Proving discrimination

The shift of the burden of proof and access to evidence

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Statistics:

• 20% differential in employment rates between disabled and non-disabled across the EU (21% in Germany, 28% in UK, 30% in Poland)
• Women are paid on average 16.3% less than men
• ~27% of Europeans with a disability/sexual or ethnic minority report experience of discrimination
• 54% of Europeans believe that being over 55 is a disadvantage when applying for a job
What are the evidential hurdles in discrimination cases?

- Perpetrators don’t admit to discrimination, or may be unaware of it
- Information that may prove discrimination is often in the hands of the wrongdoer
- Statistics may be required
- A claimant may need to respond to a justification defence

How has the EU responded to these challenges?
• Stage 1: if a claimant proves a *prima facie* case of discrimination …

• Stage 2: … respondent must prove that there has been no discrimination

• Case law – *Danfoss (C-109/88), Enderby (C-127/92)*

• Directives – 2000/43, 2000/78, 2006/54

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**Stage 1**

• Comparability: *Brunhoffer (C-381/99)*

• Lack of transparency: *Danfoss (C-109/88)*

• Occupational segregation: *Enderby (C-127/92)*

• Historic discrimination: *Firma Feryn NV (C-57/07)*

• Conduct of connected / influential parties: *ACCEPT (C-81/12)*

• Prejudicial assertions: *CHEZ (C-83/14)*
Stage 2

- Proving the real reason (not disproving a discriminatory reason)
- *Firma Feryn*: showing that comments do not reflect the reality
- *ACCEPT*: denouncing discrimination and proving good recruitment practice

- *Kelly (C-104/10)*
- *Meister (C-415/10)*
- Respect for national rules
- Respect for privacy
- But not at the expense of effectiveness
• The shifting burden of proof can be a powerful tool in advancing equality

• It remains unclear how much the CJEU will be influenced by national rules relating to disclosure

• There is the potential for new, creative and interesting future legal developments