

# Distribution of Burden of Proof in EU Antidiscrimination Law

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## Legislative Ground

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Directive 2006/54/EC (the Recast Directive) :

*“Member States shall take such measures as are necessary, in accordance with their national judicial system, 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.**”*

- Council Directive 2000/43/EC, Art 8
- Council Directive 2000/78/EC, Art 10

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## Članak 19

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Teret dokaza

1. Države članice poduzimaju potrebne mjere u okviru svojih pravosudnih sustava kako bi osigurale da, kad osobe koje se smatraju oštećenima zbog neprimjenjivanja načela jednakog postupanja pred sudom ili drugim nadležnim tijelom **utvrde činjenice iz kojih se može pretpostaviti** da je došlo do izravne ili neizravne diskriminacije, **teret dokaza nepostojanja povrede načela jednakog postupanja bude na tuženiku.**

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Early  
Caselaw  
C-109/88  
*Danfoss*  
(1989)

*“if the system of pay is **totally** lacking in **transparency** and statistical evidence reveals a difference in pay between male and female workers the burden of proof shifts to the employer **to account for the pay difference by factors unrelated to sex.**”*

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Early  
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“To show that his practice in the matter of wages *does not systematically work* to the disadvantage of female employees the employer will *have to indicate how he has applied the criteria concerning supplements* and will thus be forced to make his system of pay transparent .”

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## Burden of Proof as Expression of Effective Legal Protection



aims to **eliminate barriers to effective judicial protection** of the antidiscrimination rights granted by the EU legal order

expression of the fundamental principle of effective legal protection of EU law



**does not (necessarily) exempt plaintiff** from the conventional obligation to produce evidence capable of persuading the court that discrimination occurred

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## Effective Judicial Protection

- **Case 222/84 Johnston**

„...it must be borne in mind first of all that article 6 of the Directive requires Member States to introduce into their internal legal systems such measures as are needed to enable all persons who consider themselves wronged by discrimination<sup>1</sup> to pursue their claims by judicial process'. It follows from that provision that the **Member States must take measures which are sufficiently effective to achieve the aim of the Directive and that they must ensure that the rights thus conferred may be effectively relied upon before the national courts** by the persons concerned .

The requirement of judicial control stipulated by that article **reflects a general principle of law which underlies the constitutional traditions common to the member states**. That principle is also laid down in Articles 6 and 13 of the European Convention for the Protection of Human Rights and Fundamental Freedoms of 4 November 1950 as the European Parliament, Council and Commission recognized in their joint declaration of 5 April 1977 (Official Journal c 103, p. 1 ) and as the Court has recognized in its decisions, the principles on which that convention is based must be taken into consideration in Community law.

By virtue of article 6 of Directive 76/207, interpreted in the light of the general principle stated above, all persons have the right to obtain an effective remedy in a competent court against measures which they consider to be contrary to the principle of equal treatment for men and women laid down in the directive. It is for the Member States to ensure effective judicial control as regards compliance with the applicable provisions of community law and of national legislation intended to give effect to the rights for which the directive provides .

The answer to this part of the sixth question put by the Industrial tribunal must therefore be that **the principle of effective judicial control** laid down in article 6 of council Directive no 76/207 of 9 February 1976 does not allow a certificate issued by a national authority stating that the conditions for derogating from the principle of equal treatment for men and women for the purpose of protecting public safety are satisfied to be treated as conclusive evidence so as to exclude the exercise of any power of review by the courts .”

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### Procedural Scope of the EU Burden of Proof Guarantee

- C-109/88 *Danfoss* (1989)

14 Finally, it should be noted that under Article 6 of the Equal Pay Directive Member States must, in accordance with their national circumstances and legal systems, take the measures necessary to ensure that the principle of equal pay is applied and that effective means are available to ensure that it is observed .

**The concern for effectiveness** which thus underlies the directive means that it **must be interpreted as implying adjustments to national rules on the burden of proof in special cases where such adjustments are necessary for the effective implementation of the principle of equality** .

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## Procedural Scope of the EU Burden of Proof Guarantee

- The Guarantee requires **adjustment** of national procedural rules in the context of antidiscrimination proceedings
- The adjustment can be achieved on the basis of
  - the principle of effective judicial protection
    - the principle of equivalence and effectiveness
- What type of procedural rules fall within the scope of the EU burden of proof guarantee:
  - rules on presenting evidence (production)?
  - rules determining persuasiveness of evidence?
  - rules determining structure of proceedings?
  - rules determining adjudicators cognitive evaluation presented evidence

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## Balance of Interests

- AG Mengozzi in C-415/10 Meister explained the basic balance inherent to the redistribution of the burden of proof:

“A measure of balance is therefore maintained, enabling the victim to claim his right to equal treatment but preventing proceedings from being brought against the respondent solely on the basis of the victim’s assertions.”



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## Fundamental Right Charter of Fundamental Rights EU

- Article 47 CFREU

Everyone whose rights and freedoms guaranteed by the law of the Union are violated **has the right to an effective remedy** before a tribunal in compliance with the conditions laid down in this Article.

Everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal previously established by law.

Everyone shall have the possibility of being advised, defended and represented.

Legal aid shall be made available to those who lack sufficient resources in so far as such aid is necessary to ensure effective access to justice.

### Art 51 CFREU

The provisions of this Charter are addressed to the institutions, bodies, offices and agencies of the Union with due regard for **the principle of subsidiarity** and to the Member States **only when they are implementing Union law**. They shall therefore respect the rights, observe the principles and promote the application thereof in accordance with their respective powers and *respecting the limits of the powers of the Union* as conferred on it in the Treaties.

The Charter **does not extend the field of application of Union law** beyond the powers of the Union **or establish any new power or task** for the Union, or modify powers and tasks as defined in the Treaties.

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## Full Effectiveness - vertical and horizontal -

### C-30/19 Braathens Regional Aviation

56 ...compliance with EU law does not go so far as requiring the creation of a new right of action, but merely that the referring court refuse to apply a procedural rule according to which the court seised, in accordance with domestic law, of a claim for compensation brought by a person considering himself or herself to be a victim of discrimination, cannot rule on the issue of whether there had been discrimination on the sole ground that the defendant agreed to pay the claimant the amount of compensation claimed, without however recognising the existence of the said discrimination; and that this is so owing to the incompatibility of that rule not only with Articles 7 and 15 of Directive 2000/43 but also with Article 47 of the Charter.

57 In that regard, it must be recalled, first, that, as has been established in paragraph 38 of this judgment, Articles 7 and 15 of Directive 2000/43 **seek to ensure the real and effective judicial protection of the right to equal treatment between** persons irrespective of racial or ethnic origin derived from that directive. It follows that **those articles merely give specific expression to the right to effective judicial protection, as guaranteed by Article 47 of the Charter, which is sufficient in itself and does not need to be made more specific by provisions of EU or national law to confer on individuals a right which they may rely on as such** (judgment of 17 April 2018, Egenberger, C-414/16, EU:C:2018:257, paragraphs 76 to 78).

58 Second, by virtue of the principle of the primacy of EU law, if it is impossible for national law to be interpreted consistently with the requirements of EU law, any national court hearing a case within its jurisdiction is, as an organ of a Member State, under an obligation to disapply any provision of national law which is contrary to a provision of EU law with direct effect in the case pending before it (see, to that effect, judgment of 24 June 2019, Popławski, C-573/17, EU:C:2019:530, paragraphs 53 and 61 and the case-law cited).

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## The Material Scope of the EU Burden of Proof Guarantee

- The application of the EU burden of proof principle will show differing „specificities” depending on the material antidiscrimination guarantee which enforcement ought to facilitate:
  - Direct discrimination
  - Indirect discrimination
    - Reasonable accommodation
  - Discriminatory Harassment
    - Sexual harassment

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### Procedural Mechanism of Distribution of Responsibilities

- The purpose of the burden of proof guarantee is **to distribute responsibilities** between parties of a dispute related to **presenting evidence capable of demonstrating a set of facts** on grounds of which the court can **conclusively conclude** with acceptable degree of likelihood that the claim of discrimination is (not) justified

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## Key Elements of the Mechanism

Burden of proof distributes entitlements and duties between 1) a plaintiff (applicant), 2) a respondent (defendant) and 3) a trier of fact (court) in relation to

- The task of **production** of evidence
- The task of **persuasion** through evidence

The two tasks are functionally separated

- the burden can be redistributed in relation to the responsibility of producing evidence without redistributing the burden of persuasion

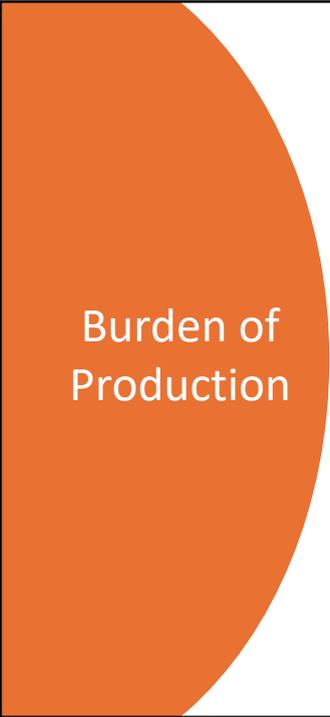
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## Production v Persuasion

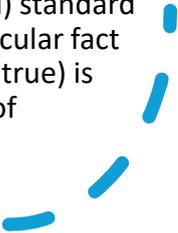
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- The burden of production refers to a party's initial obligation to present enough evidence on an issue to ensure that the claim or defense is considered by the fact-finder;
  - if this burden is not met, the claim may be dismissed without further examination.
- In contrast, the burden of persuasion is the ongoing duty to convince the judge of the truth of a particular fact or the overall case, and it determines which side wins if the evidence is evenly balanced.
  - Unlike the burden of production, which may shift between parties during a trial, the burden of persuasion typically remains with the party asserting the claim or defense throughout the proceedings.

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## Burden of Production

- Fact-finding Exercise
    - a party is responsible for
      - presenting facts which it considers relevant for a legal determination of right (violation)
      - proving the presented facts by appropriate evidentiary material
      - in principle, the (civil) standard of proof (that a particular fact could be considered true) is the preponderance of evidence
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## Burden of Persuasion

- The assessment of established facts against substantive legal criteria that define the relevant right or duty
  - Is it possible to infer, reasonably, (with a specified level of certainty) from the presented and verified factual basis (factual substrate) that the disputed behaviour may be regarded as
    - unfavourable (resulting in harm)
    - related (to a specified degree of “tightness”) to prohibited factors such as sex, gender, sexual orientation, race, disability, or age

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## Scale of Potential “Prima Facie” Assumptions

### Produce to allow to proceed/possibly shift the production burden

- to present evidence regarding specified set of facts allowing the court to draw specific inferences about the claim
  - initial duty to produce sufficient material on an issue to avoid dismissal
- to provide evidence establishing the existence of certain facts, indicating that the claim is neither *frivolous* nor *implausible*:
  - by ruling out the most probable rationale for the decision being challenged
  - facts that permit an inference that a reasonable person might suspect the decision under dispute is potentially questionable

### Produce to persuade and shift the burden

- to provide evidence regarding relevant facts with (presumed) persuasive value, enabling an adjudicator to infer that it is credible to assume the alleged violation may have taken place
  - reasonable to deduce that the alleged violation
    - possibly occurred
    - likely occurred
    - evidently occurred

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## Proving (Direct) Discrimination

- Directive 2006/54 (Recast) Gender Equality Directive

‘direct discrimination’: where one person is treated *less favourably on grounds of sex than another* is, has been or would be treated in a *comparable situation*;

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## The Suggested (Paper) List of Factors to be Proved

A plaintiff is in a *comparable situation* with another person B (comparator)

A plaintiff has a protected interest in relation to which is treated less favourably than person B (comparative harm)

A comparative harm rests on prohibited factor (relatedness)

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## Proving Direct Discrimination (Actual practice)



Produce evidence about facts which allow a court to infer conclusions regarding the question **whether a treatment** under dispute **was:**

- **unfavourable**  
- **related** to discriminatory ground



What actually is the role of the „comparator“?

Is it **essential** (constitutive) to the notion of discrimination or merely **instrumental** to demonstrating (knowing) whether discrimination occurred?

The case-law of the CJEU is full of decisions reached without help of the “comparative approach”

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## Proving Discrimination Formal v Substantive

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- What does constitute “relatedness”?
  - what needs to be proven to persuade a judge that harm occurred on “grounds of” prohibited criterion of treatment?
  - **Bias**
    - Prejudice
    - Stereotype (rational and/or irrational)
  - **Inconsistency** (breach of form)
    - likes treated unlike
    - un-likes treated the same (or with insufficient distinction)
  - **Negative Implications of Group Membership for Social Position** (real-life effects)
    - focus is on actual consequences of the examined treatment

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### Substantive Prima Facie Threshold

- What does it mean “*to presume*” – the scale of possible standards for judicial inference
  - In light of experience facts suggest with fair prospect that discrimination is plausible explanation (***plausibility cause***)
  - without other explanation of presented facts, more likely than not that discrimination explains the facts (***preponderance of evidence***)
  - specific, articulable, and individualized suspicion that discrimination is afoot (***reasonable suspicion***)
  - evidence presented must be such to make substantially more probable to be true than not that discrimination took place (***clear and convincing evidence***)

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## Calibrating the Shift

- How does a respondent satisfies his burden of proof/what precisely shifted?
  - by **producing** evidence of specific facts allowing the trier to make inferences about them?
    - the burden of persuasion stays with a plaintiff
    - prima facie “in reverse”
  - by producing evidence capable of **persuading** the trier of fact that:
    - *prima facie* presumption is unfounded (sufficiency standard)?
      - the full burden of further production and persuasion returns to plaintiff
    - by demonstrating that decision under dispute was indeed in no way related to the suspect criterion? (full burden)
  - What is degree of persuasiveness his evidence must demonstrate in order to convince the trier of fact?

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## Early Caselaw C-109/88 *Danfoss* (1989)

*“if the system of pay is **totally** lacking in **transparency** and statistical evidence reveals a difference in pay between male and female workers the burden of proof shifts to the employer to **account** for the pay difference **by factors unrelated to sex.**”*

- **Prima Facie Threshold (PFT):**
  - “applied and denied” – the applicant asked for explanation but denied
    - total lack of transparency
  - statistical evidence revealing (comparable) *unfavorability* of treatment
    - group based comparison
  - group membership

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## Early Caselaw C-109/88 *Danfoss* (1989)

“15 To show that his practice in the matter of wages *does not systematically work* to the disadvantage of female employees the employer will *have to indicate how he has applied the criteria* concerning supplements and will thus be forced to make his system of pay transparent .”

- The Shift:
  - produce evidence of factors unrelated to sex
  - duty to „**account for**”
    - present explanation of the criteria used in the decision-making
- what happens if a respondent presented evidence accounting for criteria used in the decision-making process persuading the court that the process *was not systematically rigged*?
  - *the fact the criterion of sex was not used in some concealed organized manner to disadvantage women does not mean that the particular plaintiff was not discriminated in that particular instance*
  - answer suggested in C-381/99 *Brunhoffer*
    - *the burden shifts back to plaintiff*

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## Early Case-law C-127/92 *Enderby*

—  
“if the pay of speech therapists is **significantly** lower than that of pharmacists and if the former are **exclusively women** while the latter are **predominantly men**, there is a prima facie case of sex discrimination ....

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** (see, by analogy, the judgment in *Danfoss*, cited above, at paragraph 13).”

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## Early Case-law C-127/92 *Enderby*

- The Prima Facie Elements
  - data showing statistically relevant difference in treatment (between groups performing work of equal value)
  - data showing statistically relevant difference in (gender, ethnic, etc.) structure of the two groups
  - membership in disadvantaged (“minority”) group
- The Shift Defence Elements
  - “to show” objective reasons
    - unrelated to discriminatory ground
  - responding to the issue of lack of transparency
    - employer tried defence of procedural equality relying on “democratic” process of collective bargaining
    - nontransparency of supposedly “representative” process and the history of unions as „male dominated” organisations suggested the reason was not „objective”

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## Early Case- law

## – PFD Lessons

- **Prima Facie Discrimination: (strong) presumption**
  - produce evidence of facts allowing (at least temporarily) an inference that *it is plausible* that treatment under dispute is *related to the* use of prohibited criteria
    - the standard of evaluation of produced evidence is preponderance or possibly less
    - lack of transparency + plausibility of the use of prohibited criteria command the shift
      - plausibility of the use of prohibited criteria showed through group-based statistics
      - the plaintiff has *a right* to require the shift; the adjudicator a duty
  - shifts the burden of *production and persuasion*
  - If the respondent fails to fulfil his burden of proof *the adjudicator has a duty to deliver judgment* for the plaintiff and declare she was discriminated

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## Early Casela W – Shift Lessons

- **The Shift : strong but not full**
  - obligation to **produce evidence** of “objective factors” used in decision-making
    - make the process transparent
  - produced evidence must **conclusively persuade** the adjudicator *that* considerations related to sex were not **systematically** used by employer to provide advantage to men over women
    - by preponderance of evidence at least: more likely that the system can be explained through regular use of presented “objective factors” than by concealed use of discriminatory criteria
    - respondent cannot employ “the feasible reason” strategy
  - facts must be “objective” – proven as actually related to real business needs
  - possibility of return of the burden back to plaintiff

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## Contemporary Caselaw

C-381/99  
Brunhoffer

C - 17/05  
Cadman

C - 54/07  
Feryn

C-104/10  
Kelly

C-415/10  
Meister

C-81/12  
Accept

C-83/14  
CHEZ

C-531/15  
Otero Ramos

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## The Role of Comparator

Is the proof of „likeness” essential to judicial conclusion on discrimination?

- discrimination as formal consistency
- discrimination entails difference in treatment between two sufficiently similar situation
- requires comparator

Who ought to produce the proof of (un)likeness?

- the plaintiff in a prima facie phase?
- the respondent as a part of the shift defence?

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## C-381/99 *Brunhoffer*

“57 In accordance with the normal rules of evidence, it is therefore for the plaintiff in the main proceedings to establish before the national court that the conditions giving rise to a presumption that there is unequal pay prohibited by Article 119 of the Treaty and by the Directive are fulfilled.

58 It is accordingly for the plaintiff to prove by any form of allowable evidence that **the pay she receives from the Bank is less than that of her chosen comparator**, and that **she does the same work or work of equal value**, comparable to that performed by him, so that prima facie she is the victim of discrimination which can be explained only by the difference in sex.

59 Contrary to what the national court seems to accept, **the employer is not therefore bound to show that the activities of the two employees concerned are different.**

60 if the plaintiff in the main proceedings adduced evidence to show that the criteria for establishing the existence of a difference in pay between a woman and a man and for identifying comparable work are satisfied in this case, a prima facie case of discrimination would exist and **it would then be for the employer to prove that there was no breach of the principle of equal pay.**

61 To do this, the employer could deny that the conditions for the application of the principle were met, by establishing by any legal means inter alia that the **activities actually performed by the two employees were not in fact comparable.**

62 The employer could **also justify the difference in pay by objective factors unrelated to any discrimination** based on sex, by proving that **there was a difference, unrelated to sex, to explain** the payment of a higher monthly supplement to the chosen comparator.”

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## C - 54/07 Feryn

„The fact that an employer declares publicly that it will not recruit employees of a certain ethnic or racial origin, something which is clearly **likely to strongly dissuade** certain candidates from submitting their candidature and, accordingly, **to hinder their access to the labour market, constitutes direct discrimination** in respect of recruitment within the meaning of Article 2(2)(a) of Directive 2000/43 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin. The existence of such direct discrimination is not dependent on the identification of a complainant who claims to have been the victim of that discrimination.

...

Article 15 of Directive 2000/43 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin requires that **rules on sanctions** applicable to breaches of national provisions adopted in order to transpose that directive must be effective, proportionate and dissuasive, **even where there is no identifiable victim.**”

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## C - 54/07 Feryn

“Article 8 of Directive 2000/43 states in that regard that, **where there are facts from which it may be presumed** that there has been direct or indirect discrimination, it is **for the defendant to prove that there has been no breach** of the principle of equal treatment.

The precondition of the obligation to adduce evidence in rebuttal which thus arises for the alleged perpetrator of the discrimination is a **simple finding that a presumption of discrimination has arisen** on the basis of established facts.

Statements by which an employer publicly lets it be known that, under its recruitment policy, it will not recruit any employees of a certain ethnic or racial origin **may constitute facts** of such a nature as to give rise to a presumption of a discriminatory *recruitment policy*.

It is, thus, for that employer **to adduce evidence** that **it has not breached** the principle of equal treatment, which it can do, *inter alia*, by showing that the actual recruitment practice of the undertaking does not correspond to those statements.

It is for the national court to verify that the facts alleged against that employer are established and **to assess the sufficiency of the evidence which the employer adduces in support** of its contentions that it has not breached the principle of equal treatment.”

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## C-81/12 Accept

“47 However, **Feryn does not suggest** that, in order to establish the existence of ‘facts from which it may be presumed that there has been ... discrimination’, in accordance with Article 10(1) of Directive 2000/78, the person who made the statements concerning the recruitment policy of a particular entity **must necessarily have legal capacity directly to define that policy or to bind or represent that entity** in recruitment matters.

48 The mere fact that statements such as those at issue in the main proceedings might not emanate directly from a given defendant is **not necessarily a bar to establishing**, with respect to that defendant, the existence of ‘facts from which it may be presumed that there has been ... discrimination’....

49 It follows that 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.

50 In a situation such as that at the origin of the dispute in the main proceedings, the fact that such an **employer might not have clearly distanced itself from the statements concerned is a factor which the court hearing the case may take into account** in the context of an overall appraisal of the facts.”

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## C-81/12 Accept

“56 In that context, defendants may refute the existence of such a breach before the competent national bodies or courts by establishing, by any legally permissible means, inter alia, that their recruitment policy is based on factors unrelated to any discrimination on grounds of sexual orientation.

57 In order to rebut the non-conclusive presumption that may arise under the application of Article 10(1) of Directive 2000/78, it is unnecessary for a defendant to prove that persons of a particular sexual orientation have been recruited in the past, since such a requirement is indeed apt, in certain circumstances, to interfere with the right to privacy.

58 In the overall assessment carried out by the national body or court hearing the matter, a prima facie case of discrimination on grounds of sexual orientation may be refuted with a body of consistent evidence. As Accept has, in essence, submitted, such a body of evidence might include, for example, a reaction by the defendant concerned clearly distancing itself from public statements on which the appearance of discrimination is based, and the existence of express provisions concerning its recruitment policy aimed at ensuring compliance with the principle of equal treatment within the meaning of Directive 2000/78”

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## C-83/14 CHEZ

### Elements Constituting Direct Discrimination

„In that regard, the Court’s case-law, ... is, in this instance, such as to justify the interpretation that the principle of equal treatment to which that directive refers **applies not to a particular category of person but by reference to the grounds** mentioned in Article 1 thereof, so that that principle is intended to benefit also persons who, **although not themselves a member** of the race or ethnic group concerned, nevertheless **suffer less favourable treatment or a particular disadvantage on one of those grounds** (see, by analogy, judgment in Coleman, C-303/06, EU:C:2008:415, paragraphs 38 and 50)...

As regards the situation at issue in the main proceedings, while accepting that, as Ms Nikolova asserts before the Court, she is not of Roma origin, the fact remains that **it is indeed Roma origin**, in this instance that of most of the other inhabitants of the district in which she carries on her business, **which constitutes the factor on the basis of which she considers that she has suffered less favourable treatment** or a particular disadvantage...

...whether the difference in treatment resulting from the practice at issue can be held to have been introduced on grounds of ethnic origin ... it is necessary to begin by pointing out that **the mere fact that the district at issue in the main proceedings is also lived in by inhabitants who are not of Roma origin does not rule out that such a practice was imposed in view of the Roma ethnic origin shared by most of that district’s inhabitants.**”

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## C-83/14 CHEZ

### The Prima Facie Phase

“It is ...for the referring court **to take account of all the circumstances surrounding the practice** at issue, in order to determine whether there is sufficient evidence for a finding that the facts from which it may be presumed that there has been direct discrimination on grounds of ethnic origin have been established, **and to ensure that a refusal of disclosure** by the respondent, here CHEZ RB, in the context of establishing such facts **is not liable to compromise** the achievement of the objectives pursued by Directive 2000/43.

The matters which may be taken into consideration in this connection include, *in particular*, the fact **it is common ground**, ... **and not disputed** by CHEZ RB that the latter has established the practice at issue **only in urban districts which ... are known to have Bulgarian nationals of Roma origin as the majority** of their population.

The same applies to the fact... that ... CHEZ RB asserted that in *its view* the damage and unlawful connections are **perpetrated mainly by Bulgarian nationals of Roma origin**. Such assertions could in fact suggest that the practice at issue is based on ethnic stereotypes or prejudices, the racial grounds thus combining with other grounds.”

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## C-83/14 CHEZ

### The Prima Facie Phase

The referring court must likewise take account of the compulsory, widespread and lasting nature of the practice at issue which, because, first, it has thus been extended without distinction to all the district's inhabitants irrespective of whether their individual meters have been tampered with or given rise to unlawful connections and of the identity of the perpetrators of that conduct and, secondly, it still endures nearly a quarter of a century after it was introduced, is such as to suggest that the inhabitants of that district, which is known to be lived in mainly by Bulgarian nationals of Roma origin, are, as a whole, considered to be potential perpetrators of such unlawful conduct. Such a perception may also be relevant for the overall assessment of the practice at issue (see, by analogy, judgment in *Asociația Accept*, C-81/12, [EU:C:2013:275](#), paragraph 51).

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## C-83/14 CHEZ

### The Shift Phase

„Furthermore, it should be recalled that, if the referring court were to conclude that there is a presumption of discrimination, **the effective application of the principle of equal treatment would require** that the burden of proof then falls on the respondents concerned, who must prove that there has been no breach of that principle (see, in particular, judgments in *Coleman*, C-303/06, [EU:C:2008:415](#), paragraph 54, and *Asociația Accept*, C-81/12, [EU:C:2013:275](#), paragraph 55). In such circumstances, CHEZ RB, as **respondent, would have the task of rebutting** the existence of such a breach of the principle of equal treatment **by proving that** the establishment of the practice at issue and its current retention are not **in any way founded on the fact** that the districts concerned are districts inhabited mainly by Bulgarian nationals **of Roma origin, but exclusively on objective factors unrelated to any discrimination on the grounds of racial or ethnic origin** (see, by analogy, judgments in *Coleman*, C-303/06, [EU:C:2008:415](#), paragraph 55, and *Asociația Accept*, C-81/12, [EU:C:2013:275](#), paragraph 56).”

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## Coccluding Remarks Role of Comparator

- merely instrumental
  - evidentiary means of proving
    - unfavorability of disputed treatment
    - relatedness of disputed treatment
  - Inconsistency detector
    - raises issue of credibility provided justification
- can be employed in different stages of evidentiary procedure (PFC, the shift) and by both parties

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## Concluding Remarks Prima Facie Phase

- The plaintiff must produce evidence of facts that allow a court to infer that discrimination might have occurred
- These facts ought to be proven by preponderance of evidence
  - more likely than not that facts were true
  - plaintiff does not have to prove discrimination by preponderance of evidence
- Primarily concerns the end-process of cognitive evaluation of gathered facts
- Requires very active role from a court

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## Concluding Remarks Prima Facie Phase

- PFC threshold may be reached by evidence showing conjunction of some of the following facts:
  - In the context of competition for position/opportunity
    - Group membership
    - Applied for opportunity
    - Possession of required qualifications
    - Rejection
    - Position remained opened
  - Lack of transparency/ Refusal to disclose
  - Relevant statistics concerning structure of groups affected by disputed practice
    - reveal general patterns
  - History of respondent behaviour
  - Inconsistencies/Credibility
    - Comparator
    - Appropriateness
    - Necessity
  - General policy and practices of the respondent
  - Public perception and respondent's reaction

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## Concluding Remarks The Shift Phase

- Full weight of the burden
  - the burden of persuasion not mere production
  - prove by a clear and convincing evidence the existence of actual objective reason that is no way whatsoever related to any discriminatory ground
  - justification must be real
    - objective reason that respondent offered as explanation must
      - serve actual business need
      - disputed practice must be appropriate and necessary for effective realization of that need

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Many Thanks for Your Attention