


EQUINET LEGAL TRAINING
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Evidence in discrimination cases and the place of situation testing

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Shift in the burden of proof - Objectives

- Ensuring that victims are not deprived of effective means of enforcing the principle of equal treatment
- Ensuring adequate levels of enforcement across all Member states.

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Shift in the burden of proof – *ratione legis*

- Assumption that it is often in practice very difficult or impossible for the victim to prove discrimination
- Principle of effectiveness
- Burden is shared between the parties.

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Shift in the burden of proof – EU provisions

“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”.

(Article 8 of the Racial Equality Directive and Article 10 of the Employment Equality Directive)

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Shift in the burden of proof – Transposition

- **Latvia**, only in employment
- **Romania**, problems of interpretation and draft law pending
- **Former Yugoslav Republic of Macedonia** - partial
- **Turkey and Iceland** – limited cases

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Burden of proof – EU rulings

- **Feryn (C-54/07)**
“[statements] by which an employer publicly lets it be known that, under its recruitment policy, it will not recruit any employees of a certain ethnic or racial origin may constitute facts of such a nature as to give rise to a presumption of a discriminatory recruitment policy, leading to a shift of the burden of proof.”
- **Meister (C-415/10)**
“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.”

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Burden of proof – EU rulings (II)

- **Belov (C-394/11)**

“Do the facts that only in the two parts of the city known as Roma districts are electricity meters attached to electricity poles in the streets at a height at which consumers cannot read them, with known exceptions in some parts of those two urban districts, and in all other districts of the city the electricity meters are placed at a different height (up to 1.7 m) at which they can be read, usually in the consumer’s home, on the outside of the building or on surrounding fences, lead to a shift in the burden of proof to the defendant?”

- **ACCEPT (Becali) (C-81/12)**

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Collecting evidence

- Oral evidence
- Questionnaires and written information
- Audio or video recording
- Statistics
- Expert opinions
- Inferences drawn from circumstantial evidence (e.g. chronological order of relevant events, the foreign physical appearance, foreign surname)
- Situation testing

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Oral evidence

- Difficult to document (word against word)
- Testimonies in courts, witnesses, written statement
- In combination with other types of evidence

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Questionnaires and written information

- To victims before embarking on a formal complaint
- Opportunity to gather the necessary evidence and to prepare (exploratory questions) such as
 - a) Comparator in case of direct discrimination
 - b) Financial costs or burden in case of reasonable accommodation
 - c) Statistical evidence to prove direct or indirect discrimination
- Inference can be drawn from failure to deal with questionnaire or evasive/equivocal reply
- Examples from the UK/IE and SE

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Audio or video recording

- Highly effective
- Uncertainty about admissibility and privacy issues
- Practice in SK and NL (court and equality body)

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Statistics

“The appreciation of the facts from which it may be inferred that there has been direct or indirect discrimination is a matter for national judicial or other competent bodies, in accordance with rules of national law or practice. Such rules may provide in particular for indirect discrimination to be established by any means including on the basis of statistical evidence.”

Recital 15 of the Racial Equality Directive and the Employment Equality Directive

- Lack of data available and difficult for some grounds such as sexual orientation
- Various sources (macro-level datasets such as census; research; internal monitoring data; etc.)

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Expert opinions

- External neutral assessment
- Example from NL

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Circumstantial evidence

- Circumstantial evidence pointing to discrimination through a series of inferences
- Can add weight to discrimination claim
 - a) Suspicious timing (chronology of events)
 - b) Differences in treatment on the grounds of name, appearance, etc.
 - c) Pretextual reasons to treat differently
- FR example (court of cassation)

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Conclusions

- Combination of different types of evidence
- Role of equality bodies to ensure admissibility/effectiveness
- Facilitate collection and admissibility of evidence

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How to present a Discrimination Claim – Handbook on seeking remedies under the EU Non-discrimination Directives



Measuring Discrimination: Data Collection and EU Equality Law



Handbook on situation testing

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European Network of Experts in the field of non-discrimination

www.non-discrimination.net

Thank you!

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