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# Proving discrimination

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ANTI-DISCRIMINATION  
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## What does BoP mean?

From

**Onus probandi incumbit ei qui dicit, non ei qui negat**

*How did 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**.

3. Paragraph 1 shall not apply to criminal procedures.

4. Paragraphs 1, 2 and 3 shall also apply to any legal proceedings commenced in accordance with Article 9(2) [resp. Article 7(2) in directive 2000/43/EC].

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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## Why is BoP relevant in cases of discrimination?

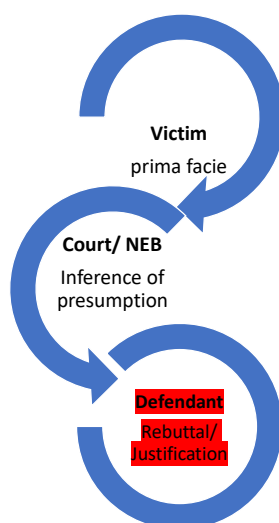
- Prior to Directives, judge-made law (Danfoss, Case 109/89 and Enderby, C-127/92) → principle of *effective protection*

*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.*

- Article 8 of Directive 2000/43/EC and Article 10 of Directive 2000/78/EC, and Article 19(1) of Recast Gender Directive 2006/54

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## What does SHIFT/ SHARE entail?



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## BoP for direct discrimination cases

| Who does What?   | Plaintiff   | Respondent                                      |
|--|---|---|
| Differentiation – less favourable treatment (comparable situation) | V (prima facie)                                     | ← Defense against different treatment claim     |
| Protected ground   | V (prima facie)                                     | ← Defense against existence of protected ground |
| Right affected   | V (prima facie)                                     | ← No right entitlement or legitimate exceptions |
|  | <b>Judge or NEB can make the inference/ presume</b> |   |
| Justification  | → Sur-rebuttal regarding validity of justification  | V as obligation                                 |
|  |   | <b>Presumption confirmed → finding</b>          |

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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

- NOT COVERED BY 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

- Documents held by defendant - Kelly, C-104/10 and Meister, C 415/10
- Statements – speech act – 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?
  
- 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.**

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## Key take-outs:

- It entails pro-active roles for Victim-Respondent-Court/NEB
- Applies to court and NEB (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 Ps (Hu or Bg)
- 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

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