



## PROVING DISCRIMINATION: THE SHIFT OF THE BURDEN OF PROOF AND ACCESS TO EVIDENCE

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### Context

1. The principle of non-discrimination is a fundamental principle throughout the EU, but equality for all is not yet a reality. Some statistics from 2017 reveal the size of the problem:<sup>1</sup>
  - a. For the economy as a whole, women's gross hourly earnings were on average 16.3% below those of men in the European Union and 16.8% in the euro area;<sup>2</sup>
  - b. At its most extreme, in Estonia, women earned on average 26.9% less than men (Italy and Luxembourg had the lowest gender pay gap at 5.5%);<sup>3</sup> and
  - c. The gender pay gap was most extreme for older women: there was a 45.3% pay gap for women over 65 in Spain and a 54.2% pay gap for women over 65 in Cyprus;
  - d. Finally, this inter-relationship between age, gender and earnings was consistent with the general pattern in the EU, with women over 65 generally being the worst paid, and the gender pay gap being lowest for women under the age of 35.<sup>4</sup>
2. The substantive rights in the EU guaranteeing equality are meaningless unless they are underpinned by rules of evidence and procedure that assist individuals to enforce those rights. Arguably, the most important rules which fall into this category are about the burden of proof and access to evidence.

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<sup>1</sup> Eurostat does not have data for countries including the UK, Ireland, Austria, Germany, and Luxembourg.

<sup>2</sup> [http://ec.europa.eu/eurostat/statistics-explained/index.php/Gender\\_pay\\_gap\\_statistics](http://ec.europa.eu/eurostat/statistics-explained/index.php/Gender_pay_gap_statistics)

<sup>3</sup> [http://appsso.eurostat.ec.europa.eu/nui/show.do?dataset=earn\\_gr\\_gpgr2ag&lang=en](http://appsso.eurostat.ec.europa.eu/nui/show.do?dataset=earn_gr_gpgr2ag&lang=en)

<sup>4</sup> Ibid.

3. In this paper, I will examine the way in which the EU has sought to balance the autonomy of member states with the need to ensure that the protection against discrimination is effective and fair.

### What are the evidential hurdles in discrimination cases?

4. In theory, rules about the burden of proof are no more than rules about who will win a case where the evidence is evenly-balanced. But in practice, the issue tends to be more complex.
5. The general rule about the burden of proof in civil proceedings within the EU (and its member states) is that a claimant must prove his or her case. However, proving discrimination in this way can be difficult in comparison to other civil claims.
6. It is important to be clear about the hurdles which claimants face in litigation involving discrimination so as to understand the function and purpose of rules concerning the burden of proof and access to evidence.
7. The challenge most commonly faced by claimants in direct discrimination claims is the absence of explicit evidence of less favourable treatment *because* of the relevant protected characteristic. This situation arises because:
  - a. Individuals are unlikely to admit to discrimination or may unknowingly be influenced by unconscious prejudices or stereotypical views. This was neatly summarised by Lord Browne-Wilkinson in a well-known case in the House of Lords in the UK called *Glasgow City Council v Zafar*<sup>5</sup> as follows:

Claims brought under [legislation prohibiting sex and race discrimination] present special problems of proof for complainants since those who discriminate on the grounds of race or gender do not in general advertise their prejudices: indeed they may not even be aware of them.
  - b. Claimants will often need to point to the treatment of other individuals who do not share their protected characteristic to make good their assertion that they have been treated less favourably because of the protected characteristic. This information will ordinarily not be in their possession. For example, a woman who suspects that she may have been paid less by way of bonus than her male colleague, will not ordinarily have access to his detailed pay information or performance data.
8. Indirect discrimination claims pose a different problem. A claimant who can identify an apparently neutral provision, criterion or practice which places her at a disadvantage, will only succeed if she can demonstrate that other people who share her protected characteristic may be similarly disadvantaged. Again, the information required to prove

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<sup>5</sup> [1998] ICR 120.

this group disadvantage will often be in the hands of her employer and may even require an employer to actively seek or collate that information. For example, a practice of requiring all train drivers to work within 24 hour periods on a flexible, shift basis might place women at a disadvantage due to their traditional role caring for children, but in order to make good that argument, a claimant might ordinarily be expected to produce some evidence to show what proportion of the train company's workforce can comply with that requirement.

9. Lastly, in cases where an organisation seeks to justify any *prima facie* discriminatory treatment, a claimant will be faced with the task of unpicking or challenging the defence with limited direct knowledge of the relevant matters. For example, an employer who seeks to justify a compulsory retirement age of 65 might rely on a justification defence that such a step is necessary to encourage younger generations of workers to progress through the ranks; evidence to support this proposition will primarily come from the employer's experiences and observations.

### **How has the EU responded to these challenges?**

10. The EU has sought to alleviate these problems in two ways:

- (1) a shifting burden of proof; and
- (2) seeking to influence rules pertaining to disclosure.

#### **A. Shifting burden of proof**

##### **Early case law**

11. The early jurisprudence of the ECJ recognised that proving discrimination could be particularly onerous for claimants. In response, it developed the concept of a shifting burden of proof which is illustrated by two seminal cases *Danfoss*<sup>6</sup> and *Enderby*<sup>7</sup>.
12. *Danfoss*: In this Danish case, there was evidence that the *average* wage for women was 6.85% lower than that received by men within a particular establishment. However, due to a complete lack of transparency within the pay system, it was not possible for the claimants to prove definitively that women were paid less in respect of each element of their remuneration.
13. The ECJ stated that the burden of proof in such circumstances rests initially with the claimants to demonstrate that a relatively large proportion of women were paid less on average than men, at which point, the burden shifted to the employer to demonstrate that there has been no discrimination. The justification for this approach was the need to

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<sup>6</sup> C-109/88, *Handels- og Kontorfunktionærernes Forbund I Danmark v Dansk Arbejdsgiverforening, acting on behalf of Danfoss* [1989] ECR 3199

<sup>7</sup> C-127/92, *Dr. Pamela Mary Enderby v Frenchay Health Authority and Secretary of State for Health* [1993] ECR I-5535

provide women with an *effective* means of enforcing the principle of equal pay. The key passages from the Judgment are as follows:

13. It should next be pointed out that in a situation where a system of individual pay supplements which is completely lacking in transparency is at issue, female employees can establish differences only so far as average pay is concerned. They would be deprived of any effective means of enforcing the principle of equal pay before the national courts if the effect of adducing such evidence was not to impose upon the employer the burden of proving that his practice in the matter of wages is not in fact discriminatory.

14. Finally, it should be noted that under Article 6 of the Equal Pay Directive Member States must, in accordance with their national circumstances and legal systems, take the measures necessary to ensure that the principle of equal pay is applied and that effective means are available to ensure that it is observed. The concern for effectiveness which thus underlies the directive means that it must be interpreted as implying adjustments to national rules on the burden of proof in special cases where such adjustments are necessary for the effective implementation of the principle of equality.

15. To show that his practice in the matter of wages does not systematically work to the disadvantage of female employees the employer will have to indicate how he has applied the criteria concerning supplements and will thus be forced to make his system of pay transparent.

16. In those circumstances the answers to Questions 1 (a) and 3 (a) must be that the Equal Pay Directive must be interpreted as meaning that where an undertaking applies a system of pay which is totally lacking in transparency, it is for the employer to prove that his practice in the matter of wages is not discriminatory, if a female worker establishes, in relation to a relatively large number of employees, that the average pay for women is less than that for men.

14. *Enderby*: In this English case, there was evidence that speech therapists, who were overwhelmingly women, were paid less by the National Health Service (NHS) than pharmacists, who were predominantly male. However, the female claimants could not go one step further and prove that the difference in pay arose because of discrimination.

15. The ECJ stated that on these facts there was a *prima facie* case of discrimination and as such the burden of proof shifted to the NHS to prove that there was no sex discrimination. Again, the justification for this approach was the need to provide women with an effective remedy. The relevant passages from the Judgment are as follows:

13. It is normally for the person alleging facts in support of a claim to adduce proof of such facts. Thus, in principle, the burden of proving the existence of sex discrimination as to pay lies with the worker who, believing himself to be the victim of such

discrimination, brings legal proceedings against his employer with a view to removing the discrimination.

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16. However, if the pay of speech therapists is significantly lower than that of pharmacists and if the former are almost 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.

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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 (see, by analogy, the judgment in *Danfoss*, cited above, at paragraph 13).

19. In these circumstances, the answer to the first question is that, where significant statistics disclose an appreciable difference in pay between two jobs of equal value, one of which is carried out almost exclusively by women and the other predominantly by men, Article 119 of the Treaty requires the employer to show that that difference is based on objectively justified factors unrelated to any discrimination on grounds of sex.

## The Directives

16. The EU decided to codify this developing case law. The first Directive to explicitly address the burden of proof in discrimination cases was introduced in December 1997 in respect of sex only. The now defunct<sup>8</sup> Directive 97/80/EC stated that:

### Article 4

#### Burden of proof

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.

(Emphasis added)

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<sup>8</sup> From 15 August 2009 by virtue of the Recast Directive.

17. The rationale for these articles was the principle of effectiveness, which is set out in the recitals to the Directive as follows:

(17) ... plaintiffs could be deprived of any effective means of enforcing the principle of equal treatment before the national courts if the effect of introducing evidence of an apparent discrimination were not to impose upon the respondent the burden of proving that his practice is not in fact discriminatory

(18) ...the rules on the burden of proof must be adapted when there is a *prima facie* case of discrimination and that, for the principle of equal treatment to be applied effectively, the burden of proof must shift back to the respondent when evidence of such discrimination is brought

18. The current regime of Directives contains identically worded provisions as follows:

- a. Article 8 in Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin (“the Race Directive”);
- b. Article 10(1) in Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation (“the Framework Directive”); and
- c. Directive 2006/54/EC of the European Parliament and of the Council 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 (recast) (“the Recast Directive”).

19. It is important to recognise that the shifting burden of proof in these Directives has real bite in member states. It requires member states to adapt their usual procedural rules so as to conform. However, this does not prevent member states from introducing more favourable rules of evidence.

### **Stage 1: In practice, what evidence is required to shift the burden of proof?**

20. The concept of a shifting burden of proof is readily understandable. However, the application of this process in practice is an entirely different matter. What precisely is required in order to demonstrate a *prima facie* case of discrimination is not necessarily straightforward.

21. In truth, national courts grapple with this issue on a daily basis. They weigh detailed and nuanced evidence before reaching a conclusion as to whether or not there is a *prima facie* case of discrimination. The cases which have reached the ECJ / CJEU are those with unusual or difficult facts. However, the case law is still useful because it demonstrates the breadth of circumstances in which a *prima facie* case of discrimination can be established.

22. **Comparability:** The case of *Brunnhofer*<sup>9</sup> is instructive. This was an equal pay case concerning, primarily, the extent to which certain female claimants were comparable to male colleagues who were employed under the same collective agreement. However, the interesting point which emerges from this case is the principle that once a woman could establish that she was “comparable” to a man and she was paid less, then that was sufficient to shift the burden of proof. The relevant passage is as follows:

The burden of proof

51. By this part of the reference, the national court is asking essentially which party to the main proceedings bears the burden of proving the existence of an inequality in pay between men and women and any circumstances capable of objectively justifying such a difference in treatment.

52. As to that point, it should be observed that it is normally for the person alleging facts in support of a claim to adduce proof of such facts. Thus, in principle, the burden of proving the existence of sex discrimination in the matter of pay lies with the worker who, believing himself to be the victim of such discrimination, brings legal proceedings against his employer with a view to having the discrimination removed (see Case C-127/92 *Enderby* [1993] ECR I-5535, paragraph 13).

53. However, it is clear from the case-law of the Court that the burden of proof may shift when this 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 (see *Enderby*, cited above, paragraph 14).

54. In particular, where an undertaking applies a system of pay with a mechanism for applying individual supplements to the basic salary, which is wholly lacking in transparency, it is for the employer to prove that his practice in the matter of wages is not discriminatory if a female worker establishes, in relation to a relatively large number of employees, that the average pay for women is less than that for men (Case 109/88 *Danfoss* [1989] ECR 3199, paragraph 16).

55. Under such a system, female employees are unable to compare the different components of their salary with those of the pay of their male colleagues belonging to the same salary group and can establish differences only in average pay, so that in practice they would be deprived of any possibility of effectively examining whether the principle of equal pay was being complied with if the employer did not have to indicate how he applied the criteria concerning supplements (see *Danfoss*, cited above, paragraphs 10, 13 and 15).

56. However, there are no such special circumstances in the present case, which concerns the inequality, which is not denied, of a precise component of the overall remuneration granted by the employer to two particular employees of different sex, so that the case-law set out in paragraphs 53 to 55 above is not applicable to this case.

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<sup>9</sup> C-381/99 *Brunnhofer v Bank der österreichischen Postsparkasse AG* [2001] ECR I-4961.

57. In accordance with the normal rules of evidence, it is therefore for the plaintiff in the main proceedings to establish before the national court that the conditions giving rise to a presumption that there is unequal pay prohibited by Article 119 of the Treaty and by the Directive are fulfilled.

58. It is accordingly for the plaintiff to prove by any form of allowable evidence that the pay she receives from the Bank is less than that of her chosen comparator, and that she does the same work or work of equal value, comparable to that performed by him, so that prima facie she is the victim of discrimination which can be explained only by the difference in sex.

59. Contrary to what the national court seems to accept, the employer is not therefore bound to show that the activities of the two employees concerned are different.

60. If the plaintiff in the main proceedings adduced evidence to show that the criteria for establishing the existence of a difference in pay between a woman and a man and for identifying comparable work are satisfied in this case, a prima facie case of discrimination would exist and it would then be for the employer to prove that there was no breach of the principle of equal pay.

61. To do this, the employer could deny that the conditions for the application of the principle were met, by establishing by any legal means inter alia that the activities actually performed by the two employees were not in fact comparable.

62. The employer could also justify the difference in pay by objective factors unrelated to any discrimination based on sex, by proving that there was a difference, unrelated to sex, to explain the payment of a higher monthly supplement to the chosen comparator.

23. This sentiment is echoed by Advocate General Geelhoed at paragraph 20 in his Opinion as follows:

Then there is the question of the burden of proof ... the burden of proof lies with Ms Brunnhofer. It is therefore for Ms Brunnhofer to demonstrate that her work is the same or of equal value and that different pay is awarded for it. The fact that classification in the same job category may be evidence that the work is the same or of equal value does not release the person who believes that she is the victim of pay discrimination from the obligation to prove with detailed facts and evidence that the work really is the same or of equal value in the case in question. It is then for the employer to demonstrate that there are grounds which can justify the difference in pay. As can be seen from the order for reference made by the Oberlandesgericht, the information concerning the pay itself is so transparent that there are no evidential difficulties standing in the way of demonstrating a difference in pay. Ms Brunnhofer appears to have shown this sufficiently ...

24. This indicates that a mere difference in treatment between a man and a woman is enough to shift the burden of proof onto the employer *where there is comparability*. It is plain from the section entitled, "preliminary remarks" at paragraphs 24 to 31 within the Judgment



that the basis for that conclusion by the ECJ is the principle of equality itself, namely that comparable situations must be treated alike unless there is objective justification for the treatment.

25. **Lack of transparency:** *Danfoss*, which is examined above, establishes that a lack of transparency in a pay system, where there is evidence that average wages differ as between men and women, is sufficient to shift the burden of proof.
26. **Occupational segregation:** Similarly, the burden of proof is shifted where there are two professions within one organisation which are essentially divided along gender lines, and the “male” profession is paid better than the “female” profession as established in *Enderby*.
27. **Conduct of connected / influential parties:** The recent case of *ACCEPT*<sup>10</sup> demonstrates that the conduct of a connected party can shift the burden of proof. There, the majority shareholder in a Romanian football club had made homophobic comments that he would prefer not to hire a player who was homosexual. The CJEU concluded that these comments could shift the burden of proof although the Judgment appears to be premised on an understanding that the majority shareholder apparently had an important role in the management of the team. The relevant passage is as follows:

48. The mere fact that statements such as those at issue in the main proceedings might not emanate directly from a given defendant is not necessarily a bar to establishing, with respect to that defendant, the existence of 'facts from which it may be presumed that there has been ... discrimination' within the meaning of Article 10(1) of that directive.

49. It follows that a defendant employer cannot deny the existence of facts from which it may be inferred that it has a discriminatory recruitment policy merely by asserting that statements suggestive of the existence of a homophobic recruitment policy come from a person who, while claiming and appearing to play an important role in the management of that employer, is not legally capable of binding it in recruitment matters.

50. In a situation such as that at the origin of the dispute in the main proceedings, the fact that such an employer might not have clearly distanced itself from the statements concerned is a factor which the court hearing the case may take into account in the context of an overall appraisal of the facts.

28. **Historic discrimination:** The case of *Firma Feryn NV*<sup>11</sup> is unusual in that the claimant was an organisation established to combat racism; there was *no actual individual* who alleged that s/he had been treated less favourably by Firma Feyn NV on the grounds of race. However, the employer had made the following ill-advised statement explaining why he would not recruit Moroccans:

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<sup>10</sup> C-81/12 *Asociatia ACCEPT v Consiliul National pentru Combaterea Discriminarii* [2013] ECR O.

<sup>11</sup> C-54/07 *Centrum voor gelijkheid van kansen en voor racismebestrijding v Firma Feryn NV* [2008] ECR I-5187.

I must comply with my customers' requirements. If you say I want that particular product or I want it like this and like that, and I say I'm not doing it, I'll send those people, then you say I don't need that door. Then I'm putting myself out of business. We must meet the customers' requirements. This isn't my problem. I didn't create this problem in Belgium. I want the firm to do well and I want us to achieve our turnover at the end of the year, and how do I do that? - I must do it the way the customer wants it done!

29. The ECJ confirmed that these remarks evidenced a *prima facie* present discriminatory recruitment policy notwithstanding the absence of a person who could show that they had been rejected by the employer on the grounds of their race.<sup>12</sup> This conclusion is not particularly surprising bearing in mind that the discriminatory remarks had been made only a little over one year earlier and there were no current employees of Moroccan origin. An interesting question for future litigation is whether “older” allegations of discrimination could also be sufficient to shift the burden of proof.

### **Stage 2: How can employers rebut the burden of proof once it has shifted?**

30. It might be said that the shifting burden of proof places an unfair onus on organisations responding to discrimination claims on the basis that “proving a negative” is rarely easy and sometimes it is impossible.

31. In most cases, that type of criticism will be unfair because the employer is not proving a negative so much as proving a positive, non-discriminatory explanation for its actions. For example, a claim from a woman who complains that she has provided with a lower bonus than her male counterpart because of her gender, will be easily defeated if her employer can prove that he performed to a higher standard.

32. However, there are cases which are less straightforward and where the employer is faced with possibly needing to prove a negative. A good example is *Firma Feryn*, which has already been discussed above. In that case, the ECJ concluded that in order to rebut the presumption of *prima facie* race discrimination, Firma Feryn BV would need to demonstrate that as a matter of fact, its recruitment policy did not correspond to the statements made publicly.<sup>13</sup> As Firma Feryn BV had not employed any Moroccan employees after making its discriminatory statement, it could be said that it is difficult to see how Firma Feryn BV could possibly have discharged the burden of proof even if in reality, this failure was wholly unconnected to ethnicity e.g. no one who was Moroccan had applied for a position.

33. However, *ACCEPT*, also discussed above, demonstrates that an employer can discharge the burden of proof by simply identifying generalised, positive steps to prevent discrimination as opposed to specific examples of non-discrimination. In that case, the

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<sup>12</sup> Judgment, paragraph 31.

<sup>13</sup> Judgment, paragraph 34.

CJEU explained that statements by the football club distancing itself from the shareholder's comments could have been sufficient to discharge the burden of proof. The relevant passage is as follows:

56. ... defendants may refute the existence of such a breach before the competent national bodies or courts by establishing, by any legally permissible means, inter alia, that their recruitment policy is based on factors unrelated to any discrimination on grounds of sexual orientation.

57. In order to rebut the non-conclusive presumption that may arise under the application of Article 10(1) of Directive 2000/78, it is unnecessary for a defendant to prove that persons of a particular sexual orientation have been recruited in the past, since such a requirement is indeed apt, in certain circumstances, to interfere with the right to privacy.

58. In the overall assessment carried out by the national body or court hearing the matter, a prima facie case of discrimination on grounds of sexual orientation may be refuted with a body of consistent evidence. As Accept has, in essence, submitted, such a body of evidence might include, for example, a reaction by the defendant concerned clearly distancing itself from public statements on which the appearance of discrimination is based, and the existence of express provisions concerning its recruitment policy aimed at ensuring compliance with the principle of equal treatment within the meaning of Directive 2000/78.

34. It follows that the case law of the CJEU actively encourages organisations to adopt “best practice” in respect of equal opportunities as this could act as a “shield” in any future litigation.

#### **B. Obtaining evidence**

35. Most of the time, the shifting burden of proof will only assist claimants if they can access relevant documentation and information which would otherwise not be in their possession. Inevitably, the case law of the EU has been careful to respect the autonomy of member states to create and implement their own procedures when it comes to obtaining evidence. However, it has also categorically stated the need for national courts to ensure that the right to be protected from discrimination is effective within the context of procedural rules such as the disclosure of documentation.

36. A recent example is the case of *Kelly*.<sup>14</sup> There, Mr Kelly had been rejected for a place on a course provided by a university. He believed that he had been the victim of sex discrimination. In order to make good that contention, he sought disclosure of extensive documentation personal to other individuals who had applied to the same course e.g. application forms, documentation attached to application forms and scoring sheets. When this request was refused, he argued in the CJEU that a failure to provide disclosure was contrary to Directive 97/80 and in particular Article 4(1) which sets out the shifting burden

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<sup>14</sup> C-104/10 *Kelly v National University of Ireland (University College, Dublin)* [2011] ECR O.

of proof, as it prevented him from being able to discharge the first stage of the shifting burden of proof.

37. The CJEU explained that Directive 97/80 (and by extension the Directives which contain the same provisions) does not create an entitlement to disclosure. However, it also stated that it was theoretically possible that a refusal to provide disclosure could deprive Article 4(1) of its effectiveness. Whilst not explicitly stated, *Kelly* must mean that national courts are obliged to ensure that its rules of procedure and evidence do not prevent individuals from being able to pursue claims for discrimination. The key passage is as follows:

33. Nevertheless, it must be stated that Directive 97/80, pursuant to Article 1 thereof, seeks 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.

34. Thus, although Article 4(1) of that directive does not specifically entitle persons who consider themselves wronged because the principle of equal treatment has not been correctly applied to them to information in order that they may establish 'facts from which it may be presumed that there has been direct or indirect discrimination' in accordance with that provision, the fact remains that it cannot be excluded that a refusal of disclosure by the defendant, in the context of establishing such facts, could risk compromising the achievement of the objective pursued by that directive and thus depriving that provision in particular of its effectiveness.

35. In that regard, it must be borne in mind that 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 (see Case C-61/11 PPU El Dridi [2011] ECR I0000, paragraph 55).

38. This case should be read in conjunction with *Meister*.<sup>15</sup> It is not an easy case but it does reveal the nuanced approach which the CJEU takes towards the topic of disclosure.
39. Ms Meister, a Russian national, was rejected twice for a job in Germany without being invited for an interview. She concluded that she had been treated less favourably because of her sex, age and ethnicity on the basis that she felt qualified to perform the job. Accordingly, she sought disclosure of the file for the person who had been recruited in the hope that it would allow her to demonstrate a *prima facie* case of discrimination. This request was rejected and she argued before the CJEU that there was a breach of the Directives concerning equal treatment and those articles which contained the shifting burden of proof.

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<sup>15</sup> C-415/10 in *Galina Meister v Speech Design Carrier Systems GmbH*.

40. The CJEU agreed with the decision in *Kelly* by concluding that a defendant's refusal to grant any access to information may undermine the effectiveness of the shifting burden of proof.<sup>16</sup>
41. However, it also contrasted the circumstances of Mr Kelly in comparison to Ms Meister. The CJEU pointed to matters which tended to suggest that there may have been discrimination against her i.e. the employer conceded that Ms Meister had the relevant expertise, yet she was not invited to interview and there was a blanket refusal to provide any disclosure.<sup>17</sup> The CJEU concluded that a claimant in those circumstances could plausibly claim to have been discriminated against.<sup>18</sup> Further, it appeared to conclude that as there was plausibility *without disclosure*, it could *not* be said that the burden of proof was rendered ineffective. The CJEU then went on to state that:

45. Moreover, as the Advocate General noted in paragraphs 35 to 37 of his Opinion, account can also be taken of, in particular, the fact that Speech Design does not dispute that Ms Meister's level of expertise matches that referred to in the job advertisement, as well as the facts that, notwithstanding this, the employer did not invite her to a job interview and she was not invited to interview under the new procedure to select applicants for the post in question.

46. In the light of the foregoing, 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.

42. In other words, the CJEU has appeared to conclude that if a claimant is in the position of Ms Meister, and there is some evidence which goes to the first stage of the shifting burden of proof, then it will be difficult to demonstrate that s/he is so prejudiced that their EU rights are not effective, although a failure to provide disclosure is of itself relevant to the first stage of the shifting burden of proof.
43. In AG Kokott's Opinion in *C 394/11 Belov v CHEZ Elektro Bulgaria AD* (20 September 2012) the Roma applicant alleged race discrimination regarding his inability to read his household electricity meter other than by special appointment, since in his Roma part of the Bulgarian city of Montana, the electricity supplier has placed household electricity

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<sup>16</sup> Judgment, paragraphs 36 to 39.

<sup>17</sup> Judgment, paragraph 45.

<sup>18</sup> Judgment, paragraph 46.

meters at a height of 7 meters. In all other parts of Bulgaria, the meters are placed at head height. The AG reasoned that the legal test under the Race Equality Directive 2000/43 was for the defendant to prove that there was no discrimination (“the reverse burden of proof”) and that this is met where the complainant’s evidence *permits* a finding of discrimination. It is not necessary for the complainant’s evidence to show that discrimination was *probable* (paras 86-94). She said requiring a high degree of certainty of discrimination before the burden shifted...

90. ....would jeopardise its practical effectiveness and mean that the rule on the reversal of the burden of proof would be practically redundant. Without such a reversal of the burden of proof, however, the normal rules on the burden of proof would be applicable with the result that anyone who believed that they were a victim of discrimination would be required to adduce and prove all the necessary facts which support their claim and indicate that discrimination has occurred with a sufficient degree of certainty.

91. Specifically to avoid such difficulties and to improve the situation of the potential victim of discrimination, however, the reversal of the burden of proof was introduced. It strengthens the position of the presumed victim. A national practice like that described by the KZD would be diametrically opposed to that purpose, since the requirement to adduce and prove facts which allow a definite conclusion as to discrimination ultimately corresponds to the normal distribution of the burden of proof. Article 8(1) of Directive 2000/43 would not then improve the procedural position of presumed victims of discrimination at all.

92. My understanding of Article 8(1) of Directive 2000/43 also does not constitute a breach of the principle of a fair hearing at the expense of CEB and CRB. Rather, with the rules on the reversal of the burden of proof in all the anti- discrimination directives, the legislature made a choice which maintained a fair balance between the interests of the victim of discrimination and the interests of the other party to the proceedings. (64) In particular, those rules do not completely remove the burden of proof from the presumed victim of discrimination, but merely modify it.

93. Certainly, the reversal of the burden of proof in the present case may mean that in the main proceedings CEB and CRB have to make submissions to justify a commercial decision, which may have been taken long ago, to install electricity meters in the Roma districts differently than is normal in Bulgaria. Such a burden of adducing evidence is only appropriate, however, since the relevant information comes from the sphere and the area of responsibility of precisely those undertakings or their legal predecessors. Furthermore, in the main proceedings the distribution undertaking described the reasons for the particular way in which the electricity meters were installed in the two districts concerned as being ‘generally known’, (65) so it should not find it difficult to make submission to justify those measures.

94. All in all, it is thus sufficient for a reversal of the burden of proof under Article 8(1) of Directive 2000/43 that persons who consider themselves wronged because the principle of equal treatment has not been applied establish facts which substantiate a *prima facie* case of discrimination.

44. The reference was found to be inadmissible by the Court in January 2013 and so this issue was not determined further.
45. However, the CJEU returned to the question of inaccessible meters in *CHEZ Razpredelenie Bulgaria AD v Komisia za zashtita ot diskriminatsia* (Case C-83/14). Anelia Nikolova complained that electricity meters in the area in which she operated a shop were situated 6 or 7m above the ground; in other areas, they were 1.7m above the ground, in people's properties. She brought proceedings alleging direct discrimination because of race.
46. The CJEU considered that in determining whether there was sufficient evidence for a conclusion that a complainant had established the facts from which it might be presumed that there had been direct discrimination, the national court might take account of:
- a. the fact that CHEZ RB had established the practice of siting electricity meters high above the grounds only in urban districts which were known to have Bulgarian nationals of Roma origin as the majority of their population;
  - b. CHEZ RB's assertion that in its view damage and unlawful connections were perpetrated mainly by Bulgarian nationals of Roma origin. Such assertions could in fact suggest that the practice at issue was based on ethnic stereotypes or prejudices, the racial grounds thus combining with other grounds;
  - c. notwithstanding requests from the Bulgarian court in respect of the burden of proof, CHEZ RB failed to adduce evidence of the alleged damage, meter tampering and unlawful connections, asserting that they were common knowledge;
  - d. the compulsory, widespread and lasting nature of the practice at issue: where the practice of installing electricity meters on pylons forming part of the overhead electricity supply network at a height of between six and seven metres had been extended without distinction to all the inhabitants of a district which was lived in mainly by Bulgarian nationals of Roma origin, irrespective of whether their individual meters had been tampered with or given rise to unlawful connections and of the identity of the perpetrators of that conduct, and where such a practice still endured nearly a quarter of a century after it was introduced, that practice was such as to suggest that the inhabitants of that district were, as a whole, considered to be potential perpetrators of such unlawful conduct. Such a perception might also be relevant for the overall assessment of the practice at issue.
47. If a national court were to conclude that there was a presumption of discrimination, the effective application of the principle of equal treatment would require that the burden of proof then fell on the respondent(s) concerned, who would have to prove that there had been no breach of that principle. In such circumstances, the respondent would have the task of rebutting the existence of such a breach of the principle of equal treatment by proving that the establishment of the practice at issue and its current retention were not in any way founded on the fact that the districts concerned were districts inhabited mainly by Bulgarian nationals of Roma origin, but exclusively on objective factors unrelated to any discrimination on the grounds of racial or ethnic origin

48. The CJEU noted that although it was the person who considered herself to have been wronged on the grounds that the principle of equal treatment had not been applied who must initially establish facts from which it might be presumed that there had been direct or indirect discrimination, it had to be ensured that a refusal of disclosure by a respondent was not liable to compromise the achievement of the objectives pursued by the equal treatment directives.
49. The CJEU considered whether the complaint was of direct or indirect discrimination: if the practice had been introduced and/or maintained for reasons relating to the ethnic origin common to most of the inhabitants of the district, it would constitute direct discrimination and could not constitute indirect discrimination, because it would not be a neutral practice. But if the practice had been introduced for race-neutral reasons, it might be capable of constituting indirect discrimination.
50. The CJEU has still very much left the door open to an argument that national rules of procedure and evidence can be modified if the principle of effectiveness is wholly eroded.
51. For example, UK law is currently in a state of flux over this issue, in the light of the abolition of the statutory questionnaire procedure in April 2014, as part of government policy to reduce regulation of British businesses.
52. Historically, the most flexible method used to obtain information in UK employment law was via a statutory questionnaire. Questions were set out on a prescribed form but otherwise a complainant might ask the respondent any question relevant to the alleged discrimination. This could (and, ideally, should) be done before legal proceedings were begun. The questions and replies were admissible in proceedings under the Equality Act 2010.
53. It is to be noted that the questionnaire procedure was provided for in UK domestic legislation and did not have its origin in European directives/practices.
54. Questionnaires were particularly useful in indirect discrimination claims because they were a way to obtain the necessary statistical data to support an assertion that a particular provision, criterion or practice had a discriminatory effect on a particular group. In the United Kingdom it was common to ask questions about the make-up of the workforce (for example a question might read '*Please give the race, ethnic and national origin of all employees employed at a particular place or in a particular grade*'). There were time limits set for the respondent to reply (21 days for cases in the employment tribunal). Although not bound to answer the questionnaire, the questions asked were admissible in evidence and a court or tribunal could draw an adverse inference from a failure to reply or from an evasive or equivocal reply, including an inference that the respondent had behaved unlawfully.
55. In the light of the abolition of the statutory questionnaire procedure, other methods for obtaining evidence in UK discrimination cases are likely to be used more often including:



- a. standard court and tribunal procedures such as a request for additional information, for written answers to questions or disclosure of documents.
- b. data protection legislation may contain useful tools for obtaining information. In the UK, for example, individuals have the right to request copies of all “personal data” held about them which, under s. 1(1) includes “... *any expression of opinion about an individual and any indication of the intentions of anyone in respect of the individual...*”

There would be support for the use of such procedural tools via cases like *Meister at §47*.

### **Conclusion**

56. Overall, it is plain that EU law is a powerful source of law for a claimant who believes that s/he has been the victim of discrimination. The impact of the shifting burden of proof should not be underestimated; it means that cases which might otherwise be unwinnable have a fighting chance. It also seems that there is scope for inventive arguments concerning the extent to which national rules of evidence require modification so as to make access to documentation far easier. However, EU’s jurisprudence on access to evidence is at a less developed stage, and future guidance is to be welcomed.

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