

**Burden of proof in Council Directives 2000/43/EC and 2000/78/EC  
on equal treatment**

(working paper)

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A. Introduction

The provisions on burden of proof contained in Council Directives 2000/43/EC and 2000/78/EC are the outcome of developments in both case law and law-making in an endeavour to make equal treatment and protection against discrimination legal realities in the entire field for which the European Union is competent and in community law itself.

In a broader context, the rules of evidence must also be seen in connection with the protection of fundamental rights through comparative jurisprudence in matters of constitutional law and the case law of the European Court of Human Rights.

However, for evident reasons of both time and practicality, this contribution has been deliberately limited to the scope of the above-mentioned directives.

B. The directives' provisions

The directives 2000/43/EC and 2000/78/EC both lay down rules governing burden of proof for the particular scope they cover, i.e. as regards applying the principle of equal treatment in relation to race and ethnic origin as well as to employment and occupation.

As is well known, the requirements laid down in these two directives are complemented by the provisions of Council Directive 97/80/EC, which deals specifically with the question of the burden of proof in cases of discrimination based on sex. On this subject, there are five further directives dealing with the field of employment and occupation, of which one merits a particular mention, namely Council Directive 76/207/ECC, as amended by Directive 2002/73/EC of the European Parliament and the Council. It is also worth mentioning the proposal for a new directive, which is currently on the table, with the intention of collating the

six currently applicable directives on the equal treatment of men and women in the field of employment and occupation.

Article 8 of directive 2000/43/EC and Article 10 of directive 2000/78/EC are identically worded:

- “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.”

Essentially the same wording had already been written into article 4 of Council Directive 97/80/EC:

- “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. This Directive shall not prevent Member States from introducing rules of evidence which are more favourable to plaintiffs.
- “3. 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.”

### C. Evidence of discrimination and justification of actions

Reading these provisions, I believe that there is one point to be made straightforwardly, namely that the frequently-used term, “reversal of the burden of proof”, does not accurately reflect the substance. The procedure defined here is very much more nuanced than that term would suggest. What is really involved is a sharing of the burden of proof and a shift to respondents of those elements that concern them:

- I do not believe that it is correct to claim that there is a total move away from the general procedural principle according to which it is for the plaintiff to furnish evidence, since, here too, the plaintiff must put forward a case from which it may be inferred that there has not been equal treatment. That, by the way, is also the view of the European Court of Justice.

- In accordance with this principle, it is for the plaintiff to submit sufficient indications as to allow for the presumption that discrimination has occurred. These indications may be considered as elements of proof, as *prima-facie* evidence or as ostensible evidence of the existence of a difference of treatment. At all events, it does require the active submission of evidence from which it may be inferred that there has been a difference of treatment, which the plaintiff has either experienced directly or which has affected the plaintiff indirectly on account of its disadvantageous impact on a particular group of persons. So we are still on the terrain of the general principle according to which the burden of proof lies with the plaintiff to establish facts from which it may be inferred that there has been direct or indirect discrimination. (The actual wording of the articles of the directives under examination (43/2000/EC, 78/2000/EC and 97/80/EC) is “establish [...] facts from which it *may be presumed* that there has been direct or indirect discrimination.) What this means for the procedure is that there is a requirement for evidence to be submitted in support of the claimed facts before the national courts or other competent bodies, and these alone have the powers to decide on said facts.
- It is only once facts from which it may be inferred that there has been a difference of treatment have been established that it is for the respondent to present a plausible defence that there was sufficient justification for that difference, because it was based on grounds other than those for which discrimination is prohibited or on grounds that are permissible according to the terms of community or national law (or, if appropriate, the respondent may argue that the claimed difference of treatment never actually occurred at all).

There can be no doubt that this does result in a modification in the general rules of evidence, since, if this provision had not been included in the named directives, plaintiffs setting out to establish facts from which it might have been inferred that they had suffered as a result of an act of discrimination (a difference of treatment without an adequate justification) would be required to prove the lack of justification for that difference of treatment. This second element, however (proof of justification (or the lack thereof)), has now been transferred to the respondent.

We ought also to bear in mind that, at this point, the directives speak of a *presumption* of the existence of an act of discrimination, but this word has been chosen deliberately on account of the incomplete nature of the evidence. All the plaintiff has so far done is to put forward facts from which it may be inferred that there had been a difference of treatment. It is only if the respondent is now not able to furnish evidence of the legality and proportionality of the measure, that the presumption turns to evidence that an act of discrimination has indeed occurred.

This shift in a part of the burden of proof is accompanied by a corresponding change in the direction of proof. If this part of the burden of proof were to remain with the plaintiff, then this element of evidence would need to be negative in nature (i.e. showing a lack of justification for the difference of treatment). If, however, the onus is placed on the respondent, it becomes positive in nature (i.e. showing that such a justification does indeed exist). Let us not forget that the European Court of Justice has repeatedly ruled that the shift is not only justified in the very general sense of the principle of promoting the protection of fundamental rights, but that it specifically makes allowance for the fact that in numerous cases it would be arduous for the plaintiff to prove the absence of a justification, whereas the respondent, inso-

far as any justification existed, could always plausibly invoke it, since they would claim to have acted according to particular motivations. Whether or not such motivations would suffice to justify a difference of treatment is, of course, a totally different issue.

In this sense, the wording used in the directives (recital 21 of 2000/43/EC and recital 31 of 2000/78/EG) is not exactly helpful. To quote: “the burden of proof must shift back to the respondent when evidence of such discrimination is brought”. At all events, the interpretation ought to follow the lines presented, and it is my humble view that that is what the European Court of Justice has done.

Meanwhile, the plaintiff still has to prove that they belong to a particular group of persons. If it is a group, the membership of which is determined by characteristics of an anatomical nature, the submission of evidence ought not, generally speaking, to create any problems. If what is at stake, however, is adherence to a group with a particular ideological or religious leaning or a particular sexual orientation, then submitting evidence might well cause difficulties. Recital 31 of directive 2000/78/EC takes this matter up expressly: “However, it is not for the respondent to prove that the plaintiff adheres to a particular religion or belief, has a particular disability, is of a particular age or has a particular sexual orientation.”

#### D. Direct and indirect discrimination and types of evidence

The effects of sharing the burden of proof in the manner just described are different depending on whether the claimed discrimination is direct or indirect. In cases of direct discrimination, which according to the directives’ definition consist in one person being treated less favourably than another in a comparable situation, there are no really crucial problems as regards the burden of proof resting on the plaintiff; above all, the plaintiff must establish facts before a national court from which it may be inferred that there has been a difference of treatment.

More questions crop up in cases of indirect discrimination. Here we must make a distinction between, firstly, the problem of indirect discrimination as a result of the unequal, disadvantageous effect or consequence (“disparate impact”) on a group of persons of an apparently neutral measure and, secondly, the problem due to the immanently harmful effect of a measure on a protected group of persons.

For the first of these problems of indirect discrimination (i.e. with “disparate impacts”), it is possible, as I am sure you know, to field statistical evidence. The two directives under examination here do indeed acknowledge this possibility, even if only in their preambles (recital 15 of both 43/2000/EC and 78/2000/EC) and not in their actual articles. Statistical evidence must also be seen as admissible in connection with directive 97/80/EC, even if the matter is not mentioned, despite the hard-hitting formulation of its preamble. In such cases, the statistical evidence is precisely that element of evidence that it is for the plaintiff to bring and to present it credibly to show that a difference of treatment has occurred. To do that, plaintiffs need to prove that they have been treated differently from others in a comparable situation, and that this difference of treatment caused a greater disadvantage for members of their group than for those not belonging to it. In other words, plaintiffs need to prove two facts. The statistical evidence they use must be of a suitable nature for establishing facts from which it may be inferred that there has been a difference of treatment of one group of persons compared

with persons not belonging to that group, and the national court seized of the matter must find such evidence to be both credible and plausible.

The use of statistical evidence by the plaintiff does not change anything in the positive nature (which, by the way, is neither negative nor diabolical) of the burden of proof shifted to the respondent. It is not so much a matter of the respondent having to show credibly that no discrimination has occurred – despite the misleading wording of the directives, especially their preambles, which must still be appropriately interpreted. As in all the other cases, the respondent's burden of proof lies in demonstrating that the action that caused a disadvantage for the plaintiff as well as for a higher proportion of persons belonging to their protected group than to persons not belonging to it was justified in accordance with the yardsticks that the European Court of Justice has laid down in the matter (“necessary, appropriate and proportionate”).

Even in cases whose substance is that the indirect discrimination was due to an apparently neutral measure, which, however, turned out to have a disadvantageous effect for the protected group of persons, there is no appreciable change in the shifted burden of proof. Plaintiffs must show that they have suffered harm as a result of belonging to a particular group of persons, which was apparently not the intention of the measure concerned, and respondents must put forward a credible case for the necessity and justification of said measure.

#### E. Limited applicability in criminal procedures

As we have seen, each of the two directives has a burden-of-proof article with a paragraph 3 which states that the partial shift in the balance of proof provided for in its article 1 “shall not apply to criminal procedures”.

This provision is deeply rooted in the general principles of criminal law and the rights of defence. It goes without saying that criminal law permits the submission of circumstantial evidence, and presumptions are hence by no means excluded. If national law defines a particular breach of the principle of equal treatment against a certain group of persons as a criminal act, it is perfectly possible for a court of that country to ascertain that a criminal act has been committed if complete evidence has been submitted and if, applying the rule of reason, the court is able to conclude “beyond reasonable doubt” (to use a well-known American legal tenet) that an act subject to a criminal sanction has been committed.

However, this is outside of the scope of the directives. These do not state that establishing a limited number of indicative facts is to suffice for inferring that discrimination has occurred (even though, as I have already said, their wording seems to come dangerously close to laying down such a provision). On the other hand, they do not demand that the facts to be established from which it may be inferred that there has been discrimination have to be as persuasive as those they could lead to a guilty verdict in a criminal procedure. In the final analysis, the evidence submitted in such a case would already be so complete that each additional element would be superfluous, and there would be no point in shifting the elements of justification to the respondent. In such a case, the plaintiff would have already convincingly proven the existence of a deliberate or guilty discriminatory act.

Like the entire jurisdiction and constitutional tradition before them, the directives remain within a realm based on elements of evidence of discriminatory acts, admitting presumptions, which, of themselves, are inadequate for inferring that there has been discrimination, precisely because there might be grounds of justification – and providing dependable proof of this is then shifted to the respondent. Now in a criminal trial, the absence of grounds for justification would be one element of the facts of the case, which is why this provision is inapplicable to criminal procedures. If that were not so, it would be as if the intention were to impose an obligation on defendants to contribute actively to furnishing evidence that they had committed a punishable offence, which would contradict the presumption of innocence and the principle of due process of law.

In legal doctrine, the point has also been made that there might be a breach of the criminal-law principle whereby prosecution of an offence is mandatory in a situation in which there is uncertainty regarding the punishable offence. This could occur in cases in which the discriminatory treatment is due to a harmful effect on a protected group of persons arising out of an apparently neutral measure, especially if proving such an effect requires statistical evidence.

There is, however, an omission, namely for cases heard before administrative courts involving the imposition of sanctions.

#### F. Non-applicability to investigations by courts

There also appear to be clear reasons for excluding investigations by courts from the application of the changed burden of proof contained in the two 2000 directives (paragraph 5 of the corresponding article in each of them) as well as in directive 97/80/EC (article 4(3)). These are instances in which the facts of the case are investigated by “the court or competent body”. It is quite obvious that, in such cases, the investigation has an objective and neutral (unbiased) character, which makes an express determination of the sharing of the burden of proof unnecessary. In the context of individual countries’ procedural provisions, the parties to the case have the possibility anyway of submitting such evidence to the investigating authority as they consider to be propitious for their particular positions and of appraising it in their evidence as a whole, so that the provision of the directive concerning the sharing of the burden of proof really has neither meaning nor purpose here. Since, as emerges clearly from the directives, the purpose of this provision is to facilitate the submission of evidence of discriminatory acts that are hard to prove (especially acts of indirect discrimination), it will be obvious to everyone (apart from perpetrators of acts of discrimination) that this selfsame difficulty of establishing evidence, being the reason for the changed rules of evidence, is dispelled, if, in the final analysis, the gathering of evidence is carried out by an independent, impartial body.

#### 7. Implementation of the directives in Spain

The directives 2000/43/EC and 2000/78/EC have been transposed in Spain by means of an Act of Parliament, number 62/2003 of 30 December 2003, on fiscal, administrative and social measures. The question of the shift in the burden of proof, which is the central subject of this presentation, is dealt with in article 36 for civil and administrative procedures as well as for the sphere of access to employment, membership of, and involvement in, organisations of workers or employers, employment and working conditions, including promotion, vocational

training, advanced vocational training and retraining, access to self-employment, the exercise of a profession and membership of, and involvement in, any type of organisation whose members carry on a particular profession (Article 34.1). Its actual wording translates as follows:

“Article 36. In procedures before the civil and administrative jurisdictions in which the plaintiff’s evidence allows for the conclusion of the existence of proven indications of discrimination on grounds of race or ethnic origin, religion or belief, disability, age or sexual orientation in one of the areas falling within the scope of this Section, it shall be for the respondent to show an adequately reasoned, objective and appropriate justification for the measure taken as well as the proportionateness thereof.”

With this Act, a change was also made to the law governing the procedure of labour courts, in that its article 96 was reformulated to be identical with the above. That means that the change in the burden of proof within the meaning of the directives has now been settled for all the areas mentioned and is generally applicable for the whole scope of the jurisdiction of the labour courts in civil, administrative-dispute and labour matters.

Although measures to provide protection against discrimination have been implemented in the civil service and although there is a general reference in the Act’s preamble to the effect that the legal situation created by it is also applicable to the civil service, nowhere is it explicitly stated that the change in the burden of proof is to be applied here too. Its validity for the civil service is thus going to depend more on endeavours to obtain a corresponding interpretation rather than an explicit provision in national law. Such an interpretation ought to result from the general character of the law and the explicit mention of the civil service in its preamble as falling within its scope and also from the explicit reference to the administrative courts mentioned beforehand.

Another Act of Parliament, number 51/2003 of 2 December 2003, on equal opportunities, non-discrimination and universal access for persons with disabilities, which was adopted in the same year as the other law just mentioned, includes references to the two directives from the year 2000 as well as directive 2002/73/EC as bases for it. This law also makes provision for a change in the burden of proof, but it uses a somewhat different form of wording in an attempt to do justice to the particularities that may arise in connection with persons suffering disabilities:

#### “Article 20. Particular criteria for evidence of relevant facts

“1. In court cases in which the evidence submitted by the plaintiff allows for the conclusion of the existence of serious indications of direct or indirect discrimination on grounds of a disability, the judge or the court, having appreciated the aforementioned and having considered the evidence and the reduction in the burden of proof available to each of the parties involved in the case as well as the procedural principle of the equality of the parties, may require the respondent to provide an objective and appropriate justification for the measures adopted as well as the proportionateness thereof.

“2. The preceding paragraph shall not apply to criminal procedures nor to administrative procedures dealing with objections to decisions imposing sanctions.”