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Proving discrimination : burden of proof and access to evidence

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Overview

- 1 Burden of proof rules of Directives & origin of shift of burden of proof
- 2 Burden of proof and direct / indirect discrimination
- 3 How to rebut the presumption
- 4 Access to information

Burden of proof provisions Directives

Main rule	<ul style="list-style-type: none"> – facts from which it may be presumed that there has been direct or indirect discrimination – respondent needs to prove that there has been no breach of the principle of equal treatment
Exceptions	<ul style="list-style-type: none"> – Does not apply to criminal procedures – Needs not to be applied to proceedings where court / competent body has investigative powers
Scope	<ul style="list-style-type: none"> – Applies to direct and indirect discrimination – More favourable rules of evidence allowed at national level – Also applies to proceedings in which associations / organisations with legitimate interest are engaged

Art. 10 Directive 2000/78

Art. 8 Directive 2000/43

Art. 9 Directive 2004/113

Art. 19 Directive 2006/54

Origin of rule

In case law developed principle...

- Court of Justice
- Gender discrimination
- Implied in development of (presumption of) *indirect* discrimination
- Further developed in equal pay cases
- Derived from 'effet utile' – principle

... with the following fundamentals

- Acknowledging difficult position (alleged) victim
 - Without shifting burden of proof, effectiveness may be compromised
- Prima facie discrimination requires justification
 - Lack in transparency may result in prima facie case
 - Statistical evidence may result in prima facie case
 - High comparability may result in prima facie case
- Prima facie discrimination requires a justification based on objectively justified factors unrelated to any discrimination

Danfoss – 109/88 -17 October 1989 -
ECLI:EU:C:1989:383

Enderby – C-127/92. – 27 October 1993 –
ECLI:EU:C:1993:859

Royal Copenhagen – C-400/93 – 31 May 1995
– ECLI:EU:C:1995:155

Brunnhöfer – C-381/99 – 26 June 2001 –
ECLI:EU:C:2001:358

Burden of proof and direct discrimination

Concept	<ul style="list-style-type: none"> – Less favourable treatment – Comparability – Causation
Issues	<ul style="list-style-type: none"> – Lack of information / transparency on one or more of the constitutive elements
Solution	<ul style="list-style-type: none"> – Conceptual changes (hypothetical & historic comparator) – Burden of proof solutions in the strict sense: <ul style="list-style-type: none"> – Statistics (pattern) of discrimination (<i>Danfoss / Royal Copenhagen</i>) – Public statements (<i>Feryn / Accept</i>) – Assertions suggesting stereotypes or prejudice (<i>CHEZ</i>) – Allegations without foundation (<i>CHEZ</i>) – No public distancing from discriminatory statements by shareholder (<i>Accept</i>) – Refusal to provide information (<i>Kelly / Meister</i>) – Providing evidence on comparability / compliance with job requirements (<i>Brunnhofer / Meister</i>) – Less favourable treatment in itself generally insufficient

Firma Feryn – C-54/07 – 10 July 2008 –
ECLI:EU:C:2008:397

ACCEPT – C-81/12 – 25 April 2013 –
ECLI:EU:C:2013:275

CHEZ – C-83/14 – 16 July 2015 –
ECLI:EU:C:2015:480

Meister – C-415/10 – 19 April 2012 -
ECLI:EU:C:2012:217

Burden of proof and indirect discrimination

Concept	<ul style="list-style-type: none"> – an apparently neutral provision, criterion or practice – Particular disadvantage – No objective justification (legitimate / appropriate / necessary)
Issues	<ul style="list-style-type: none"> – [Lack of information / transparency] – Detailed and specific statistical evidence needed?
Application	<ul style="list-style-type: none"> – Conceptual solution (from disparate impact to particular disadvantage) – In parallel burden of proof solution in strict sense: <ul style="list-style-type: none"> – General statistics can be sufficient – no need for detailed statistics related to situation if no / difficult access to such specific statistics (<i>Schuch-Ghannadan</i>) – Facts of general knowledge / intrinsically liable criterion (<i>O'Flynn</i>)

O'Flynn – C-237/94 – 23 May 1996 - ECLI:EU:C:1996:206

Minoos Schuch-Ghannadan – C-274/18 – 3 October 2019 - ECLI:EU:C:2019:828

Burden of proof and access to information

Issue	<ul style="list-style-type: none"> – (Alleged) victim may sometimes have insufficient information to trigger presumption – Is (alleged) victim entitled to access to information under burden of proof rules?
Solution	<ul style="list-style-type: none"> – Burden of proof rules do not entitle an (alleged) victim to have access to information – Refusal of disclosure may undermine effectiveness (Kelly) – National court must ensure under Article 4(3) TEU that refusal of disclosure is not liable to compromise the achievement of the objectives of Directive (Meister) – it cannot be ruled out that a defendant's refusal to grant any access to information may be one of the factors to take into account in the context of establishing facts from which it may be presumed that there has been direct or indirect discrimination (Meister) – Entitlement to access can be affected by rules of European Union law relating to confidentiality / privacy (Kelly)

Meister – C-415/10 – 19 April 2012 - ECLI:EU:C:2012:217

Kelly – C-104/10 – 21 July 2011 - ECLI:EU:C:2011:506

Burden of proof and rebuttal of presumption

Basic rules	<ul style="list-style-type: none"> – Defendant needs to adduce evidence that it has not breached the principle of equal treatment – Objectively justified factors unrelated to any discrimination (Danfoss / Coleman / Accept / Chez) – Evidence that practice does not correspond with discriminatory statements (Feryn) – Distancing from discriminatory statements by shareholder (Accept)
Issues	<ul style="list-style-type: none"> – Evidence of a negative ? – Unlawful evidence? – Scrutiny in relation to evidence / justification?
Application	<ul style="list-style-type: none"> – No need to prove a negative – possible evidence to the contrary (can be combined) <ul style="list-style-type: none"> – No comparable situation – No causation (other legitimate criterion / factor) – No disparate impact – Justification (indirect) discrimination – No unlawful evidence (Accept)

Conclusions

EU

- Rebuttal and justification
- Standard of scrutiny
- Access to evidence

Member States

- Effectiveness of burden of proof provisions?

Questions?

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