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Reversing the Burden of Proof

Practical dilemmas at the
national and European levels

The Report

- ❖ Eight substantive chapters - focus on EED & RED
 - ❖ analysis of 4 recent judgments (Ch 6)
 - ❖ full scheme of directive-compliant civil proceedings (causation: harm, conduct, protected ground, comparator) to locate the SHIFT
 - ❖ domestic practice and general trends (Ch 9)
 - ❖ recommendations - standard setting re application of BoP, facilitating access to information (Ch 10)

The BoP provision

- ❖ uniform across the grounds except for nationality
- ❖ application contingent on the definition of the type of discrimination invoked - sui generis forms of direct discrimination: harassment (Coleman), victimization & segregation (ECtHR case law)
- ❖ intent not necessary but taken into account when shown
- ❖ does not apply in criminal cases
- ❖ no obligation to ensure application in proceedings where court or competent body investigate the facts - contentious!

‘Double trouble’

- ❖ In order to connect evidence to the showing of bias, the BoP is derailed at two distinct junctions:
 - ❖ (i) it lowers the onus of proof (presumption) resting on the plaintiff in relation to the causal link between the protected ground and the conduct (prima faciae case), while
 - ❖ (ii) placing and limiting the remaining onus of proof in relation to bias onto the respondent (justification defense).

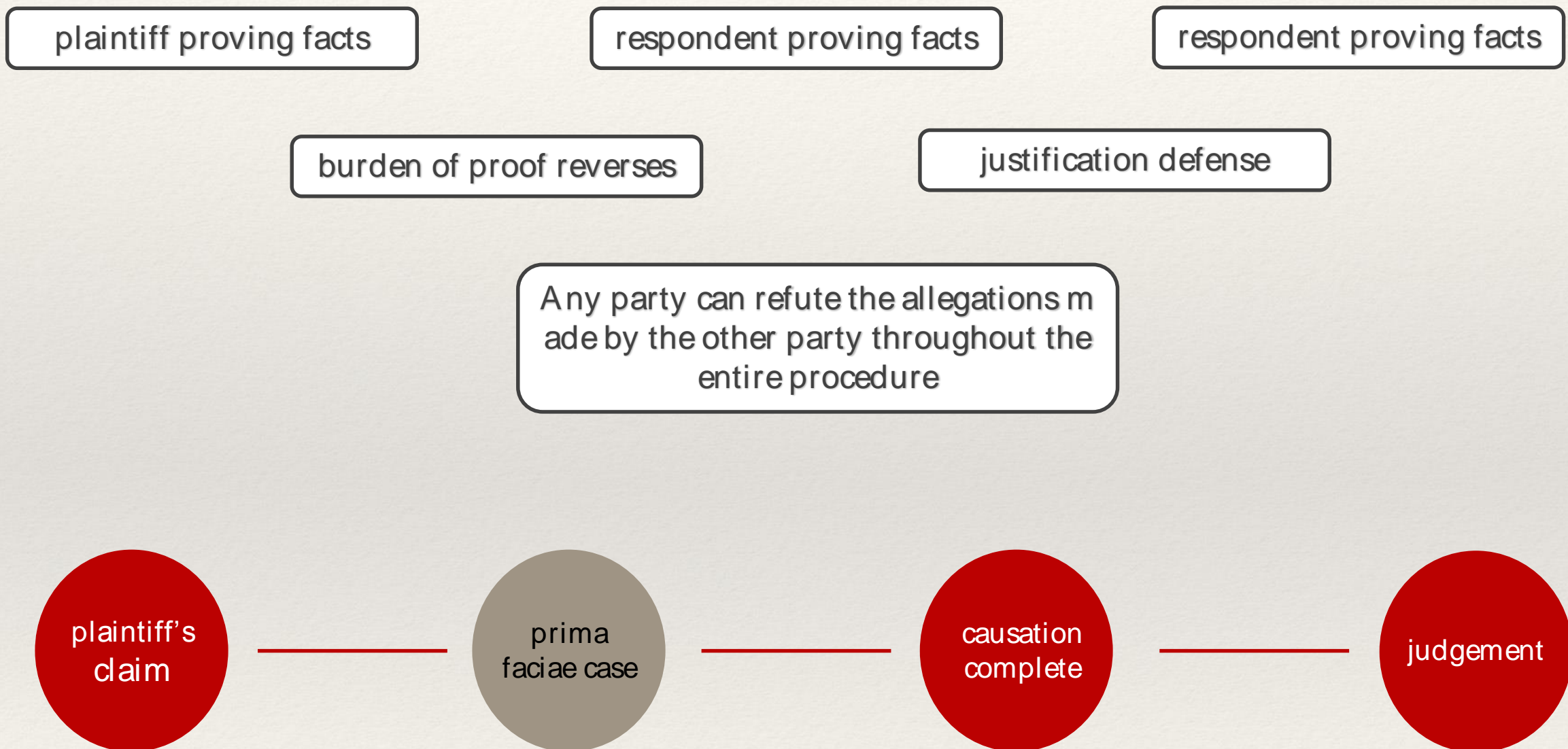
Prima faciae case

- The reversal of the burden of proof does not mean that plaintiffs are exempt from convincing the court that they have a case. When establishing a *prima facie* case, they convince the court of the likeliness or probability that they suffered discrimination.
- Bias and prejudice need to be ‘factored in’ to the process for the benefit of those who usually suffer it
- Art 8 RED, Art 10 EED
 - 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.

Justification defense

- The burden of proof shifts before causation is complete. It moves to the respondent. He will not be held liable if proving that discrimination played no part in the treatment or effect complained of.
- If the respondent fails to establish that the treatment arose from objective reasons unrelated to discrimination, he will be liable for a breach of non-discrimination law.
- This is the only interpretation compatible with Section 611a(1) of the German Civil Code the EU BoP provision was modeled on. This provision set out that “where an employee substantiates by prima faciae evidence facts from which it may be presumed that there has been less favorable treatment on grounds of sex, it shall be for the employer to prove that this treatment is justified by *objective reasons other than sex*”.
- Justification defense is limited in certain cases.

The ex culpatio based scheme known from torts



The Achilles heel: the comparator I.

- Talks to causality: harm - conduct - protected ground

“Discrimination is not a response to a given individual’s character or behavior, but rather a repeated and unthinking reaction to any person who possesses a particular trait”. What follows from this is that “a person is badly treated because he is, involuntarily, a member of a group” disliked by the respondent or by society at large. (Laurence Lustgarten)

- Difficult to identify

The Achilles heel: the comparator II.

- ❖ lack of clear definition of grounds - direct discrimination may be conceived as indirect (e.g. minority language)
- ❖ real, assumed and associated ground
- ❖ hypothetical - substantive ideal of human dignity or standard of treatment widely acknowledged (duty of care)
- ❖ homogeneity of groups - Nikoloudi and Maruko (covert direct discrimination)
- ❖ no comparator needed: pregnancy, statement of bias (Feryn, Accept), harassment (Coleman) ...

No guidelines from the CJEU

- The CJEU has clarified the standards of *prima facie* cases (pregnancy) and justification re gender & shaped the justification of age discrimination.
- No standard setting despite domestic courts' requests in *Feryn* & *Accept*.
- Standard setting feasible and beneficial: *Igen v Wong*, UK Court of Appeals.
- Standard setting necessary:
 - imperfect understanding of how the rule applies re *prima facie* cases
 - standard of proof for rebuttal not known for all states, may be lenient in others
 - before EBs the outcome tends to be better for the plaintiff
 - may also be differences whether litigant is an individual or an NGO

The stumbling block: access to information

- ❖ Flagged as a huge issue at domestic level
- ❖ Reinforced by referrals: Kelly & Meister, Accept & Feryn
 - ❖ lack of transparency of the employer's practices (Danfoss: prevents any form of supervision by the national courts): total or partial lack of information
 - ❖ equal pay v access (to employment) cases: worker not yet 'in'
 - ❖ respondents cultivate the reluctance of courts to make orders of disclosure if that could lead to disclosing confidential data of identifiable individuals who are not party to the proceedings.

Need to ensure access to information

- ❖ Two ways available
 - ❖ CJEU analyses and resolves mismatches between data protection and right to equal treatment provisions once a thoughtful referral comes before it
 - ❖ legal tools adopted at EU level to facilitate access to information, e.g. through questionnaire procedures