Charter, which, according to Article 6(1) TEU, has the same legal force as the Treaties. Article 7 of Directive 2003/88 and Article 31(2) of the Charter must be interpreted as precluding provisions of national law, such as those at issue in the main proceedings, ...

A propos - exemption from a provision contrary to the Directive on the basis of Article 47 of the Charter.

If the national court seized of a dispute between private individuals is unable to interpret the applicable national law in a way that is consistent with this point, that court must, within the limits of its jurisdiction, guarantee the judicial remedy of the subjects of the law under Article 47 of the Charter of Fundamental Rights of the European Union and guarantee the full effectiveness of that Article by not applying, to the extent necessary, any provision of national law that is contrary to it.

X (C-715/20)

Article 27

Workers' right to information and consultation within the company

Workers or their representatives must be guaranteed information and consultation at the appropriate level and in good time in the cases and under the conditions laid down by Union and national legislation and practice.

Association de médiation sociale (AMS) (C-76/12)

Article 27 of the Charter, entitled "The right of workers to information and consultation within the undertaking", provides that workers must be guaranteed information and consultation at various levels in the cases and under the conditions laid down by Union and national legislation and practice.

It is therefore clear from the text of Article 27 of the Charter that, in order to be fully effective, this Article must be made more specific by rules of Union law or national law.