

## Shifting the burden of proof in equality cases

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### 1. Introduction

Non-discrimination legislation has been part and parcel of European Union since the introduction of gender equality laws in the 1970s.

As the European Court of Justice (ECJ) stated in relation to pay discrimination between men and women: combating discrimination is ‘part of the social objectives of the Community’.<sup>2</sup> The principle that non-discrimination is central to the values of the EU has been reinforced by the Lisbon Treaty: *The Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities. These values are common to the Member States in a society in which pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men prevail.*<sup>3</sup>

The Lisbon Treaty, which came into force on 1 December 2009, amended the Treaty on European Union (TEU) and introduced the Treaty on the Functioning of the European Union (TFEU). It created and consolidated specific provisions relating to equal treatment and non-discrimination. One of the new norms is Article 10 of the TFEU: *In defining and implementing the policies and activities referred to in this Part, the Union shall aim to combat discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation.* This article requires that the fight against discrimination should be mainstreamed into EU policy considerations, including employment strategy and external relations. The Lisbon Treaty consolidated the more specific non-discrimination norm in Article 19 TFEU: *Without prejudice to the other provisions of the Treaties and within the limits of the powers conferred by them upon the Union, the Council, acting unanimously in accordance with a special legislative procedure and after obtaining the consent of the European Parliament, may take appropriate action to combat discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation.*<sup>4</sup>

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<sup>2</sup> Case 43/75 *Defrenne II* [1976], ECR 455,

<sup>3</sup> The quoted text refers to the new Article 2 of the TEU.

<sup>4</sup> Former Article 13 Treaty on the European Communities (TEC).

In 2000, the EU introduced two non-discrimination Directives.<sup>5</sup> These were based on the previous version of Article 19 TFEU. One of the objectives of these Directives is to provide victims of discrimination with a set of tools to take legal action against discrimination on the grounds of race or ethnic origin, religion or belief, disability, sexual orientation and age. The Council of the European Union used the opportunity of the introduction of the two equality directives to introduce a shift of the burden of proof. The provisions were built on existing law and practice in the field of gender discrimination.

The motivation to develop a specific regime in the area of proof was the experience that it is often difficult to obtain information about the existence of discrimination.<sup>6</sup> Often, the relevant information to establish a sufficient amount of evidence, lies with the responding party, i.e. the employer or the provider of services.

In court procedures, the burden of proof generally lies with the person who submits the case, the claimant. The shift of the burden of proof provides that if the claimant establishes facts from which the presumption of discrimination arises, then the responding party needs to prove that discrimination did not occur.

In this contribution, I will discuss the legal issues relating to the shift of the burden of proof.

## **2. Development of the shift of the burden of proof**

Combating discrimination through court cases can be an effective means of redress. Court decisions can have a lasting impact even beyond the situation of the individual claimant. In practice, however, there are many challenges and difficulties in successfully bringing legal cases against discrimination. As stated, an important stumbling block is the fact that discrimination is difficult to prove. Rarely will an individual admit to having discriminated. In many cases, discrimination is hidden or indirect. In most jurisdictions, the law requires the person who makes a claim in court, to prove all the facts on which he bases his claim.

For a person who is confronted with discrimination, it is a difficult and sometimes impossible task to bring forward such evidence on which a *prima facie* or straightforward case of discrimination can be based. A job applicant who is rejected may have the impression that he did not get the job because of his ethnic origin, but it will be difficult to hand over to the court the company's internal note in which the selector refers to his ethnic origin as the reason to reject him. It is this reason that, building on developments in the field of sex discrimination, the Racial Equality Directive as well as the Framework Employment Directive introduced specific provisions with regards to easing the burden to establish proof in cases of discrimination.

### ***2.1 Developments in proving sex discrimination***

The provision in the Directives cannot be discussed in isolation from the developments in the legal approach of sex discrimination. Initially, the European Community saw discrimination

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<sup>5</sup> Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin and Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation, available at: <http://europa.eu.int/eur-lex> .

<sup>6</sup> Jacobsen, Björn Dilou and E.O. Rosenberg Khawaja, 'Legal assistance to individuals. Powers and procedures of effective and strategic individual enforcement', in: *Strategic enforcement. Powers and competences of equality bodies*, Brussels: Equinet Secretariat/MPG, 2006 p. 20.

between men and women in the field of pay both as an economic or competitive problem as well as a social problem. In the TFEU, Article 157<sup>7</sup> addresses the issue of equal pay for work of equal value and equal treatment in a broader sense in the field of gender. The motivation for the inclusion of this Article was both social and economic.

A problem of competition arose where Member States that had introduced equal pay schemes for men and women were disadvantaged compared to Member States that allowed differences in pay based on sex, and consequently would be able to produce more cheaply. Discrimination against women was also defined as a social problem. Discrimination in payment was seen as a breach of one of the fundamental human rights as laid down in international and European instruments, such as the European Convention on Human Rights and the European Social Charter. From the 1970s onwards, the European Court of Justice has dealt with cases concerning unequal pay. The Court stated repeatedly that in EC law and policies, the social dimension, amongst which equal treatment, is equally, if not more important than the economic dimension.<sup>8</sup>

In 1975, the European Commission introduced Directive 75/117, which was aimed at harmonizing national legislation with regard to the principle of equal pay for work of equal value. The intention was to overcome the problem of applying the equal-pay principle when the work performed by two employees is different, but is alleged to be of equal value. In practice, however, claimants faced the problem that employers did not always maintain a clear and transparent system of payment. Providing proof of unequal pay before a court was a daunting task and the lack of proof often made it impossible to substantiate a difference in payment.

#### *Case law of the European Court of Justice*

In the Danfoss case, the ECJ acknowledged that problem for the first time. It concluded that where a company applies a system of pay which is totally lacking in transparency and statistical evidence reveals a difference in pay between male and female workers, the burden of proof shifts to the employer to account for the pay difference by factors unrelated to sex.<sup>9</sup>

The view emerged from the ECJ that if the normal division of proof is applied in cases where the employer does not have an easily accessible and understandable pay system, it would be excessively difficult or impossible to show that pay discrimination had taken place.<sup>10</sup> In later cases the ECJ ruled more specifically on the use of statistical evidence by female employees to indicate that a pay gap existed with their male colleagues. The ECJ found that the use of statistics, indicating that men earned more than women in work of the same value, could lead to 'apparent discrimination'. As a consequence, the burden to prove that the difference in pay was not based on discrimination, needed to shift to the employer. These developments were reinforced in the Enderby case. The ECJ ruled that: 'it is normally for the person alleging facts in support of a claim to adduce proof of such facts... However, it is clear from the case-law of the Court that the onus may shift when that is necessary to avoid depriving workers who appear to be the victims of discrimination of any effective means of enforcing the principle of equal pay. Accordingly, when a measure distinguishing between employees on the basis of their hours of

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<sup>7</sup> Former Article 141 TEC.

<sup>8</sup> Case 80/70, *Defrenne I* [1971] ECR 445 and C-50/96 *Deutsche Telekom v. Schröder* [2000] ECR I-743, para 56.

<sup>9</sup> Case 109/88 *Danfoss* [1989] ECR 3199.

<sup>10</sup> Craig, Paul and G. De Búrca, *EU Law. Text, cases, and materials. Third Edition*. Oxford: Oxford University Press, 2003, p. 851.

work has in practice an adverse impact on substantially more members of one or other sex, that measure must be regarded as contrary to the objective pursued by Article 119 [currently Article 141]<sup>11</sup> of the Treaty. (...) 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...'<sup>12</sup>

These developments with regard to the use of statistical data were reinforced in a ruling of 1999 regarding indirect discrimination. If a national court finds that statistical data show there is apparent indirect discrimination, the employer should prove that the difference is justified by factors unrelated to sex. The ECJ declared that it is for the national court to judge the reliability of the statistics used, for example in terms of the number of individuals covered, or whether the records are purely fortuitous or short-term phenomena and whether in general, they appear to be significant.<sup>13</sup>

### *Burden of Proof Directive*

Despite the existence of this case law, in many Member States it continued to be difficult for women to win cases of unequal pay before their national courts. Not all judges were informed about the ECJ jurisprudence or were willing to apply the guidelines set forth in the European Court's decisions. Therefore, after long deliberations, in 1997 the European Council adopted Directive 97/80/EC on the burden of proof in cases of discrimination based on sex.<sup>14</sup> The aim of the Directive was to ensure that measures to implement the principle of equal treatment are made more effective, in order to enable all persons who consider themselves wronged because the principle of equal treatment has not been applied to them to have their rights asserted by judicial process.

With the implementation in 2001, Member States were compelled to adapt their laws and from then on, national courts were required to shift the burden of proof in gender equality cases.

## ***2.2 Article 13 and the non-discrimination Directives***

In a further development, the principle of equal treatment was extended to other grounds of discrimination: racial or ethnic origin, religion or belief, disability, age and sexual orientation. The Treaty of Amsterdam included the general non-discrimination Article 13 in the EC Treaty. Article 13 acted as the legal base for the two equal treatment Directives, 2000/43/EC (Racial Equality Directive) and 2000/78/EC (Framework Employment Directive). With the coming into force of the Lisbon Treaty, Article 13 was slightly amended and replaced by Article 19 of the TFEU.<sup>15</sup>

Although the Treaty of Amsterdam increased the number of protected grounds beyond sex, the level of protection of the various grounds is different. This became apparent with the swiftly developed proposals for the two non-discrimination Directives in 2000. The Racial Equality

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<sup>11</sup> Under the Lisbon Treaty, Article 141 TEC is replaced by Article 157 TFEU.

<sup>12</sup> Case C-127/92 *Enderby v. Frenchay Health Authority* [1993] ECR I-5535, 5573.

<sup>13</sup> Case C-167/97 *R. v. Secretary of State for Employment, ex parte Seymour Smith and Perez* [1999] ECR I-623.

<sup>14</sup> Council Directive 97/80/EC of 15 December 1997 on the burden of proof in cases of discrimination based on sex, OJ L 014 , 20/01/1998 p. 0006 – 0008.

<sup>15</sup> The main difference between Article 19 TFEU and the former Article 13 TEC is a procedural aspect and the changed role of the European Parliament.

Directive protects persons irrespective of racial or ethnic origin in a wide scope of social activities: employment, self employment, social security, health care, education, housing and the supply of goods and services. The Framework Employment Directive covers religion or belief, disability, age and sexual orientation, but only in the area of employment.

### ***2.3 Burden of proof***

Both directives have included in the chapters on remedies and enforcement the provision on shifting the burden of proof. Article 8 of the Racial Equality Directive and Article 10 of the Framework Employment Directive use the same terminology as the Burden of Proof Directive in sex discrimination, mentioned above:

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 proceedings brought in accordance with Article 7(2).
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.

Paragraph 1 of these Articles outlines the key elements regarding the application of the shift of the burden of proof, including the need for it to be applied nationally, if the claimant has established facts from which discrimination can be presumed. The shift applies in cases of both direct and indirect discrimination.

#### *National jurisdictions*

The provision must be implemented in accordance with the Member State's national judicial system. This implies that the circumstances, under which the burden of proof is shifted, may vary according to the legal norms in the Member States and therefore the way in which the provision on shifting the burden of proof is applied be different from country to country. In the Netherlands, for example, the existing Equal Treatment Act was amended to include a section on the burden of proof.<sup>16</sup> In its case law, the Dutch Equal Treatment Commission, the specialised body, has applied the mitigated burden of proof on a regular basis.

In the UK, after the implementation of the shift of the burden of proof,<sup>17</sup> the Court of Appeal issued guidelines for employment tribunals on the application of the shift.<sup>18</sup> These useful

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<sup>16</sup> Article 10 (1) Equal Treatment Act: 'If a person who considers that he is a victim of discrimination within the meaning of this Act adduces before a court facts from which it may be presumed that such discrimination has taken place, the responding party is required to prove that the action in question was not in breach of this Act.' In the equal treatment laws regarding disability and age, similar sections have been included.

<sup>17</sup> E.g. section 63a of the Sex Discrimination Act 1975. In the relevant UK non-discrimination laws, similar provisions were included.

<sup>18</sup> Court of Appeal *Igen v. Wong* [2005] EWCA Civ 142, 18.02.2005 (<http://www.bailii.org/ew/cases/EWCA/Civ/2005/142.html>) .

guidelines explain which elements the tribunal needs to consider in order to decide if the respondent needs to prove that he did not commit, or as the case may be, is not to be treated as having committed, the specific discriminatory act. According to the guidelines, it is initially for the claimant who complains of discrimination to prove on the balance of probabilities facts from which the tribunal could conclude, in the absence of an adequate explanation, that the respondent has committed an act of discrimination against the claimant which is unlawful.

## ***2.4 Claimant's requirements***

The claimant is required to 'establish facts' from which a presumption of discrimination arises. The establishment of facts needs to be addressed both in cases of direct discrimination as well as in indirect discrimination.<sup>19</sup> In order to prevent an unjustified or flimsy accusation of discrimination by a person, the claimant must substantiate or prove that the facts he presents are actual incidents or measures. In various Member States, the text of the transposed provisions on the burden of proof mentions that facts need to be *proven* before the burden of proof of discrimination shifts to the responding party.

The application of the shift of the burden of proof depends on the type of discrimination. As explained below, in cases of direct discrimination, the process of dividing the burden is different from case of indirect discrimination.

### *Direct discrimination*

Where direct discrimination is concerned, the claimant needs to establish that he has been treated less favourably than another is, has been or would be treated in a comparable situation. This requires a concrete comparator or, in a situation where a comparator is not available, a possible comparator. In the latter situation, the claimant needs to make it plausible that a comparator is not necessary. For example when a patient makes a disparaging comment towards a nurse of ethnic minority background, it would be enough for the nurse to prove that the patient has made racist remarks, without having to establish that the remarks were not made towards fellow nurses of native origin.

The facts the claimant puts forward need to have the effect that the court or competent body will start suspecting that the behaviour under discussion *could be* discrimination in the sense of the law. An example is the claim of a Dutch-Turkish worker, who requested an opinion of the Equal Treatment Commission (CGB). He claimed discrimination on grounds of race on the work floor by his supervisor. According to the petitioner, on several occasions the supervisor made insulting and discriminatory remarks about his origin and about his Islamic faith. Also, he claimed that racist signs were written on his locker. In the procedure before the CGB, the supervisor denied the allegations and an investigation by the employer into the racist signs did not reveal the existence of such signs. The CGB considered that the facts of the case were explained in opposing ways by the petitioner and the employer. The petitioner was unable to substantiate his views on the facts, for example with witness statements or otherwise. According to the CGB, he

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<sup>19</sup> See in more detail: M. Miné, 'Le régime probatoire de la discrimination'. Paper for the European Academy of Law (ERA), Trier: ERA, 2004.

therefore failed to establish a presumption of discrimination. This part of his claim was dismissed.<sup>20</sup>

### *Indirect discrimination*

Cases of indirect discrimination concern apparently neutral criteria, practices or measures that would put persons belonging to racial or ethnic minorities at a particular disadvantage as compared to others. The facts that the claimant needs to establish will have regard to the effect of the criterion, measure or practice.

Proving indirect discrimination may require the claimant to produce significant quantitative data or statistics, although this is not an obligation. According to consideration 15 in the Preamble of the Racial Equality Directive: 'such (national) rules may provide in particular for indirect discrimination to be established by any means including on the basis of statistical evidence'. The definition of indirect discrimination in the Racial Equality Directive is based on the assumption that the effect of a distinction is liable to be disadvantageous, intrinsically or by its very nature, to persons belonging to a category of persons protected from discrimination. The disadvantage does not have to be determined, statistically, to have a disparate impact on the group concerned; common knowledge suffices to create the presumption of discrimination.<sup>21</sup> An example is the language requirement for job seekers: if a company requires applicants to speak the national language fluently, it is apparent that persons with a migrant background will be disadvantaged compared to native speakers.

When statistics are used, a slightly different approach is needed. Statistical data may lead to the conclusion that the measure, practice or criterion has a disparate impact on one group in comparison with another group. This is the approach taken in the burden of proof Directive in sex cases (97/80) as well as the ECJ case law in sex discrimination cases.<sup>22</sup> The EC Directive requires evidence that the measure, practice or criterion affects a significantly larger proportion of members of one sex, unless the measure is appropriate and necessary and can be objectively justified. An example would be the refusal by a bank to give mortgages for houses in certain, often poor parts of a city, a practice called *redlining*. If the claimant, who is refused a loan, can supply statistical data from which it appears that the majority population in that area is of ethnic minority background, the court may shift the burden of proof. In these cases, claimants need to give evidence of two facts. The statistical data they provide must be suitable to establish the facts from which the presumption of discrimination arises, and they need to convince the court or competent body that such evidence is credible and plausible.

An example is the case of a Dutch-Surinamese woman who moved to a new house in the south-eastern part of Amsterdam. When she found out that her pay-tv box did not work at the new address, she called the pay-tv company to send a mechanic. The company however refused to send mechanics to that particular neighbourhood. According to them, their staff and their vehicles risked being mugged or stolen. The woman supplied statistical evidence, in the shape of

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<sup>20</sup> Equal Treatment Commission, opinion no. 2010-7, 15.01.2010. In this case, the CGB concluded subsequently that the employer had failed to properly investigate the worker's initial complaint and came to the opinion that that led to a violation of the law.

<sup>21</sup> De Schutter, Olivier, 'Methods of proof in the context of combating discrimination', in: Cormack, J. (Ed.) *Proving discrimination. The dynamic implementation of EU-anti-discrimination law: The role of specialised bodies*. Brussels: Migration Policy Group, 2003, p. 24.

<sup>22</sup> Specifically: Case C-167/97 *R. v. Secretary of State for Employment, ex parte Seymour Smith and Perez* [1999] ECR I-623.

municipal population data, to the CGB that the majority population of the area was of ethnic minority origin. That, and the fact that the company related the area with criminal activity, was enough for the CGB to assume indirect discrimination.<sup>23</sup>

Other ways to elicit the relevant information from an employer should he refuse to provide it on a voluntary basis, are a questionnaire or written answers from the respondent. Once the statistics are to hand, the following steps can be taken:

- calculate the proportions of different groups (e.g. ethnic minority, disabled, men/women) among the work force;
- look at the figures over several years to see if a trend can be identified;
- put the proportions to the employer for his agreement and invite him to concede that there is disparate impact;
- where the level of significance is not immediately obvious and disparate impact is in dispute, it may help to obtain expert evidence from a statistician.

An additional problem is the use of sensitive personal data. Data protection laws at both the European and national levels are strict and sometimes forbid the use of data with regards to information revealing racial or ethnic origin, political opinions, religious or philosophical beliefs, trade-union membership and the processing of data concerning health or sex life.<sup>24</sup> There are a number of exceptions mentioned in the Data Protection Directive. These exceptions refer to a) the explicit consent given by the person to use the data, b) the processing by a non-profit organisation, trade union or similar on the condition that it concerns data of the members of the organisation and c) data which are manifestly made public by the data subject or d) the necessity of processing the data for the establishment, exercise or defence of legal claims.

Some countries, such as Hungary, Spain and Germany, have explicitly forbidden the collection and processing of personal data based on the racial or ethnic origin of persons.<sup>25</sup> In those Member States it will therefore often be impractical to collect the required data to establish a prima facie case of indirect discrimination. Other Member States, including The Netherlands, Denmark, France and the UK, allow the collection and the use of ethnic data with regard to immigrant minorities. Establishing statistics in individual cases may be easier in those countries.

## ***2.5 Requirements of the respondent***

If the presumption of discrimination is accepted by the court or other competent authority, it is for the respondent to prove that there has been no breach of the principle of equal treatment. The proof the respondent has to put forward in order to exonerate himself, amounts to bringing forward facts that explain and justify the measure, practice or incident. Again, the question of delivering the proof of non-discrimination is different in cases of direct and of indirect discrimination.

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<sup>23</sup> Equal Treatment Commission, opinion no. 2004-15, 01.03.2004.

<sup>24</sup> Article 8 Directive 95/46/EC on the protection of individuals with regard to the processing of personal data. OJ L 281, 23.11.1995, p. 31.

<sup>25</sup> However, it is noted that despite the official resistance, both local governments and private institutions in these countries do collect ethnic data. See: Goldstone, James A., 'Ethnic data as a tool in the fight against discrimination', in: Simo Mannila (ed.) *Data to promote equality. Proceedings of the European Conference*, Helsinki: Finnish Ministry of Labour, 2005, p. 126-128.

### *Direct discrimination*

In principle, direct discrimination cannot be justified, as the Directive only allows for an objective justification in cases of indirect discrimination. The respondent must prove that there was no case of unequal treatment, such as showing that the situation of the person who is presumed to have been discriminated is not equal to that of a comparator. The ECJ explained in the Feryn case, in which an employer publicly stated that he would not hire personnel of ethnic minority background, that the employer needs to repel the allegation by ‘showing that the undertaking’s actual recruitment practice does not correspond to those statements’.<sup>26</sup> In cases of pay discrimination, the employer may for example argue that the work was not of the same value as that of a comparator.

It is for the national court to verify that the facts alleged are established and to assess the sufficiency of the evidence submitted in support of the employer’s contentions that it has not breached the principle of equal treatment.

### *Indirect discrimination*

In cases of indirect discrimination, the respondent may deliver proof that the statistics that were used to create the presumption of discrimination could be interpreted otherwise. In addition to factual counter-evidence, the respondent can bring forward an objective justification for the measure, practice or incident under scrutiny.

The criteria for objective justification of indirect discrimination were developed in the ECJ case of Bilka-Kaufhaus and others.<sup>27</sup> The requirements entail that the measure, practice or incident can be objectively justified on grounds other than the relevant discrimination ground, that the measure corresponds to a real need on the part of the employer, is appropriate with a view to meeting that need, and is necessary to meet that need.

## **2.6 Other provisions**

Paragraphs 2 to 5 of Article 8 of the Racial Equality Directive and of Article 10 of the Framework Directive provide more details on the shift of the burden of proof. Paragraph 2 allows Member States to introduce rules of evidence that are more favourable to claimants and paragraph 3 excludes criminal procedures from the shift of the burden. In criminal cases it will be the prosecutor who needs to produce the evidence of a criminal act. This principle, based on the rule of law as well as the principle of the presumption of innocence, prevents the courts from shifting the burden of proof to the defendant.<sup>28</sup>

Paragraph 4 says that the rules with regard to the burden of proof also apply to cases where an association or legal entity engages in a procedure on behalf of a victim of discrimination.

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<sup>26</sup> Case C-54/07 *Centrum voor gelijkheid van kansen en racismebestrijding v. Firma Feryn NV* [2008].

<sup>27</sup> Case 170/84 *Bilka-Kaufhaus* [1986] ECR 1697 and consequently developed in later case law, such as in Case C-381/99 *Susanna Brunnhofer v. Bank der österreichischen Postsparkasse AG* [2001] ECR I-04961.

<sup>28</sup> It must be noted, however, that in breaches of international human rights law, the burden of proof may be shifted to a government. In the case of *Nachova v. Bulgaria*, the Grand Chamber of the European Court of Human Rights stated that: ‘in certain circumstances... the burden of proof may be regarded as resting on the authorities to provide a satisfactory and convincing explanation of, in particular, the causes of the detained person’s death.’ ECHR, 6 July 2005, 43577/98; 43579/98 [2005] ECHR 465.

Paragraph 5 allows Member States to make an exception for procedures in which it is for the court or competent body to investigate the facts of a case. If such a body carries out the investigation, it may be presumed to be neutral and objective; if these courts have powers to request evidence, including statistics, it seems obvious that the need to put the burden of proof on the respondent does not exist.

### **3. Conclusion**

European case law and legislation have introduced procedural tools that create a more even balance between a person who feels discriminated against and an employer or service provider. The difficulty of proving that discrimination has taken place in a certain case is alleviated by the introduction of the shift of the burden of proof in several non-discrimination Directives. It was deemed reasonable that the party who has access to the largest body of information, such as an employer, bears a more stringent responsibility in refuting a presumption of discrimination than the party without full access to information.

However, both the case law of the European Court of Justice as well as a growing body of case law in Member States shows that a mere statement of facts by a claimant is insufficient to shift the burden of proof. The claimant is required to bring forward and prove on the balance of probabilities, facts and circumstances to substantiate a discrimination claim. Only then, the respondent is required to prove that he did not commit the specific discriminatory act.