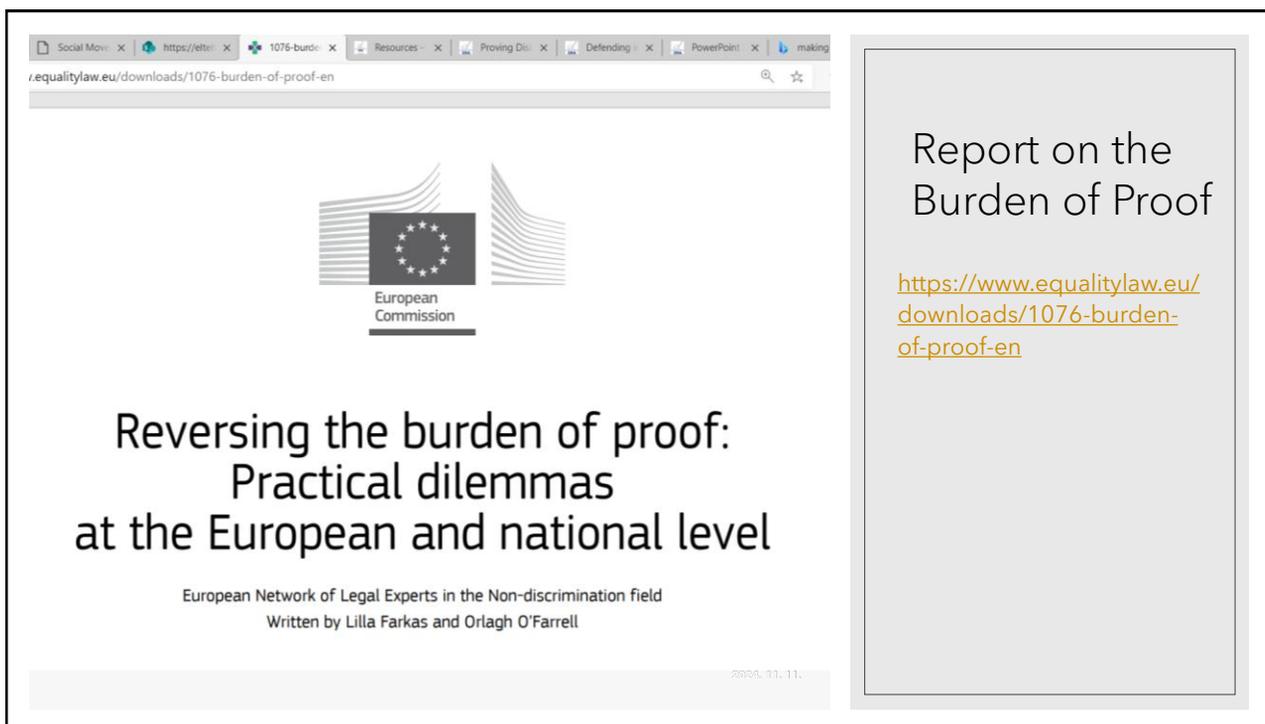


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PROVING DISCRIMINATION UNDER EU LAW

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European
Commission

Reversing the burden of proof: Practical dilemmas at the European and national level

European Network of Legal Experts in the Non-discrimination field
Written by Lilla Farkas and Orlagh O'Farrell

2024. 11. 11.

Report on the Burden of Proof

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of-proof-en](https://www.equalitylaw.eu/downloads/1076-burden-of-proof-en)

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- In civil/employment law the person who makes a claim must prove it
- However, discrimination contains an element (=discriminatory intent or motive) that is only fully known by the discriminator
- Moreover, only the discriminator has full access to all the evidence.
- Right to equality under EU law is meaningless unless accessible in practice, particularly in court (access to justice).
- Notice that the reversal of the burden of proof is motivated in CJEU cases by both the need to obtain evidence held by defendant and to establish a plausible explanation for their conduct.

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Key principles and early legislation

Effectiveness

Effective judicial protection

„Judge-made‘ law:

BoP Directive 97/80/EC

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- Equal pay cases in which the BOP shifted to the employer to show that the pay differential between men and women was objectively justified when:
 - i. Female workers were paid less, on average, than men and the system of pay that led to this result was completely lacking in transparency (Danfoss)
 - ii. Significant & valid statistics showed that a collective bargaining system had resulted in a predominantly female occupational group being paid less than predominantly male occupational groups (Enderby)

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Early caselaw

Danfoss - Case 109/89
[1989]Enderby - Case C-127/92
[1993]

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"Member States shall take such measures as are necessary in accordance with their national judicial systems, to ensure that, when persons who consider themselves wronged because the principle of equal treatment has not been applied to them **establish**, before a court or other competent authority, **facts from which it may be presumed** that there has been direct or indirect discrimination, it shall be for the respondent to prove that there has been no breach of the principle of equal treatment."

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Recent legislation on gender BoP

Recast Gender Directive 2006/54/EC (empl) Article 19(1)

Access to services directive 2004/113/EC, Article 9

Pay Transparency Directive (EU) 2023/970, Article 18 (Fol Article 7)

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- National rules can be more beneficial to plaintiffs. For instance, in Bulgaria and Hungary, plaintiffs must establish protected ground and disadvantage, not causal link between the two. (legal presumption)
- Does not apply to criminal proceedings.
- May apply to administrative proceedings (**equality bodies**, labour etc. Inspectorates)
- Pregnancy: practically no justification
- Intersectional discrimination: justification for direct race discrimination is limited

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Gender BoP II

Discrimination on certain grounds can only be justified under limited conditions - **relevance for intersectional discrimination**

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1. Gathering evidence

2. Making prima facie case: presenting facts from which it may be “presumed” there has been discrimination

- Establishing causal link between protected ground and conduct
- Establishing causal link between conduct and harm/disadvantage

3. Drawing inferences: does discrimination seem more likely or less likely

4. Justification and rebuttal:

- justifying discrimination: establish reason for conduct, gender must not be a motivation
- and/or
- rebutting evidence (defendant, plaintiff)

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Establishing discrimination: key stages

Must apply to direct and indirect discrimination

May apply to harassment
Instruction to discriminate
Victimisation

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- Employer’s public speech as evidence (Feryn Case C-54/07 and ACCEPT Case C-81/12)
- Situation testing – Test Achats (Case C-236/09)
 - can one test prove discriminatory practice?
- Statistical and documentary evidence:
 - if plaintiff not employed: investigation by equality body, freedom of information request (for analogy, see Pay Transparency Directive (Article 7))
 - trade union assistance in obtaining gender statistics (Danfoss, Enderby)
 - – sample size, temporality, comparability

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Gathering evidence: type of evidence

Documents
Public speech
Witness testimonies
Situation testing
Audio and video recording
Statistical data
Combination of evidence - Feryn

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Plaintiffs under Pay Transparency Directive have access to information

was job seeker informed about the **starting salary or pay range** in due time

Was she ranked according to her **pay history**

Are the **criteria** used to determine pay and career progression gender neutral?

Reports on **average pay levels**, by sex, for categories of employees doing the same work or work of equal value

Requesting documents revealing personal data Kelly (Case C-104/10)

- Plaintiff not recruited and having received redacted documents beforehand, requested evidence that contains personal data

Broad request for documents containing personal data Meister (Case C-415/10) (GDPR: anonymised ethnic data collection)

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Gathering evidence:
mistakes to avoid

Finding the right proxies for gender and other grounds

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- Kelly (para 34): ...although Article 4(1) of Directive 97/80 does not specifically entitle persons who consider themselves wronged because the principle of equal treatment has not been correctly applied to them, to information in order that they may establish 'facts ... it is **not however inconceivable that a refusal of disclosure by the defendant, in the context of establishing such facts, is liable to compromise the achievement of the objective pursued by that directive** and, in particular, to deprive that provision of its effectiveness.

- Meister: ... **it must be ensured that a refusal of disclosure by the defendant is not liable to compromise the achievement of the objectives pursued by Directives 2000/43, 2000/78 and 2006/54**

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Access to documents held by defendant

Seemingly plaintiff friendly
YET

Interpreted by national courts in favour of defendants

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- Director in Feryn: "It is not just immigrants who break in. I won't say that, I'm not a racist. Belgians break into people's houses just as much. But people are obviously scared. **So people often say: 'no immigrants'. I must comply with my customers' requirements.** If you say 'I want a particular product or I want it like this and like that', and I say 'I'm not doing it, I'll send these people', then you say 'I don't need that door'. Then I'm putting myself out of business. We must meet the customers' requirements. ... I didn't create this problem in Belgium. I want the firm to do well and I want us to achieve our turnover at the end of the year, and how do I do that? I must do it the way the customer wants it done!"
- Major shareholder of Steaua Bucuresti in ACCEPT: not hiring homosexuals

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Plaintiff's public 'speech act'

Can it prove discriminatory practice?

Can it prove subsequent discrimination?

Is other evidence needed to 'verify' confession to discriminate?

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New Czech Civil Code no. 89/2012 Sb. (§88 para. 1: the use of private recordings for the protection of rights, §90 : proportionality)

Judgment of the Czech Constitutional Court of 9 December 2014, no. II. ÚS1774/14:

"Under normal circumstances, the arbitrary recording of private conversations without the knowledge of the participants is a gross invasion of their privacy. [...] The Constitutional Court is firmly opposed to the unfair practice of electronic surveillance and covert recording of private and professional meetings, which, as a rule, not only contravenes the law but, judged from the social and ethical point of view, spreads an atmosphere of suspicion, fear, uncertainty and distrust in society. However, a completely different approach must be taken in cases where the secret recording of an audio recording of a conversation is part of the defence of the victim of a crime against the perpetrator or where it is a means of obtaining legal protection for a significantly weaker party to a significant civil and, in particular, employment dispute. The interference with the right to privacy of the person whose speech is recorded is fully justified here by the interest in protecting the weaker party to the legal relationship who is at risk of serious harm (including, for example, loss of employment).

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Audio and video recording

(Zdenek Kühn)

Who is acting unlawfully?

Power imbalance

Criminal law: public or private prosecution?

Civil law: proportionality between plaintiff's right to equal treatment and defendant's right to privacy

Comparative law

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- The essence of reversed BoP
- Plaintiff must establish causal link between conduct (action, omission) and harm/disadvantage as in any tort case, relatively easy
- Establishing causal link between protected ground and conduct is difficult and plaintiff bears this burden **partially**
- A useful test is to ask: BUT FOR SEX would this treatment have been suffered?
- If it seems plausible that the plaintiff would have been treated differently if of a different sex, etc, the burden of proof should be shifted

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Before the burden of proof shifts

Drawing inferences

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An employer's prior statement that it would not appoint employees of certain ethnic minority backgrounds "may constitute facts of such a nature as to give rise to a presumption of a (still existing) discriminatory recruitment policy" (Feryn)

"...a defendant employer cannot deny the existence of facts from which it may be inferred that it has a discriminatory **recruitment policy** merely by asserting that statements suggestive of the existence of a homophobic recruitment policy come from a person who, while claiming and appearing to play an important role in the management of that employer, is not legally capable of binding it in recruitment matters.... The fact that an employer might not have clearly distanced itself from the statements concerned is a factor which the court...may take into account in the context of the overall appraisal of the facts" (ACCEPT)

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Drawing inferences

One piece of evidence is usually insufficient

BUT

Context is important: what are trends and patterns of discrimination at defendant?

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- Expecting plaintiff to prove intent at any stage is contrary to EU law
- Intent disguised by seemingly neutral practices:
 - Nikoloudi (Case C-196/02): a rule that reserved established staff positions to persons with full-time jobs. However, not only were all the part-time workers women, but the staff regulations made it possible only for women to obtain a part-time contract for the particular job category.
 - CHEZ (Case C-83/14)

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Intent

Intent, as in direct causal link between protected ground and conduct does not have to be proven by plaintiff

YET

Judges tend to examine intent, especially re racial or ethnic discrimination

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- The defendant is required to provide evidence on what really happened
- In case the conduct was free of any discriminatory motive or element, the justification defence succeeds
- If the inference is that there had been discrimination, justification depends on the form it had taken - CHEZ
 - Direct discrimination: some forms can be justified in limited ways: pregnancy, racial discrimination except for genuine and determining occupational requirement and positive action measures
 - Indirect discrimination
 - Harassment
 - Instruction to discrimination
 - victimisation

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After the burden of proof shifts

Justification can be rebutted by plaintiff

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In case of indirect discrimination, he may justify his conduct by showing that the **apparently neutral** criterion, provision or practice that would put persons of a protected ground at a particular disadvantage is objectively justified by a legitimate aim and the means of achieving that aim are appropriate and necessary.

- Legitimate aim
- Appropriate and necessary: are there alternative solutions?
- Proportionate: harm caused v. discriminator's need

Ruiz Cornejo (Case C-270/16):

Combating absenteeism at work - intermittent sick leaves over two months (20 days)

Limitation does not apply to conditions comparable to disability

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Justifying indirect discrimination

Direct discrimination can also be justified with exceptions, particularly on the grounds of racial or ethnic origin