

Tallin, 23 – 24 September 2021

EU Gender Equality Law Proving discrimination

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Burden of proof – general rules and exceptions

Burden of proof refers to the obligation or responsibility to prove, in a case before the courts, the assertions made by a complainant.

The general rule is that the burden of proof lies with the party who makes the allegation.

That rule in some exceptional cases changes.

In discrimination cases that obligation changes into „shifting burden of proof”

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The shift of the burden of proof – practical definition

- Shifting the burden of proof means **to change the responsibility of proving or disproving a point from one party to the other party.**

The general rule about the burden of proof for 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 very difficult in comparison to other civil claims.

That is why the principle of „shifting of the burden of proof” was introduced.

In a nutshell, it means that the plaintiff is obliged to give a ***prima facie*** evidence and then the defendant must prove that discrimination has not existed – nobody was not discriminated.

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Proving discrimination Key regulations (1)

Council Directive 97/80/EC on the burden of proof in cases of discrimination based on gender

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.
3. Member States need to apply paragraph 1 to proceedings in which it is for the court or competent body to investigate the facts of the case.

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Proving discrimination Key regulations (2)

- **Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin**

Article 8 – 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. 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 proceeding brought in accordance with Article 7 (2).
5. Member States need not apply paragraph 1 to proceedings in which it is for the court competent body to investigate the facts of the case

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Proving discrimination Key regulations (3)

- **Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation**

Burden of proof – Article 10

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 also apply to any legal proceedings commenced in accordance with Article 9 (2).
4. Paragraphs 1, 2 and 3 shall also apply to any legal proceedings in which it is for the court or competent body to investigate the facts of the case.

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Proving Discrimination(4) Key Regulations

COUNCIL DIRECTIVE 2004/113/EC of 13 December 2004

- implementing the principle of equal treatment between men and women in the access to and supply of goods and services

Article 9

- **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. 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 8(3).
- 5. Member States need not apply paragraph 1 to proceedings in which it is for the court or other competent authority to investigate the facts of the case.

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Proving discrimination, Key Regulations (5)

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)

• **Article 19**

- **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. Paragraph 1 shall not prevent Member States from introducing rules of evidence which are more favourable to plaintiffs.
- 3. Member States need not apply paragraph 1 to proceedings in which it is for the court or competent body to investigate the facts of the case.
- 4. Paragraphs 1, 2 and 3 shall also apply to:
 - (a) the situations covered by Article 141 of the Treaty and, insofar as discrimination based on gender is concerned, by Directives 92/85/EEC and 96/34/EC;
 - (b) any civil or administrative procedure concerning the public or private sector which provides for means of redress under national law pursuant to the measures referred to in (a) with the exception of out-of-court procedures of a voluntary nature or provided for in national law.
- 5. This Article shall not apply to criminal procedures, unless otherwise provided by the Member States.

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How to establish a presumption of discrimination.

This is one of the most complicated parts of the topic in practice.

BUT, DON'T PANIC!

It is not enough just to accuse somebody of discriminating activities.

A party who brings a claim before a court has to give facts and make them believable, what means to give a *prima facie evidence*.

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Shift of the burden of proof and establishing a presumption of discrimination cases in CJEU caselaw and in the practice

Case C-109/88 **Danfoss** EU:C:1989:383; **Enderby** C-127/92 [1993] ECR I-5535

In this example the burden of proof was shifted to the employer to show that the pay differential between men and women was objectively justified in circumstances where: female workers were paid less, on average, than men, and the system of pay that led to this result was completely lacking in transparency.

Brunhofer (C-381/99) it was sufficient when a claimant made believable facts that she earned less money than her male colleagues.

So, the employer has to prove that the duties of male colleagues were different and the value of work was different too.

In fact,

It is sufficient when the employee who brings the complaint before a court makes believable that the average salary allotted to women is lower than allotted for a man.

Then, according to the role „shift of the burden of proof”, the employer has to persuade that the decisions about that fact were justified.

National practice and examples.

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How to establish a presumption of discrimination. Examples and CJEU caselaw (2) *Consequences of the Words in public*

- **Feryn (C-54/07)** the employer announced in public that looked for employees. Subsequently, the shareholder in an interview informed that they do not want any Marrocan peoples because this is the wish of their clients. His annoucement created a prima facie evidence that the discrimination existed in that enterprise. Moreover, the claimant dos not have to indicate a specific victim. The employer has to prove that although the presumption of discrimination seems to appear, in fact that situation has never existed.
- **Accept C-81/12** – if public statements excluding the recruitment of a football player presented as being homosexual were considered to be ‘facts from which it may be presumed that there has been direct or indirect discrimination’ based on sexual orientation during the recruitment of players by a professional football club,
- **Associazione Avvocatura per i diritti LGBTI C-507/18** – during an interview an attorney held that he would never employ a homosexual person in his office.

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Access to the evidence and CJEU case law on disclosure of information

- **Case Kelly v National University of Ireland C-104/10** (Complaint of direct sex discrimination in access to vocational training. An unsuccessful male candidate wanted to see the application forms of other, successful applicants. Disclosure had been refused by the national court, but some voluntary disclosure was offered. CJEU held that claimant’s belief did not specifically entitle him to the information of the other applicant’s qualifications etc in order to establish the facts;
- **BUT**
- It cannot be ruled out that a refusal of disclosure by the defendant, in the context of establishing the facts, could risk compromising the achievement of the objective pursued by that directive and thus depriving, in particular of its effectiveness.

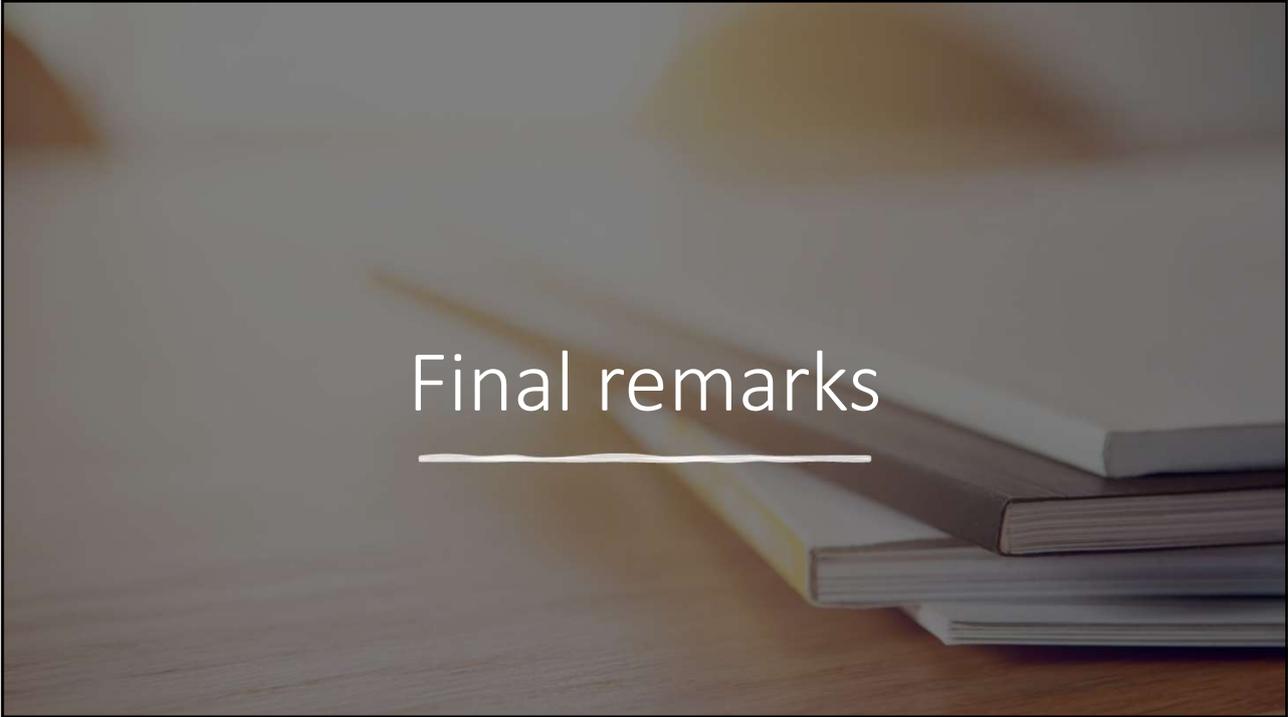
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Access to the evidence and CJEU case law on disclosure of information (2)

- **Meister v Speech Design Carrier Systems GmbH C-415/10**
- A woman who felt discriminated because of her race, sex and age. She applied for a job position and in her opinion she fulfilled the required qualifications but she was not invited even for a job interview. Therefore, she asked for information about other applicants.
- In determining the question the national court “must, in particular, take account of all the circumstances of the main proceedings, in order to determine whether there is sufficient evidence for a finding that the facts from which it may be presumed that there has been such discrimination have been established.

National practice and examples

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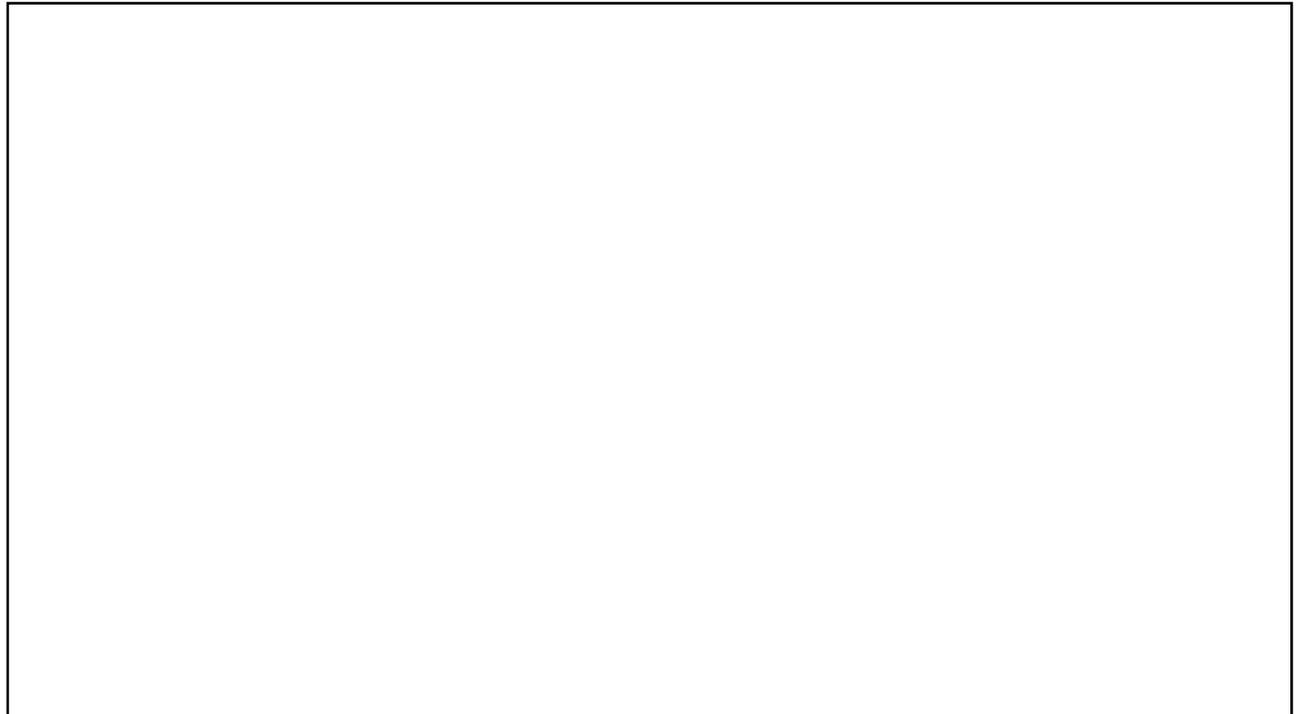
Final remarks

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So long, and thanks for all the fish



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