

The burden of proof in EU Equality Law and especially Sex Equality Law

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BURDEN OF PROOF in the field of discrimination in EU Law

Introduction : Importance et difficulties of the topic

I - What has to be proved ? Concepts

II - Who must prove ?

- II – 1 Sources
- II – 2 The burden of proof in general – a mechanism in 2 stages
- II – 3 Exceptions

III – Implementation. New problems...

Conclusion and Questions.

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Introduction ; Importance et difficulties of the topic

- No equality without appropriate legal implementation , The role of tribunals and other actors.
- Consequences of lost cases.
- Experience shows that traditional rules *Actori incumbit probatio, reus in excipiendo fit actor* cannot come to a result
- Who owns evidence ?
- Who is able to built cohorts for comparisons when necessary ?
- New rules, new actors.

New actors

- **Equality agencies :**
- **Collective action : Directive 2000/78/EC art 9"2. and Directive 2006/54/EC art 17 2**
- Member States shall ensure that associations, organisations or other legal entities which have, in accordance with the criteria laid down by their national law, a legitimate interest in ensuring that the provisions of this Directive are complied with, may engage, either on behalf or in support of the complainant, with his or her approval, in any judicial and/or administrative procedure provided for the enforcement of obligations under this Directive";
- **This is not the topic of this presentation, but it must be kept in mind.**

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I – DEFINITIONS : What must be proved ?

- Direct and indirect discrimination
- Difference between the 2 concepts
 - (a) "direct discrimination": where one person is treated less favourably on grounds of sex than another is, has been or would be treated in a comparable situation;
 - (b) "indirect discrimination": where an apparently neutral provision, criterion or practice would put persons of one sex at a particular disadvantage compared with persons of the other sex, unless that provision, criterion or practice is objectively justified by a legitimate aim, and the means of achieving that aim are appropriate and necessary

CONSEQUENCES

- DIRECT DISCRIMINATION
 - Unequal treatment of a person
 - Comparison is not always necessary if the reason of the treatment is prohibited
- INDIRECT DISCRIMINATION
 - Statistic demonstration.

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II – 1 SOURCES

II – 1 – 1 Decisions of the Court of Justice

- Jenkins 31 march 1981 96/80
- Bilka 13 may 1986 170/84
- Danfoss 17 October 1989 C 109/88
- Enderby 27 October 1993 C 127/92

- And
Feryn NV. 10 July 2008 Case C-54/07

Enderby 27 October 1993 C 127/92

- 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).

II – 1 Sources

II – 1- 2 Directives



Gender Equality Directive

- 1 2 1 97/80 -15 December 1997
- 1 2 2 2006/54/CE 5 July 2006

Employment Equality Directive

- 1 2 3 2000/78/EC of 27 November 2000

Racial Equality Directive

- 1 2 4 Directive 2000/43/EC of 29 June 2000
- 1 2 5 Proposal for a Council Directive on implementing the principle of equal treatment between persons irrespective of religion or belief, disability, age or sexual orientation {SEC(2008) 2180} {SEC(2008) 2181}

Council Directive 97/80/EC of 15 December 1997 on the burden of proof in cases of discrimination based on sex

- 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 not apply paragraph 1 to proceedings in which it is for the court or competent body to investigate the facts of the case.

**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.

**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) art 19**

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 sex 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.

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

- Article 10
- 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 legal proceedings commenced in accordance with Article 9(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.

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 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.

Proposal for a Council Directive on implementing the principle of equal treatment between persons irrespective of religion or belief, disability, age or sexual orientation {SEC(2008) 2180} {SEC(2008) 2181}

- 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 prohibition of discrimination.
- 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

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II – 2 The burden of proof in general – a mechanism in 2 stages

Description of the 1st stage

- It is not only a declarative stage. The plaintiff has to bring first evidence of facts.
- AND THE RESPONDANT CAN DISCUSS THE FACTS
- He must not only claim he suffered a difference of status,
- But also a possibility of discrimination.
- APPROPRIATE FACTS AND APPROPRIATE INTERFERENCE

Means of proof

- Direct evidence
- Testimonies
- What about statistics ?

Statistics

Case 96/80, *J.P. Jenkins v Kingsgate (Clothing Productions) Ltd.* 31 March 1981):

However there would be discrimination 'where, regard being had to the difficulties encountered by women in arranging to work that minimum number of hours per week, the pay policy of the undertaking in question cannot be explained by factors other than discrimination based on sex': the national courts should decide in each individual case 'whether, regard being had to the facts of the case, its history *and the employer's intention*, a pay policy [where the hourly rate of pay differs according to whether the work is part-time or full-time] although represented as a difference based on weekly working hours is or is not in reality discrimination based on the sex of the worker'.

- C-54/07, *Centrum voor gelijkheid van kansen en voor racismebestrijding V Firma Feryn NV*, 10 July 2008
- It is for the national court to verify that the facts alleged against that 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.

Conclusion of the first stage

Has the plaintiff established, on the basis of primary facts and appropriate inferences, facts from which it may be presumed that there has been direct or indirect discrimination ?

No? Claim fails.

Yes? Second Stage.

II – 2 The burden of proof in general – a mechanism in 2 stages

Second stage

- It shall be for the respondent to prove that there has been no breach of the principle of equal treatment
- At that stage, the « prima facie » facts have been discussed.
- Can the respondent justify the practice, provision or criteria ?
- Are they not discriminations ?

Means of proof

- Direct evidence
 - Testimonies
 - Statistics.
-
- See Adv GI Maduro, Case C-54/07 FERYN
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- 24. *As regards the matter of how the national court should appraise the evidence in rebuttal submitted by the employer, it must be held that the national court should apply the relevant national procedural rules, provided, first, that such rules are not less favourable than those governing similar domestic actions (principle of equivalence) and, secondly, that they do not, in practice, render the exercise of rights conferred by Community law impossible or excessively difficult (principle of effectiveness).*

II – 2 The burden of proof in general – a mechanism in 2 stages conclusion

- QUESTIONS and EXAMPLES
 - A revolution for judges...
 - A precise mechanism
 - With large powers left to the judge
 - And a very important role for both parties at both stages.
- Importance of the first stage; must not be neglected.
- Must not be taken as a facility...

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II – 3 Exceptions

- 1 - rules of evidence which are more favourable to plaintiffs.
- 2 – Criminal procedures.
- Why : Presumption of innocence
- **(Art. 6(2) ECHR) et 48 of Charter etc..**
- **When carrying out their duties, the members of a court should not start with the preconceived idea that the accused has committed the offence charged; the burden of proof is on the prosecution, and any doubt should benefit the accused (Barbera, Messegué and Jabardo v. Spain 6 December 1988, Series A no. 146, pp. 31 and 33, § § 67-68 and 77). Thus, the presumption of innocence will be infringed where the burden of proof is shifted from the prosecution to the defence (John Murray v. the United Kingdom 8 February 1996)**

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IMPLEMENTATION and DIFFICULTIES

- Transposition
 - Effective implementation.
 - The example of Gender Equality.
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- General Studies
 - General Study in 1995
 - Report of the network Bulletin 1 2005
-
- Difference between transposition and implementation.....

- CONCLUSIONS.
- New texts ? New practise ?