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Applying EU Anti-Discrimination Law:

The Burden of Proof  
in discrimination cases

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## Introduction

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## Legislative history

The shifted burden of proof is about access to justice in discrimination cases

- ❑ Based on the principle of effectiveness, see 2000/78/EC recital 31 and 32, and 2000/43/EC recital 21 and 22
- ❑ Concept is derived from the jurisprudence of the CJEU on gender
- ❑ Based on the practical fact that it is normally impossible for the claimant to prove the actual factual basis or criteria applied in reaching the contested decision in discrimination cases

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## The shifting of the burden of proof

- ❑ Normally: the task of proving the facts upon which a claim is based rests upon the claimant. The defendant does not need to prove anything
- ❑ C-109/88 Danfoss and C-127/92 Enderby: developing a shifting of the burden of proof from the claimant to the defendant (employer) once the complainant established the facts that there was a disproportionate impact on one sex. The employer must prove that the reason was unrelated to sex.

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## C-109/88 Danfoss

- ❑ Female workers earned on average 7% less than male co-workers
- ❑ ECJ: if the system of pay 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.

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## C-127/92 Enderby

- ❑ ..if the pay of speech therapists is significantly lower than that of pharmacists and if the former are exclusively women while the latter are predominantly men, there is a *prima facie* case of sex discrimination, at least where the two jobs in question are of equal value and the statistics describing that situation are valid. (para 16)
- ❑ "Where there is a *prima facie* case of discrimination, it is for the employer to show that there are objective and non-discriminatory reasons for the difference in pay" (para 18)

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## Community legislation - Gender Equality

- ❑ Council Directive 97/80/EC on the burden of proof: intended to make the enforcement of the principle of equal treatment more effective. Covered not only equal pay cases, but any case of discrimination. Does not cover criminal cases.

Art 1:

“The aim of this Directive shall be to ensure that the measures taken by the Member States 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 after possible recourse to other competent bodies”

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## Community legislation - Gender Equality

- ❑ Council Directive 97/80/EC on the burden of proof:

Art 4(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”.

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## Community legislation: Anti-discrimination

- ❑ Directive 2006/54/EC of 5 July 2006 on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation (the Recast Directive) article 19(1)
  
- ❑ Directive 2000/43/EC article 8
  
- ❑ Directive 2000/78/EC article 10
  
- identically worded

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## Note: not inquisitorial processes

- ❑ The shifting of the burden of proof need not apply to proceedings in which it is for the court or competent body to investigate the facts to the case itself, that is, to proceedings that are inquisitorial rather than adversarial
  
- ❑ Directive 2000/43 art 8(5)
- ❑ Directive 2000/78 art 10(5)

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## Test for shifting the burden of proof

1. The complainant must prove the primary facts to establish a *prima facie* case.
2. The court must evaluate the fact and be satisfied that they are of sufficient significance to raise a presumption of discrimination.
3. If the complainant succeeds at 1 and 2, the burden of proof shifts to the respondent.
4. The respondent must provide an adequate explanation to discharge the burden of proving that a prohibited ground was not any part of the reason(s) for the treatment in question.
5. If the respondent fails to discharge the burden of proof, the court must make a finding of unlawful discrimination.

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## The "two-stage test":

- 1) The claimant must show "facts from which it may be presumed that there has been direct or indirect discrimination"
- 2) If no 1 is fulfilled, then the respondent must prove on a balance of probabilities and despite the *prima facie* case made out by the claimant, that the reason for the treatment complained of is NOT caused by any discrimination whatsoever.

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## The first stage: What kind of facts?

- The burden of proof does not shift simply on proof that there has been a difference in treatment and a difference in race (or age or disability etc).
- There must be additional facts not *proving* that discrimination has occurred, but supporting the likeliness of a direct or indirect discrimination occurring – the *probability*
- A slightly higher probability (50,1%) is sufficient to shift the burden of proof regarding
  1. the less favorable treatment of the claimant
  2. the reason why the claimant is less favorably treated (on the grounds of being part of a protected group)

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## Prima facie evidence of discrimination

- Did the alleged treatment occur?
- If so, when, by whom? Who was affected?
- Is there an actual or hypothetical comparator who was/ could have been treated differently?
- Were proper procedures followed?
- Is there evidence of prejudice, segregation or past discrimination?
- Was the treatment on the alleged grounds?
  - The court needs to consider all the evidence relevant to the complaint of discrimination, including evidence adduced by the respondent disputing the claimant's evidence.

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## Establishing facts

- ❑ Not always easy because a prima facie case must be built on whatever resources are available to the worker (is a worker entitled to request information from the employer fex on the qualifications of other candidates?).
- ❑ In many countries making voice recordings or taking pictures/ filming is not allowed, even a punishable offence
- ❑ Impertinent comments are difficult to prove. An oral statement is not accepted as evidence if not witnessed or admitted to.
  - ❑ (Are you pregnant? Given your religion, will you be able to perform this task?)

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## Establishing facts

- ❑ The evidence accepted by national courts are key to the prospects of the claimants case
- ❑ CJEU Case C-104/10 Kelly:
  - ❑ "Member states may not apply rules which are liable to jeopardise the achievement of the objectives pursued by a directive and therefore deprive it of its effectiveness"

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## Primary facts include

- The facts to the complaint being made: What happened, who was where, when, why and how..
- Background evidence: how many women/ minorities/ disabled does this company employ, how many of these has got a promotion etc?
- Were the claimant and the successful candidate equally well qualified and had similar experience?
- What is the reason given for the non-selection of the claimant?
- Relevant statistical evidence and rules: Infringements of company agreements/ voluntary commitments/ equal opportunities policy etc
  - From these primary facts, a court may draw inferences

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## Case C-54/07 *Firma Feryn*

The facts: an employer had in 2005 publicly stated a policy of not employing certain ethnic minorities.

- Was this policy capable of being a fact which would place the burden upon the employer to disprove the discriminatory nature of its recruitment policy at a later time?
- How strict must the national court be in assessing evidence in rebuttal of the presumption?

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## Case C-54/07 Firma Feryn - para 29-34

- ❑ The statement “may constitute facts of such a nature as to give rise to a presumption of a (still existing) discriminatory recruitment policy”.
- ❑ It is for the employer to “adduce evidence that it has not breached the principle of equal treatment”.
- ❑ The national court must verify “that the facts alleged against the employer are established and to assess the sufficiency of the evidence which the employer adduces in support of its contentions that it has not breached the principle of equal treatment”.

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## The second stage – the respondent

- ❑ The burden of proof shifts to the respondent (employer) once a *prima facie* case is established, to prove no breach of the principle of equal treatment.
- ❑ The court must uphold the complaint unless the respondent provides a cogent explanation which is sufficient to prove, on a balance of probabilities, that there has been no discrimination whatsoever.
- ❑ The court may go directly to the “second stage” focusing on the respondent’s reason for the treatment.

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## The second stage – the respondent

- The weight of the burden of proof imposed at the second stage will depend on the strength of the prima facie at the first stage
- The respondent must prove that there is a reason for the decision which is not discriminatory, and that the non-discriminatory reason is the only reason for the decision.
- The employer must either provide an explanation that in no sense at all is connected to the protected status of the employee, or provide an explanation in which it is accepted that what occurred is related to the protected status of the employee, but that the exceptions to direct/ indirect discrimination are invoked

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## What evidence may be considered at each stage?

- Situation testing? Depending on national legislation if admitted as evidence
- Statistics – increasingly used, such as the ECHR case D.H and other vs Czech Republic of 13. November 2007 (app 57325/00 – Grand Chamber – % Roma pupils in special schools

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## Indirect discrimination - justification

- If the claimant establishes a prima facie case that a provision, criterion or practice of the respondent puts/ would put old/disabled etc at a particular disadvantage compared with others without that particular characteristic
- If the respondent is not able to provide an adequate explanation to rebut the claimant's facts and to prove that any disadvantage is unrelated to the protected ground, the court must make a finding of indirect discrimination
- UNLESS* the respondent can justify that the provision, criterion or practice as appropriate and necessary means of achieving a legitimate aim – and thus not discriminatory...

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## The importance of inferences : presuming that discrimination might have happened

- Trying to establish a causative link between the primary facts/ treatment and the alleged discrimination
- An inference is a link between the discriminatory ground and a fact in the case; the process of inference drawing is a consideration of what conclusions might be drawn from evidence not specifically or indirectly tainted with discrimination
- Adverse inferences: when an employer does not provide for witnesses involved in the event etc
- Where there is a difference in treatment and a difference in characteristic and no acceptable explanation is given by the employer, an inference of discrimination may follow

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## ECJ Case C-415/10 Meister

❑ Facts of the case: Speech Design advertised for an 'experienced software developer' twice. Ms Meister claimed to be qualified for the job, responded both times, and was rejected twice. Speech Design did not invite her to an interview and did not tell her on what ground her application was unsuccessful. Ms Meister alleged discrimination based on sex, age and ethnic origin and claimed a right to information.

❑ The referring court questions whether Ms Meister can claim a right to information on the basis of Directives 2000/43, 2000/78 and 2006/54 and, if so, what are the consequences of a refusal of disclosure by Speech Design.

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## ECJ: Case C-415/10 Meister

46. "The answer to the first question is that Article 8(1) of Directive 2000/43, Article 10(1) of Directive 2000/78 and Article 19(1) of Directive 2006/54 must be interpreted as not entitling a worker who claims plausibly that he meets the requirements listed in a job advertisement and whose application was rejected to have access to information indicating whether the employer engaged another applicant at the end of the recruitment process.

47. Nevertheless, it cannot be ruled out that a defendant's refusal to grant any access to information may be one of the factors to take into account in the context of establishing facts from which it may be presumed that there has been direct or indirect discrimination. It is for the referring court to determine whether that is the case in the main proceedings, taking into account all the circumstances of the case before it."

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## Conclusion – community legislation

- Material from the ECJ to guide the interpretation of the burden of proof is still sparse
- National courts decide on the cases before them. Equal practice in all member states?
- What is the standard of proof?
- More probable than not?
- Different standards for different grounds and cases?

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