

Applying EU Anti-Discrimination Law

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Proving discrimination

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Proving discrimination

- Why do we need a different rule of probation?
- What does the shift of the burden of proof mean?
- What does the shift/share of the BoP mean?
 - For direct discrimination
 - For indirect discrimination
 - For harassment (?)
- What kind of evidence? – practical challenges
- Key take outs on BoP

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Why is BoP relevant in cases of discrimination?

- Prior to adoption of Equality Directives, judge-made law (*Danfoss*, Case 109/89 and *Enderby*, C-127/92) → principle of *effective protection*

18. Where there is a prima facie case of discrimination, it is for the employer to show that there are objective reasons for the difference in pay. Workers would be unable to enforce the principle of equal pay before national courts if evidence of a prima facie case of discrimination did not shift to the employer the onus of showing that the pay differential is not in fact discriminatory.

- Codified in identical provisions: Article 8 of Directive 2000/43/EC, Article 10 of Directive 2000/78/EC, and Article 19(1) of Recast Gender Equality Directive 2006/54

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What does BoP in discrimination cases mean?

From

Onus probandi incumbit ei qui dicit, non ei qui negat

we get to:

Article 8 of Directive 2000/43/EC and Article 10 of Directive 2000/78/EC ... and Recast Directive 2002/54

1. 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**.

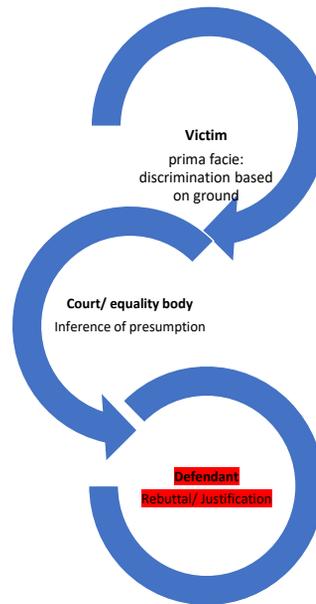
2. Paragraph 1 shall not prevent Member States from introducing rules of evidence which are **more favourable to plaintiffs**.

...5. Member States need not apply paragraph 1 to proceedings in which it is for the court or competent body to investigate the facts of the case."

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What does SHIFT/ SHARE entail?

1. Complainant: **must establish prima facie case of discrimination** – must establish **facts** from which it **may be presumed** that there has been direct or indirect discrimination
2. Court or national equality body: **makes an inference of discrimination** and shifts the burden of proof
3. Defendant: **must rebut the presumption** – prove that discrimination has not occurred or was justified under the strict requirements of EU Law



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BoP for direct discrimination cases*

(*discrimination by injunction, by statements, by association, through harassment)

Who does What?	Plaintiff will	Respondent/ defendant will
Differentiation – less favourable treatment (in a comparable situation): is, was or would be	V (prima facie)	← Defence against different unfavourable treatment claim
Protected ground and causal relation between unfavourable treatment and protected characteristic	V (prima facie)	← Defence against existence of protected ground ← Defence against link between treatment and protected ground
Right affected	V (prima facie)	← No right entitlement or legitimate exceptions
	Judge or NEB may make the inference/ presume discrimination	
Justification (legitimate objective reasons or other neutral factors)!!!	→ Sur-rebuttal regarding validity of justification	V as obligation
		Presumption confirmed → finding of discrimination

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BoP for indirect discrimination

- Differential impact can be proved also through statistical data – *Bilka-Kaufhaus*, C-170/84
- Particular disadvantage does not have to be proven “in practice”. It’s enough to point to that the measure *is liable* to have such a negative effect (*O’Flynn*, C-237/94, p. 21).
- The Respondent will have to show that the apparently neutral criterion, provision or practice which is considered to put persons at a particular disadvantage linked to a protected ground has a legitimate aim, there were no other means to achieve that aim, and the measures taken were necessary, appropriate and proportional. The legitimate aim in itself requires proof and should not be related to discrimination (*Chez RB*, C-83/14 p.116).

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BoP for harassment cases

- NO SPECIFIC LANGUAGE IN DIRECTIVES ...BUT IN NATIONAL LAW
- The victim shows facts regarding unwanted, offensive or degrading conduct (generally unacceptable) linked to a protected ground
- Key: human dignity → no need for comparators
- There is no justification and intention should not be relevant
- Respondent can show that:
 - ✓ There was no alleged behaviour
 - ✓ The conduct was wanted by the victim
 - ✓ The conduct was legitimate

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What kind of evidence? Practical challenges and caveats for national courts

- Documents held by defendant - *Kelly*, C-104/10 and *Meister*, C 415/10
- Statements – speech act – *Firma Feryn*, C-54/07 and *ACCEPT*, C-81/12
- Statistical data – *Danfoss* and *Enderbery*, + recitals 15 of both 43/200/EC and 78/2000/EC
- Video and audio recording
- Situation testing or abuse of rights? - *Nils-Johannes Kratzer v. R+V Allgemeine Versicherung AG*, C-423/15
- Disclosure concerns! - *Kelly*, C-104/10 > no entitlement to disclosure
- *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.”
- *Nils-Johannes Kratzer*, C-423/15, para.37: “EU law cannot be relied on for abusive or fraudulent ends.”

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Key take-outs on BoP:

- It entails pro-active roles for Victim-Respondent-Court/ equality body by lowering the evidentiary burden of the claimant– just presumption
- It applies to courts and NEBs (admin) proceedings BUT not to criminal proceedings
- Aim: effective protection of the victim → it should not be onerous
- Member States can adopt rules more beneficial to the plaintiffs
- Discrimination on specific grounds can be justified only in limited conditions (to be read in conjunction with ECtHR jurisprudence)
- Intention of the defendant is not relevant in EU law



BUT FOR ... (SEX, RACE, RELIGION, DISABILITY, AGE, SEXUAL ORIENTATION)... would this have happened?

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Suggested sources

<https://www.equalitylaw.eu/downloads/1076-burden-of-proof-en>



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