

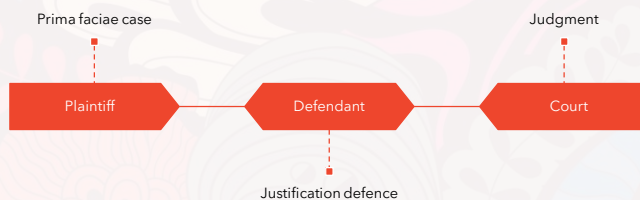
# PROVING DISCRIMINATION UNDER EU LAW

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## Access to evidence and reversal of burden of proof



Report on the Burden of Proof

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

# 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

- Right to equality under EU law is meaningless unless accessible in practice, particularly in court (access to justice).
- Why is it necessary to reverse the BoP? Only defendant knows the real reason of the seemingly discriminatory conduct. Only he has full access to all the evidence.
- Equal pay cases in which the BOP shifted to the employer to show 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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## Key principles Early caselaw & legislation

Effectiveness  
Effective judicial protection

„Judge-made“ law:  
Danfoss - Case 109/89 [1989]  
Enderby - Case C-127/92 [1993]

BoP Directive f Directive 97/80/EC

- Member States must ensure that, when claimants 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.
- National rules can be more beneficial to plaintiffs. For instance, in Bulgaria and Hungary, plaintiffs need to prove 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)

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## Recent BoP legislation

Racial Equality Directive  
2000/43/EC (all social fields,  
racial or ethnic origin)

Framework Employment  
Directive 2000/78/EC  
(employment & occupation  
in relation to religion or  
belief, disability, age or  
sexual orientation)

Recast Gender Directive  
2006/54/EC (empl)

- Nationality
  - Even though no BoP provision
  - Justification is limited
- Pregnancy
  - Practically no justification
- Racial or ethnic origin
  - Justification for direct discrimination is limited to
    - Genuine and determining occupational requirements (who play Othello)
    - Positive action measures

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## BoP & ground of discrimination

Discrimination on certain grounds can only be justified under limited conditions

- Two stage process?
  - Gathering evidence
  - Presenting facts from which it may be “presumed” there has been discrimination?
  - HOWEVER: limited justification (see above) and arguably in harassment instruction and victimisation cases REBUTTAL rather than JUSTIFICATION
  - Drawing of inferences before defendant is asked to justify his conduct.
- First stage has two components
  - Establishing causal link between protected ground and conduct
  - Establishing causal link between conduct and harm/disadvantage
- Justification: establish reason for conduct
- Rebuttal: on-going

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## BoP & form of discrimination

Direct discrimination  
 Indirect discrimination  
 Harassment  
 Instruction to discriminate  
 Victimisation

- Access to documents held by defendant
- Plaintiffs already employed, trade union assistance in obtaining gender statistics
  - Danfoss and Enderby
- Requesting access to documents containing personal data having received redacted documents beforehand
  - Kelly - Case C-104/10
- Making too broad a request for documents containing personal data, including ethnic data
  - Meister - Case C-415/10
  - NB: ethnic data collection for the purposes of ADL litigation is an exception to the prohibition of handling sensitive data under GDPR
- Employer provides data voluntarily
  - Feryn Case C-54/07 and ACCEPT Case C-81/12

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## Gathering evidence: type of evidence

Documents  
 Confessions - Feryn, ACCEPT  
 Witness testimonies  
 Situation testing - can one test prove discriminatory practice?  
 Audio and video recording  
 Statistical data - sample size, temporality, comparability  
 Combination of evidence - Feryn

- 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

- Director of 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. This isn't my problem. 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 Steua Bucuresti: not hiring homosexuals

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## Confessions – 'speech act'

Can it prove discriminatory practice?

Can it prove subsequent discrimination?

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

- 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?

- Two components
- Establishing causal link between conduct (not necessarily action) and harm/disadvantage as in any tort case, relatively easy
- Establishing causal link between protected ground and conduct is difficult
- Expecting defendant to prove intent at this stage (or any other stage) is contrary to EU law
- A useful test is to ask: BUT FOR (SEX, RACE, RELIGION, DISABILITY) would this treatment had been suffered?
- If this seems plausible that the plaintiff would have been treated differently if of a different sex, etc, the burden of proof should be shifted
- Intent disguised by seemingly neutral practices: CHEZ Case C-83/14

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## First stage

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

YET

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

- The defendant is required to provide evidence on what really happened
- In the context of the form of discrimination at hand
- In case his conduct was free of any discriminatory motive or element, his justification defence succeeds
- If the inference is that he discriminated
- 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 (for instance, proficient in a language)
  - Appropriate and necessary: are there alternative solutions? (lower level of knowledge)
  - Proportionate: harm caused v. discriminator's need (type of job and linguistic skills)

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## Second stage

Justification defence can be rebutted by plaintiff



Thank you for  
your attention!

Budapest, Liberty Bridge,  
500 m from my office.