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The burden of proof

EU GENDER EQUALITY LAW

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Multiplicity of sources

Primary sources:

EU Treaties and Directives and TEU/CJEU:

- Articles 2 and 3 TEU, 8 TFEU

- Directive 97/80/EC (burden of proof discrimination based on sex.) Directive 2000/78/EC (general framework for equal treatment in employment) Directive 2006/54/EC (equal opportunities and equal treatment, in particular Cons. 30, Art. 10 and 19), Directive 2010/41 EU (equal treatment in the self-employed professions)

- Article 21 Charter of Fundamental Rights of the European Union

- Opinion 1/19 of the CJEU of 6 October 2021 concerning the accession of the Union to the Council of Europe Convention (Istanbul Convention) on preventing and combating violence against women and domestic violence

(// Council of Europe, European Convention ECHR - Article 14 ECHR, Protocol 12 ECHR, Article E European Social Charter)

Secondary or derived sources:

European Committee of Social Rights

Introduction to French law / Labour code, civil service code

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Direct discrimination / Indirect (or systemic) discrimination

The basis for discrimination research: the 'comparable situation' between the different actors.

Prohibited grounds of discrimination/protected characteristics: race, gender, religion, sexual orientation, etc.

One person is treated less favourably than another because of 'prohibited grounds of discrimination': differential treatment (direct discrimination):

➤ *ECJ judgment, Elisabeth Johanna Pacifica Dekker v. Stichting Vormingscentrum voor Jong Volwassenen (VJV-Centrum) Plus, of 8 November 1990, C-177/88: "refusal of employment on the grounds of pregnancy can only be made against women and therefore constitutes direct discrimination on the grounds of sex"*

An apparently neutral provision leads to a disadvantage for a group of people with the same characteristics - differential effects (compared to another group):

➤ *Bilka" judgment of 13 May 1986 (case C-170/84): the CJEU ruled that a measure which excluded part-time employees from a company pension scheme constituted "indirect discrimination", and was therefore contrary to the former Article 119 of the Treaty establishing the European Economic Community if it affected a significantly higher number of women than men, unless it was shown that the situation was due to objectively justified factors unrelated to gender discrimination.*

➤ *"Praxair" judgment of 8 May 2019 (Case C-486/18): the CJEU stated that the calculation of the redundancy payment and the reclassification leave allowance of an employee who is on part-time parental leave must be made on the basis of the remuneration for the work performed on a full-time basis. National law to the contrary leads to indirect discrimination on the basis of gender*

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"Actori incumbit probatio" and the principle of effectiveness

In EU law, the burden of proof lies with the applicant.

BUT

Article 47 of the Charter of Fundamental Rights states: *"Everyone whose rights and freedoms guaranteed by Union law have been infringed has the right to an effective remedy before a court in accordance with the conditions laid down in this Article.*

➤ *Opinion of Advocate General Poiares Maduro delivered on 12 March 2008 in the case of Centrum voor gelijkheid van kansen en voor racismebestrijding, known as 'Feryn', 11 (paragraph 24): "As regards the national court's assessment of the evidence produced by 'the employer' in order to rebut that presumption, it must be held that the national court must apply the relevant national procedural rules provided that, first, those rules are not less favourable than those relating to similar domestic remedies (principle of equivalence) and, second, they do not render impossible or excessively difficult in practice the exercise of the rights conferred by the Community legal order (principle of effectiveness)."*

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Establishing a presumption of discrimination: the balance between these different rights and principles

These different rights and principles are balanced against each other:

- the effective protection of fundamental rights such as the right not to be discriminated against, and the prohibition of prohibited discrimination
- the principle that the claimant must prove what he or she is claiming in court

SO :

- Danfoss case 109/88 ECJ 17 October 1989 *"where an undertaking applies a pay system which is characterised by a total lack of transparency, the employer has the burden of proving that its pay practice is not discriminatory, if the female worker establishes, in relation to a relatively large number of employees, that the average pay of female workers is lower than that of male workers"*.
- Directive 97/80/EC (burden of proof discrim. Sex.), Directive 2006/54/EC (equal opportunities and equal treatment not. Cons. 30, and art. 19)

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Proving discrimination: the principle and the necessary adaptation of the principle

- ❖ Principle: the applicant proves
- ❖ Difficulty: more difficult to prove discrimination
- ❖ Legal obligation: effectiveness of rights
- ❖ Outcome: Shifting the burden of proof
 - Presumption of discrimination: the claimant establishes facts which give rise to a presumption that...
 - Reversal of the burden: the defendant must prove that there is no violation of non-discrimination
 - Negative" evidence: the impossibility of objectifying the difference in treatment:
 - "CQFD" = *imputation of discrimination*

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Establishing a presumption of discrimination: examples from the case law of the CJEU

- ❖ Protected feature
- ❖ The evidence admitted and used:
 - remuneration, leave, qualifications, access to places, public statement, testimonies...
- ❖ Panels
- ❖ Situation tests
- ❖ The statistics
- Lack of scope of intentionality
- Lack of scope for possible prejudice

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The defendant's burden: a "hollow" illustration of the rebuttable presumption and its reversal

- *Negative" defences: no comparison can be made = no presumption*
 - Lack of comparability (no male employee to compare with in the group or company)
 - No comparable or similar situation (different training, different seniority, different functions)
- *Positive" defences: the presumption is established and must be rebutted*
 - "Bundle of corroborating clues".
 - A necessary and proportional practice to the objective pursued
 - A legitimate and non-discriminatory objective (genuine need, necessary for this purpose)
- *Specific exceptions to age discrimination (objective and legitimate grounds Article 6 dir. 2000/78)*

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Establishing the facts, elements of comparison

The facts directly concerned

Facts about context and circumstantial evidence

Relevant statistical evidence

An "ad hoc" panel with reasons and details

- The comparison requires **sufficient similarity**, or in other words, the comparator must be a person in the same situation as the complainant, or a **situation that does not deviate significantly from it.**

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Direct discrimination and reversal - ECJ, Brunnhofer, of 26 June 2001, C-381/99

The single employee must prove the existence of an appearance of discrimination by establishing that he or she receives lower pay than a colleague of the other sex while performing the same work or work of equal value comparable to that of the colleague. The employee must therefore first establish the existence of comparable work and a difference in pay for that work between herself and a worker of the other sex

(extract from the operative part): "*as a general rule, it is for the worker who considers himself to be the victim of discrimination to prove that he receives **lower pay** than that paid by the employer to his colleague of the other sex and that he is in fact doing the same work or work of equal value, comparable to that done by his reference colleague ; the employer then has the possibility not only to contest that the conditions for the application of the principle of equal pay for male and female workers are met in this case, but also to put forward objective reasons unrelated to any discrimination based on sex in order to justify the difference in pay observed.*"

"If the claimant in the main proceedings were to prove that the criteria relating to the existence of a difference in pay between a female and a male worker and comparable work are met in the present case, there would be an appearance of discrimination and it would then be for the employer to prove that there had been no breach of the principle of equal pay.

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Public statements on an employment policy and presumption - ECJ, Feryn judgment, 10 July 2008, C-54/07

(extract from the operative part, point 2): *'Public statements by which an employer makes it known that, as part of its recruitment policy, it will not hire employees of a certain ethnic or racial origin are sufficient to presume, within the meaning of Article 8(1) of Directive 2000/43, the existence of a directly discriminatory recruitment policy.*

It is then up to the employer to prove that there has been no violation of the principle of equal treatment. This can be done by showing that the company's actual hiring practice does not correspond to these statements. It is for the referring court to verify that the facts complained of are established and to assess whether the evidence provided in support of the employer's claims that he has not violated the principle of equal treatment is sufficient.

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Office of the national judge: evidence and statistics - ECJ, Seymour-Smith and Perez, of 9 February 1999, C-167/97, points 60 and 61

"it should first be recalled that it is ultimately for the national judge, who is competent to assess the facts and to interpret national legislation, to determine whether and to what extent a legislative provision that applies regardless of the worker's gender, but which actually affects a percentage of women than men, is justified on the basis of the following reasons objective and non-discriminatory on the basis of sex (see judgment of 13 July 1989, Rinner-Kühn, 171/88, ECR p. 2743, paragraph 15)". (paragraph 67 of the judgment).

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Effective protection of workers who have provided support to the victim - Hakebracht judgment of 20 June 2019 (Case C-404/18)

The CJEU has ruled that where a person who claims to be a victim of gender discrimination makes a complaint, workers other than the victim must be protected in so far as they are likely to be disadvantaged by their employer because of the support they have given, formally or informally, to the alleged victim

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An arrangement of the burden of proof that has its limits: non-disclosure of information



No specific right of access to information for the victim of discrimination

Application of EU rules on data privacy rights

A principle mitigated by taking into account the refusal to disclose information

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CJEU 19 April 2012 C-415/10, Meister - Refusal of information

"(...) a refusal by a defendant to provide access to information may constitute one of the factors to be taken into account in establishing the facts from which it may be presumed that there has been direct or indirect discrimination. It is for the national court, taking into account all the circumstances of the case before it, to ascertain whether that is the case in the main proceedings.

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THANK YOU! THANK YOU! DANKE SCHÖN! GRAZIE! GRACIAS!
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Ευχαριστώ!

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