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# Proving discrimination

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## Summary

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1. Special criteria for the distribution of the burden of proof
2. Establishing a presumption of discrimination
3. Refuting a presumption of discrimination
4. Final notes

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# 1. Special criteria for the distribution of the burden of proof

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## 1.1 General criteria

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- Inadequacy of the general criteria for the (subjective) distribution of the burden of proof
  - Multiplicity of intangible discriminatory behaviour
  - Direct and indirect discrimination
  - Difficulty accessing evidence

## 1.2 CJ's special criteria

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➤ *Danfoss*, 109/88 (1989)

➤ *Enderby*, C-127/92 (1993)

- The burden of proving the existence of discrimination based on sex can be shifted when necessary in order not to deprive the apparent victim of discrimination of an effective means of enforcing the principle of equal pay.

## 1.3 EU law

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➤ Racial Equality, Directive 2000/43 (art. 8)

➤ Employment Equality, Directive 2000/78 (art. 10)

### Gender Equality

➤ Equal Treatment in Goods and Services, Directive 2004/113 (art. 9)

➤ Equal Treatment (Recast), Directive 2006/54 (art. 19)

## 1.4 Shifting of the burden of proof

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- Special rules in two stages
  1. Establishing a presumption of discrimination (Applicant)
  2. Rebutting the presumption of discrimination (Defendant)
  
- Rules apply to
  - Proof of discrimination
  - If more favourable ones are not adopted in the MS
  
- Rules do not apply to
  - Criminal proceedings
  - Cases where the court is responsible for establishing the facts

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## 1.5 Effectiveness & fairness

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- Principles of **equality and non-discrimination**
- Principle of **effective** EU law
- Principle of **effective judicial protection**
- Principle of **procedural fairness**

Other examples of 'fairer' distribution of the burden of proof

- *Harman International Industries*, C-175/21 (2022)
- *Hamoudi v Frontex*, C-136/24 P (Grand Chamber, 2025)

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## 1.6 Fair balance

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Opinion AG Kokott, *Belov*, C-394/11 (2012, 92)

- Rules on the burden of proof – maintain a fair balance between the interests of the victim of discrimination and the interests of the other party to the proceedings.
- These rules do not completely remove the burden of proof from the presumed victim of discrimination, they merely modify it.

## 1.7 Application of EU law to facts prior to Brexit

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Opinion AG Kokott, *Credit Agricole Corporate & Investment Bank*, C-350/24

- effect of Brexit on “old cases”
- burden of proof in discrimination claims under Directive 2006/54

## 2. Establishing a presumption of discrimination

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"factual evidence from which it may be presumed that there has been discrimination"

### 2.1 Types of evidence

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## i. Public statements

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- Statements by the defendant's legal representative
  - *Feryn*, C-54/07 (2008)
  
- Declarations of persons without legal capacity of representation
  - *Accept Association*, C-81/12 (2013)
  
- Declarations by undetermined persons
  - *CHEZ Razpredelenie Bulgaria*, C-83/14 (2015)
  
- Link between declarations and recruitment policy - criteria
  - *NH*, C-507/18 (2020, 43-46)

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## ii. Statistical data

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- Non-cyclical data
  - *Schuch-Ghannadan*, C-274/18 (2019, 46-47)
  
- Non-fortuitous or short-term phenomena
  - *KfH Kuratorium für Dialyse*, C-184/22 (2024)
  - *Danish 'Ghettos'*, C-417/23 (2025, 142)
  
- Less important but persistent difference
  - *Seymour-Smith and Perez*, C-167/97 (1990, 60-61)
  
- Significant difference
  - *Jenkins*, 96/80 (1981, p. 925, 13)
  - *Schönheit*, C-4/02 and C-5/02 (2003)
  - *KfH Kuratorium für Dialyse*, C-184/22 (2024, 64)
  - *Kowalska*, C-33/89 (1990, dispos.)
  
- Task for the national court
  - *YS (Occupational pensions of managerial staff)*, C-223/19 (2020, 50)

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### iii. Comparative elements

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- Up to the plaintiff to prove the comparability of the work and the difference in pay
  - *Brunnhofer*, C-381/99 (2001, 57-59, 60)
  - Exception: impossibility of comparison
  - *Air Nostrum e.a.*, C-314/23 (2024, 38, 42)
    - concept of remuneration (daily subsistence allowances) – non-comparable work (no indirect discrimination)
  
- Equal work or work of equal value - extracted from a "bundle of factual elements"
  - *Brunnhofer*, C-381/99 (2001, 43, 48)
  - *Kenny e.a.*, C-427/11 (2013, 27-28)
  
- Proof equal work + different pay = appearance of discrimination
  - *Brunnhofer*, C-381/99 (2001, 60)

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### iv. Pregnant women, women who have given birth or are breastfeeding

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- Pregnancy
  - *Dekker*, C-177/88 (1990, 12)
  
- Risk assessment did not include specific examination
  - *Otero Ramos*, C-531/15 (2017, 71)
  - *González Castro*, C-41/17 (2018, 75)

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## v. Preparatory documents for legislation

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### ➤ *Danish 'Ghettos', C-417/23 (2025)*

- Criterion of 'immigrants from non-Western countries and their descendants'
- Preparatory documents for the legislation of which the criterion forms part may contain relevant information for determining whether that legislation establishes a difference in treatment on the ground of ethnic origin
- Statistical evidence

## 2.2 Access to evidence

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## 2.2 No general right of access

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Anti-discrimination directives do not provide for a right of access

➤ *Kelly*, C-104/10 (2011)

- access to the qualifications of other candidates for vocational training

➤ *Meister*, C-415/10 (2012)

- access to information on employer hiring

## 2.2 Refusal of access, inaccessibility, lack of transparency

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- It must not jeopardise the achievement of the objectives pursued by the anti-discrimination directives

➤ *Schuch Ghannadan*, C-274/18 (2019, 55)

- Can contribute to establishing a presumption of discrimination

➤ *Danfoss*, 109/88 (1989, 10, 13 and 15)

➤ *Kelly*, C-104/10 (2011, 39)

➤ *Meister*, C-415/10 (2012, 47 et seq.)

## 2.3 Standard of proof

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## 2.3 *Presumption of discrimination*

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- "Appearance of discrimination" / "apparent discrimination"
  - *Danfoss*, 109/88 (1989); *Enderby*, C-127/92 (1993, 16-18); *Brunnhofner*, C-381/99 (2001, 60)
  - *Schuch Ghannadan*, C-274/18 (2019, 51)
  
- "Facts that give rise to a presumption of discrimination"
  - *Coleman*, C-303/06 (2008, 54)
  
- "Sufficient evidence" to prove facts from which discrimination can be "inferred"
  - *Meister*, C-415/10 (2012, 42)
  
- "Constituent elements of fact that give rise to a prima facie case of discrimination"
  - Opinion AG Kokott, *Belov*, C-394/11 (2012, 94)

## 2.3 Plaintiff burden of proof

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To establish a presumption of discrimination (*prima facie* case of discrimination), the plaintiff needs to prove:

- i. a protected characteristic (gender, racial or ethnic origin, age, etc.)
  - Note: discrimination of multiple kinds
- ii. A less favourable treatment or less favourable effects
- iii. An apparent, presumed or *prima facie* causal link between i. and ii.

## 3. Refuting the presumption of discrimination

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# Defendant's burden of proof

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## 1. Legitimate objective based on objectively justified factors and alien to any discrimination

- *Jenkins*, 96/80 (1981, 9-12)
  - *Bilka*, C-170/84 (1986)
  - *Seymour-Smith and Perez*, C-167/97 (1999, 58-65)
  - *CHEZ*, C-83/14 (2015, 17)
    - "notoriety" of the facts
  - *Kutz-Bauer*, C-187/00 (2003, 59-60)
    - budget objectives
  - Opinion AG Szpunar, *Air Nostrum*, C-314/23 (2024, 68 et seq., not followed by CJ)
    - objective autonomy social partners
- 2. Appropriate and necessary means to achieve a legitimate goal
- *Danish 'Ghettos'*, C-417/23 (2025, 160)

# 4. Final notes

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