THE BURDEN OF PROOF IN ANTI-DISCRIMINATION PROCEEDINGS. A FOCUS ON BELGIUM, FRANCE AND IRELAND

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The Burden of Proof in Anti-discrimination Proceedings. A Focus on Belgium, France and Ireland[*]

Julie Ringelheim[**]

Abstract

This article aims to clarify the meaning and operation of the rules governing proof of discrimination under EU law, in particular the rule of the 'sharing of the burden of proof'. In addition to the text of the antidiscrimination directives, it looks at the guidelines provided by the Court of Justice of the European Union and at the application of these rules at the domestic level, focusing on three Member States: Belgium, France and Ireland.

Section 1 describes the basic operation of the burden of proof provision, clarifies the respective obligations it entails for claimants and respondents and highlights differences resulting from whether direct or indirect discrimination is at stake. Section 2 considers in more detail the means of proof that can be used to establish discrimination, with particular emphasis on statistics and situation testing. Section examines the issue of complainants' access to information held by the alleged discriminator and Section 4 offers conclusions.

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Introduction

The difficulty of proving discrimination in court is a longstanding concern in anti-discrimination law. The causes of the problem are well known: in all jurisdictions, in civil litigation, it falls on the claimants to establish the facts they allege. In many cases, however, discrimination leaves no material traces. Furthermore, when documents that could constitute evidence of the discriminatory character of a measure do exist, they are often in the hands of the discriminator. For instance, where an employer does not want to hire a 50-year-old job applicant because of her age or where a landlord refuses to let his apartment to a black applicant because of his skin colour, it may be easy for them to mask their real motivation and put forward some alternative, acceptable, reason for their decision. Or if workers with a certain ethnic background are paid less than their fellow employees for work of equal value, various pieces of information and documents that are internal to the company will usually be necessary to establish that the pay system in place unfairly disadvantages workers of a certain ethnic origin. The standard rule on the burden of proof thus ignores the inequality between the parties in accessing the proof that typically characterises discrimination cases. As a result, it jeopardises the effectiveness of the protection against discrimination: ever since discrimination has been prohibited by law, lack of proof has been a recurrent cause of failures of legal action.

This problem was recognised by the Court of Justice of the European Union (CJEU) in the late 1980s in its case law on sex discrimination. In *Danfoss*, the Court acknowledged the necessity of adjusting national rules on the burden of proof in order to ensure the effective implementation of the principle of equality.[1] This was further elaborated in *Enderby*, where the Court articulated the principle of a shift in the burden of proof once certain conditions are met: '[w]here 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.'[2] This principle was justified by the imperative of the effectiveness of the protection against discrimination: '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'.[3] The requirement of an adaptation of the burden of proof in national law was first codified in Article 4 of Council Directive 97/80/EC of 15 December 1997 on the burden of proof in sex discrimination cases (the Burden of Proof Directive). A similar provision was then inserted in the Racial Equality and Employment Equality Directives adopted in 2000,[4] as well as in the 2004 Gender Equality in Access to Goods and Services Directive[5] and the 2006 Recast Gender Directive.[6] The wording of this provision is identical in all these instruments and reads as follows:

> 'Member states shall take such measure 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

[1] Judgment of 17 October 1989, *Handels- og Kontorfunktionærernes Forbund i Danmark* v. *Dansk Arbejdsgiverforening (acting on behalf of Danfoss)*, C-109/88, ECLI:EU:C:1989:383, para. 14.
[2] Judgment of 27 October 1993, *Enderby* v. *Frenchay Health Authority and Secretary of State of Health*, C-127/92, ECLI:EU:C:1993:859, para. 18.
[3] *Enderby*, para 18; see also para. 14.
[4] Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin (*Racial Equality Directive*), Article 8; Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation (*Employment Equality Directive*), Article 13.
[5] 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 (*Gender Equality in Access to Goods and Services Directive*), Article 9.
[6] 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) (*Recast Gender Directive*), Article 19. Note that this directive repeals the Burden of Proof Directive.

respondent to prove that there has been no breach of the principle of equal treatment.'

The provision specifies that this rule will not apply to criminal procedures. Member States need not apply it to proceedings in which it is for the court or competent body to investigate the facts of the case.[7] Moreover, Member States are not prevented from introducing rules of evidence that are more favourable to claimants.

The principle that in discrimination litigation, once a claimant establishes a prima facie case of discrimination, the onus should shift to the respondent, who is responsible for proving that no discrimination has occurred, is now firmly anchored in EU anti-discrimination law. As noted in the preambles to both the Racial Equality Directive and the Employment Equality Directive, the rationale for this requirement is to ensure the effective application of the principle of equal treatment.[8] All Member States have had to insert this rule in their national procedural law. It has also been imported by the European Court of Human Rights in its case law on discrimination.[9] Yet, it appears from the various reports on the implementation of the anti-discrimination directives that the application of the burden of proof provision remains a major source of difficulty.[10] In most countries, the problem seems to result not so much from the way in which the rule has been transposed in domestic legislation, as from its implementation in court proceedings.[11] This rule continues to be misunderstood by national judges and uncertainties persist as to how it should be applied. In practice, proving discrimination in legal proceedings remains a significant obstacle for claimants across Member States.

This article aims to clarify the meaning and operation of the special rules governing proof of discrimination under EU law and discusses some of the difficulties that they raise. In addition to the text of the directives, it looks at the guidelines provided by the CJEU and at the application of these rules at the domestic level, focusing on three Member States: Belgium, France and Ireland. Section 1 describes the basic operation of the burden of proof provision, clarifies the respective obligations it entails for claimants and respondents and highlights differences resulting from whether direct or indirect discrimination is at stake. Section 2 considers in more detail the means of proof that can be used to establish

[7] In France and Belgium, the anti-discrimination legislation provides that the special rule concerning the burden of proof is applicable to administrative law proceedings in addition to civil and social law proceedings.
[8] Racial Equality Directive, Recital 21 and the Employment Equality Directive, Recital 31.
[9] See Henrard, K. (2018), 'Sharing of the Burden of Proof in Cases on Racial Discrimination: Concepts, General Trends and Challenges before the ECtHR', in Bribosia, E. and Rorive, I. (eds), *Human Rights Tectonics. Global Dynamics of Integration and Fragmentation*, Intersentia, Cambridge, pp. 271-301.
[10] See Foubert, P. (2017), *The enforcement of the principle of equal pay for equal work or work of equal value. A legal analysis of the situation in the EU Member States, Iceland, Liechtenstein and Norway*, European Network of Legal Experts in Gender Equality and Non-discrimination, European Commission, pp. 50-52; Farkas, L. and O'Farrell, O. (2014), *Reversing the burden of proof: Practical Dilemmas at the European and national level*, European Network of Legal Experts in the Non-discrimination field, European Commission, December, pp. 59-71; EU Fundamental Rights Agency (FRA) (2012), *Access to justice in cases of discrimination in the EU. Steps to further equality*, Luxembourg: Publications Office of the European Union, pp. 43-44; Milieu (2011), *Comparative study on access to justice in gender equality and anti-discrimination law*, *Synthesis Report*, pp. 23-26.
[11] Farkas, L. and O'Farrell, O. (2014), *Reversing the burden of proof: Practical Dilemmas at the European and national level*, p. 74. For instance, the French Court of Cassation disregarded the national provision on the burden of proof in a case where discrimination based on illness was alleged. The complainant had been dismissed by her employer following repeated absences from work due to illness. Her employer alleged that his decision was not motivated by her illness but by the disturbance that her absences had caused within the company, obliging him to recruit a new employee. This latter allegation however was proved to be materially false. This should have been sufficient to establish a presumption that the dismissal was directly based on the employee's illness. Yet, the Court held that additional elements had to be adduced by the complainant to demonstrate the causal link between her dismissal and her illness (Court of Cassation, No. 14-10.084, 27 January 2016. See Mouly, J. (2016) 'Licenciement pour maladie sans remplacement définitif du salarié: pas de discrimination automatique', *Droit social*, No. 4, April 2016, pp. 384-386). Although illness as such is not a prohibited ground of discrimination under EU law, it has been recognised by the CJEU that where an illness meets certain characteristics, it can be covered by the concept of 'disability' within the meaning of Directive 2000/78/EC (judgment of 11 April 2013, *HK Danmark (acting on behalf of Jette Ring)* v. *Dansk almennyttigt Boligselskab*, C-335/11, ECLI:EU:C:2013:222, para. 41. See also judgment of 18 January 2018, *Carlos Enrique Ruiz Conejero* v. *Ferroser Servicios Auxiliares SA, Ministerio Fiscal*, C-270/16, ECLI:EU:C:2018:17, para. 28-30).

discrimination, with particular emphasis on statistics and situation testing. Section 3 examines the issue of complainants' access to information held by the alleged discriminator and Section 4 offers conclusions.

Section 1. The division of the burden of proof between the complainant and the respondent

The notion of a shift in the burden of proof does not mean that complainants in discrimination cases are exempt from providing evidence of their claims. However, their task is alleviated: as stated in the anti-discrimination directives, what is required from them is, to 'establish facts from which it may be *presumed* that there has been direct or indirect discrimination'. It is only when this condition is met that the burden of proof moves to the respondent, who may rebut this presumption by proving 'that there has been no breach of the principle of equal treatment.' EU anti-discrimination law thus provides a *sharing* of the burden of proof: rather than resting exclusively on the complainant, the burden is divided between both parties.[12]

The application of the rule entails a two-stage test.[13] The court must first examine whether the complainant is able to establish a prima facie case of discrimination. If it finds that this is the case, it must, in a second stage, ascertain whether or not the elements provided by the respondent allow a reversal of the presumption. If not, the court will arrive at a finding of discrimination. In practice, as is apparent from national case law, both the question of what amounts to a prima facie case of discrimination and that of how a presumption of discrimination can be rebutted continue to provoke debate.[14]

Establishing a presumption of discrimination

To establish a prima facie case of discrimination, complainants must adduce facts that are adequate and sufficient to raise a suspicion of discrimination. They have to 'convince the court of the likeliness or probability that they suffered discrimination.'[15] As the Court of Appeal of England and Wales indicated in *Igen* v. *Wong*, the claimant has 'to prove on the balance of probabilities facts from which the tribunal could conclude, in the absence of an adequate explanation, that the employer has committed an act of discrimination against the claimant […]'.[16] In a similar vein, the Irish Labour Court held in *Mitchell* v. *Southern Health Board* that 'a claimant must prove, on the balance of probabilities, the primary facts on which they rely in seeking to raise a presumption of unlawful discrimination.'[17] In a subsequent case, it specified that '[a]t the initial stage the complainant is merely seeking to establish a prima facie case. Hence, it is not necessary to establish that the conclusion of discrimination is the only, or indeed the most likely, explanation which can be drawn from the proved facts. It is sufficient that the presumption is within the range of inferences which can reasonably be drawn from those facts.'[18]

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[12] On the concept of burden of proof and the difference between the burden of production of evidence and the burden of persuasion, see Kokott, J. (1998), *The Burden of Proof in Comparative and International Human Rights Law*, Kluwer, The Hague, London, Boston.
[13] See Palmer, F. (2006), 'Re-dressing the Balance of Power in Discrimination Cases: The Shift in the Burden of Proof', *European Anti-Discrimination Law Review* (4) pp. 23-29.
[14] Henrard, K. (2019), 'The Effective Protection against Discrimination and the Burden of Proof. Evaluating the CJEU's Guidance Through the Lens of Race', in Belavusau U. and Henrard K. (eds), *EU Anti-Discrimination Law Beyond Gender*, Hart, Oxford, Portland, p. 101.
[15] Farkas, L. and O'Farrell, O. (2014), *Reversing the burden of proof: Practical Dilemmas at the European and national level*, p. 34. See also Palmer, F. (2006), 'Re-dressing the Balance of Power in Discrimination Cases: The Shift in the Burden of Proof', p. 25.
[16] Court of Appeal of England and Wales, *Igen Ltd (formerly Leeds Careers Guidance) and Others* v. *Wong, Chamberlin* and *Another* v. *Emokpae* and *Webster* v. *Brunel University* (2005) IRLR 258, para. 76. Available at http://www.bailii.org/ew/cases/EWCA/Civ/2005/142.html.
[17] Irish Labour Court, *Mitchell* v. *Southern Health Board*, DEEO11, 15 February 2001, https://www.workplacerelations.ie/en/cases/2001/february/dee011.html.
[18] Irish Labour Court, *McCarthy* v. *Cork City Council*, EDA0821, 16.12.2008, https://www.workplacerelations.ie/en/cases/2008/december/eda0821.html.

The facts that a complainant may rely upon to establish a presumption of discrimination will of course vary from case to case, but they should be of such character as to substantiate the claim that the constitutive elements of discrimination are fulfilled. These constitutive elements depend on what kind of discrimination is alleged.

Direct discrimination is defined in EU law as arising where one person is treated less favourably than another is, has been or would be treated in a comparable situation, on grounds of a protected characteristic.[19] Where complainants allege direct discrimination, they must convince the court of two things: first, that they suffered harm in the form of unfavourable treatment (for instance, they were fired from their job, their application to rent an apartment was rejected or they are paid less than their colleagues for work of equal value); and secondly, that there is a causal relation between this unfavourable treatment and a protected characteristic – in other words that they were disadvantaged *because* of their sex, race or another discrimination ground.[20] In practice, it is often that causal link between the adverse treatment and the protected characteristic that complainants struggle to demonstrate, and it is at this point in particular that sharing of the burden of proof becomes useful. According to Lilla Farkas and Orlagh O'Farrell, the 'key effect of the reversal of the burden of proof is that it alleviates the burden on plaintiffs to show a clear causal link between the protected ground and the harm. Consequently, the burden of proof shifts even if the causation between the protected ground and the harm is only probable or likely.'[21] The question of how this connection is to be proved, however, is the subject of debate. Notably, under the Hungarian anti-discrimination legislation, it is enough for complainants to establish that they have been disadvantaged and that they possess – or are assumed by the perpetrator to possess – a protected characteristic for the causal link between the two to be presumed, thereby triggering the shift of the burden of proof to the respondent.[22] However, this approach is rare: in most Member States, complainants are required to provide facts to substantiate to some extent the causal link between the adverse treatment and the discrimination ground.[23] The Belgian Constitutional Court has held that in order to raise a prima facie case of discrimination, '[it] is not enough for a person to prove that she suffers unfavourable treatment. This person must also prove facts that seem to indicate that this unfavourable treatment was dictated by illicit motives.'[24] In a similar vein, Irish courts have stated that membership of a protected group and evidence of adverse treatment is not sufficient to shift the burden of proof in direct discrimination cases. Complainants must also produce evidence of a connection between the treatment complained of and the prohibited ground invoked.[25] However, this does not hold in relation to the dismissal of pregnant women: 'the special protection afforded to pregnant woman against dismissal in European law requires that where a pregnant woman is dismissed the employer must bear the burden of proving that the dismissal was grounded on exceptional circumstances unrelated to pregnancy or maternity. Hence, in every case in which pregnancy related dismissal is in issue, the factual combination of the dismissal

[19] See e.g. Racial Equality Directive, Article 2(a) and Employment Equality Directive, Article 2(1)(a).
[20] Farkas, L. and O'Farrell, O. (2014), *Reversing the burden of proof: Practical Dilemmas at the European and national level*, pp. 38-52. See also Henrard, K. (2019), 'The Effective Protection against Discrimination and the Burden of Proof. Evaluating the CJEU's Guidance Through the Lens of Race'.
[21] Farkas, L. and O'Farrell, O. (2014), *Reversing the burden of proof: Practical Dilemmas at the European and national level*, p. 47.
[22] Hungary, Act CXXV of 2003 on Equal Treatment and the Promotion of Equal Opportunities, Article 19. See Kadar, A. (2018), *Country Report - Non Discrimination - Hungary*, European Network of Legal Experts on Gender Equality and Non-Discrimination, p. 112.
[23] Farkas, L. and O'Farrell, O. (2014), *Reversing the burden of proof: Practical Dilemmas at the European and national level*, p. 75. In practice, the Hungarian Supreme Court has interpreted the Hungarian legislation as requiring complainants to prove a causal link between the protected ground invoked and the disadvantage suffered, despite the fact that this condition does not appear in the text of the law. See Decision No Kfv.II.37.053/2010/8 of the Supreme Court.
[24] Belgian Constitutional Court, Decision No. 17/2009 of 12 February 2009, B. 93.3, available at https://www.const-court.be/public/f/2009/2009-017f.pdf. On the case law of Belgian lower courts in this respect, see Sine, F. and Verhelst, I. (2017), 'Tien jaar antidiscriminatiewetgeving voor de Belgische arbeidsgerechten: wat maakt het verschil?', *Orientatie* 2017/5, pp. 11-12.
[25] Irish Labour Court, *Melbury Developments Ltd.* v. *Valpeters*, EDA 0917, 16.09.2009, https://www.workplacerelations.ie/en/cases/2009/september/eda0917.html.

and the woman's pregnancy must, in and of itself, place onus of proving the absence of discrimination firmly on the Respondent.'[26]

The Belgian legislation provides examples of facts that enable a presumption of discrimination. In demonstrating a presumption of direct discrimination, it mentions two types of facts: elements revealing a certain recurrence of unfavourable treatment towards persons sharing a protected characteristic, such as repeated reports of discrimination to the equality body or to an anti-discrimination NGO, and elements revealing that the situation of the claimant is comparable to that of a person who does not present the protected characteristic and was treated better.[27] This latter method, based on the use of a comparator, is a common way to establish prima facie discrimination. In *Brunnhofer*, for instance, the CJEU held that where a female worker proves that the pay she receives from her employer is less than that of a male colleague and that they both perform the same work or work of equal value, she is prima facie the victim of discrimination.[28] However, it may not always be easy for complainants to obtain information about how other workers, housing applicants or goods or service consumers of a different sex, race or other characteristic have been treated. This raises the issue of complainants' access to information, which is examined in Section 3. In any case, the use of a comparison with the treatment afforded to another individual is by no means the only way of showing the probability of a causal link between the respondent's conduct and the prohibited ground. The definition of direct discrimination allows for the use of a hypothetical comparator. Courts have also accepted that a presumption of discrimination can be inferred from other types of facts that raise the suspicion that the adverse treatment was determined by a prohibited ground. Thus, Irish courts have recognised in some cases that this causal link could be inferred from the fact that the respondent's conduct diverged from standard practice in relation to the service in question.[29] In Belgium, in the case of the manager of a fitness centre who was fired the day after he had informed his employer and colleagues by email that his newly born child was disabled, the Leuven Employment Tribunal took account of the temporal proximity of the announcement made by the claimant and his dismissal in establishing a presumption of disability discrimination by association.[30] The French Court of Cassation has stated that proving the existence of discrimination does not necessarily require a comparison of the situation of the complainant to that of other employees: where a tribunal finds that employers took advantage of the fact that their domestic employee was a foreign national and in an irregular situation to disregard her contractual and legal rights, it may legitimately conclude that she was discriminated against based on her origin.[31]

Often, it is through a combination of factors that the likeliness of the connection between the adverse treatment and a protected ground can be shown. The Court of Justice emphasized in the *CHEZ* case that a national court should 'take account of *all the circumstances* surrounding the practice at issue, in order to determine whether there is sufficient evidence for a finding that the facts from which it may be presumed that there

[26] Irish Labour Court, *Wrights of Howth Seafood Bars Limited* v. *Murat,* EDA1728, 26.10.2017, https://www.workplacerelations.ie/en/cases/2017/october/eda1728.html.
[27] Belgium, Federal Act pertaining to fighting certain forms of discrimination of 10 May 2007 (the General Anti-Discrimination Federal Act), Article 28(2); Act of 30 July 1981 criminalising certain acts inspired by racism or xenophobia as amended by the 10 May 2007 Federal Act (the Racial Equality Federal Act), Article 30(2) and Federal Act pertaining to fighting against discrimination between women and men of 10 May 2007 (the Federal Gender Act), Article 33(2).
[28] Judgment of 26 June 2001, *Susanna Brunnhofer* v. *Bank der österreichischen Postsparkassse AG*, C-381/99, para. 58.
[29] For instance, in *A Nigerian National* v. *A Financial Institution,* a Nigerian citizen complained that his application for a term loan was refused although he met the applicable criteria. This raised an inference of discrimination on the race ground that was not rebutted by any evidence presented by the respondent. See DEC-S2005-114, https://www.workplacerelations.ie/en/cases/2005/august/dec-s2005-114-full-case-report.html.
[30] Leuven Employment Tribunal, 12 December 2013, AR 12/1064/1.
[31] Court of Cassation, Social Chamber, No. 10-20.765, 3 November 2011, https://www.legifrance.gouv.fr/affichJuriJudi.do?oldAction=rechJuriJudi&idTexte=JURITEXT000024764368&fastReqId=1647684556&fastPos=1.

has been direct discrimination on grounds of ethnic origin have been established'.[32] The case at stake concerned the practice of an electricity supplier of placing electricity meters for all consumers in a district inhabited mainly by persons of Roma origin at a height of between 6 and 7 metres, whereas in the other districts they were placed at a height of 1.7 metres. The Court indicated to the referring court some of the elements that it could take into account when assessing whether a presumption of discrimination could be established, namely: that it was common knowledge that the company had established the practice at issue only in urban districts known to be inhabited mainly by Roma; statements made by the company suggesting ethnic stereotypes or prejudices against Roma; the fact that this company, notwithstanding requests to this effect, had failed to adduce evidence of the alleged damage, meter tampering and unlawful connections as well as the compulsory, widespread and lasting nature of the practice.[33] The Irish case *McGreal* v. *Cluid Housing*[34] provides another example of reasoning based on a combination of factors. The Irish Equality Tribunal found that the eviction of an older tenant without giving reasons for the decision and inviting the complainant to respond amounted to direct discrimination based on age. The equality officer had regard to the fact that the procedure adopted was 'extraordinary' and at variance with standard practice in social housing. Moreover, it followed a complaint of elder abuse made by the complainant and other tenants. For those reasons, the tribunal considered that it was for the respondent to demonstrate that their actions were untainted by discrimination on the grounds of age. Similarly, the French Court of Cassation has ruled that complainants satisfy their evidential burden where they establish facts which, *taken as a whole*, lead to a presumption of discrimination.[35]

Indirect discrimination is defined as resulting from an apparently neutral provision, criterion, or practice which would put persons possessing a protected characteristic at a particular disadvantage compared with other persons.[36] Thus, in order to establish a prima facie case of indirect discrimination, complainants need to establish that the contested measure imposes a disadvantage and that this disadvantage – despite the fact that the measure is not directly based on a prohibited ground – is likely to affect *in particular* persons possessing a protected characteristic compared to other persons. As illustrated by the case law of the CJEU on sex discrimination, one important way of demonstrating this particular disadvantage is to produce statistics showing that the provision, criterion or practice at stake has an adverse impact on a significantly higher number of members of a protected group than members of other groups. For instance, the provision of significant statistics disclosing 'an appreciable difference in pay between two jobs of equal value, one of which is carried out almost exclusively by women and the other predominantly by men'[37] permits the establishment of prima facie discrimination, or where a collective wage agreement allows employers to exclude part-time employees from the payment of a severance grant on termination of their employment, showing that a considerably higher percentage of women than men work part time, permits a presumption of indirect discrimination based on sex.[38]

When the notion of indirect discrimination was first codified in the 1997 Burden of Proof Directive, it was actually defined by reference to a statistical criterion: it was described as resulting from 'an apparently neutral provision, criterion or practice [that] disadvantages a *substantially higher proportion* of members of one sex […]'.[39] However, a different

[32] Judgment of 16 July 2015, *CHEZ Razpredelenie Bulgaria AD*, C-83/14, European Court of Justice (Grand Chamber), ECLI:EU:C:2015:48, para. 80, (emphasis added).
[33] *CHEZ Razpredelenie Bulgaria AD*, paras. 81-84.
[34] Irish Equality Tribunal, DEC-S2011-004, 20.01.2011, https://www.workplacerelations.ie/en/cases/2011/january/dec-s2011-004-full-case-report.html.
[35] Court of Cassation, Social Chamber, No.17-18190, 19 December 2018, available at: https://www.legifrance.gouv.fr/affichJuriJudi.do?oldAction=rechJuriJudi&idTexte=JURITEXT000037851016.
[36] See e.g. Racial Equality Directive, Article 2(b) and Employment Equality Directive, Article 2(2)(b).
[37] *Enderby*, para. 19.
[38] Judgment of 27 June 1990, *Kowalska* v. *Freie und Hansestadt Hamburg*, C-33/89, ECLI:EU:C:1990:265, para. 16.
[39] Burden of Proof Directive, Article 2(2), (emphasis added).

definition was inserted in the Racial Equality and Employment Equality Directives adopted in 2000: this definition centres on the criterion of 'particular disadvantage' (see above) and has been extended to the field of sex discrimination, replacing the previous one.[40] This does not mean that statistics can no longer be used as a means of proof. Statistical data remain perfectly relevant to show the 'particular disadvantage' caused by an apparently neutral measure (see Section 2), but the current definition allows the demonstration of this particular disadvantage through other means, in particular, by showing that the measure, by its very nature, in light of facts that are common knowledge, has an adverse impact mainly or especially on members of a protected group. The Belgian anti-discrimination legislation specifies that the facts that would allow prima facie indirect discrimination to be established include not only statistics relating to the situation of a group to which the complainant belongs, but also facts that are common knowledge, as well as the use of a distinction criterion that is intrinsically suspect.[41] This was also acknowledged by Irish courts. For instance, in *Noonan Services* v*. A Worker*, the Irish Labour Court held that a requirement to have competence in English is clearly likely to place persons whose native language is other than English at a disadvantage relative to English native speakers. Hence a requirement of competence in English was deemed to constitute prima facie indirect discrimination.[42] In the foundational case of *NBK Designs* v*. Inoue*, the Irish Labour Court insisted that statistical data are not always necessary to establish indirect discrimination: '[i]t would be alien to the ethos of this Court to oblige parties to undertake the inconvenience and expense involved in producing elaborate statistical evidence to prove matters which are obvious to the members of the Court by drawing on their own knowledge and experience.'[43] In the case at stake, it found that a requirement to work full time had an obviously disproportionate impact on women.[44] Nevertheless, in *Stokes*, the Irish Supreme Court in effect ruled that statistical evidence was *required* to establish prima facie indirect discrimination.[45] This, however, is not in conformity with the EU definition of indirect discrimination.[46]

Rebutting the presumption

Once a presumption of discrimination has been established, the onus shifts to the respondent, who is responsible for demonstrating that no discrimination has occurred. There are two ways in which the respondent can rebut this presumption. First, they can try to invalidate the elements established prima facie by the complainant, by proving that the latter did not in fact receive unfavourable treatment or that the treatment they complained of was not determined by a protected ground (in direct discrimination cases), or that the contested measure did not impose any particular disadvantage on a protected group (in indirect discrimination cases). The second way in which a respondent can

[40] Equality in Access to Goods and Services Directive, Article 2(b) and Recast Gender Directive, Article 2(1)(b).
[41] Belgium, General Anti-Discrimination Federal Act, Article 28(3); Racial Equality Federal Act, Article 30(3); Federal Gender Act, Article 33(3). The legislation also mentions 'statistical material revealing an unfavourable treatment'.
[42] Irish Labour Court, *Noonan Services* v*. A Worker*, EDA1126, 29.07.2011, https://www.workplacerelations.ie/en/cases/2011/july/eda1126.html.
[43] Irish Labour Court, *NBK Designs* v. *Inoue,* EED0212, 25.11.2002, https://www.workplacerelations.ie/en/cases/2002/november/eed0212.html.
[44] See also Irish Equality Tribunal, *McDonagh* v. *Navan Hire Limited*, DEC-S2004-017, 06.02.2004, https://www.workplacerelations.ie/en/cases/2004/february/dec-s2004-017-full-case-report.html (on indirect discrimination against Travellers).
[45] Irish Supreme Court, *Stokes v Christian Brothers High School, Clonmel*, [2015] IESC 13, 24.02.2015, http://www.courts.ie/Judgments.nsf/597645521f07ac9a80256ef30048ca52/a09897a48211897980257df6005a3c31?OpenDocument. The Court overturned an earlier decision of the Equality Tribunal that held that a school admission policy that prioritised former pupils' children constituted indirect discrimination against Travellers. It deemed that the evidence presented by the complainant was not adequate to demonstrate that the school's policy placed Travellers at a particular disadvantage.
[46] Since then, the wording of national indirect discrimination provisions was amended by the Equality (Miscellaneous Provisions) Act 2015: in line with EU directives, the word '*puts*' a person at a particular disadvantage was replaced with '*would put*' persons at a particular disadvantage. This change militates against a shift towards 'requiring' statistical evidence. See O'Farrell, O. and Walsh J. (2018) *Country Report: Non Discrimination. Ireland* - 2018, European Network of Legal Experts on Gender Equality and Non-Discrimination, p. 37.

demonstrate the absence of discrimination is by showing that the contested measure rests on a legitimate justification under EU law. Where indirect discrimination is at stake, the contested provision, criterion or practice will not be deemed discriminatory if the respondent proves that, despite the particular disadvantage it entails (or could potentially entail) for persons belonging to a protected group, it 'is objectively justified by a legitimate aim' and that 'the means of achieving that aim are appropriate and necessary.'[47] Where a prima facie case of direct discrimination is at issue, proving that the measure is justified will generally be more difficult for the respondent as anti-discrimination directives only admit a limited range of possible justifications, which vary depending on the discrimination ground concerned, with sex, race and ethnic origin enjoying the highest level of protection.

Section 2. Providing evidence of discrimination: statistics, situation testing and other means of proof

Determining what means of evidence can be used in discrimination proceedings is in principle a matter left to domestic authorities. Both the Racial Equality and Employment Equality Directives provide in their preambles that 'the appreciation of the facts from which it may be presumed that there has been direct or indirect discrimination remains a matter for the relevant national body in accordance with national law or practice.'[48] Commonly accepted means of evidence, such as, written documents, witness statements and audio and video recordings (i) are of course used in litigation relating to discrimination but, given the specificities of discrimination, this type of evidence is often not available to alleged victims of discrimination. Accordingly, particular evidentiary tools have been developed to help complainants establish a prima facie case. These include statistics (ii) and situation testing (iii). Additionally, the special issue of public declarations revealing discriminatory predisposition in contexts where no victim of discrimination has made themselves known deserves attention, as it was at the centre of two cases brought before the CJEU, *Feryn* and *Accept* (iv).

(i) Ordinary means of proof

Commonly accepted means of proof include written documents, witness statements, and audio or video recordings.[49] One issue raised by audio and video recordings is whether recordings that were made secretly by complainants, without the respondent's knowledge or consent, can be admitted. This has been accepted in some cases relating to discrimination in Ireland[50] and Belgium.[51] In France, while the production of a phone conversation recorded in such conditions has been admitted in criminal proceedings,[52] the social chamber of the Court of Cassation has held that the recording of a private phone conversation made without the knowledge of the person being recorded is an unfair method that cannot be admitted as means of proof, although it found that messages left on an answering machine are admissible.[53] Nonetheless, in May 2019, in a harassment case, the Toulouse Court of Appeal ruled that an audio recording made secretly by the complainant

[47] See the definition of indirect discrimination, e.g. the Racial Equality Directive, Article 2(b) and the Employment Equality Directive, Article 2(2)(b).
[48] Racial Equality Directive and Employment Equality Directive, Recital 15. See also the Recast Gender Directive, Recital 30.
[49] Farkas, L. and O'Farrell, O. (2014), *Reversing the burden of proof: Practical Dilemmas at the European and national level*, p. 36.
[50] See e.g. *Laurentiu* v. *The Central Hotel,* DEC-E2010-147, https://www.workplacerelations.ie/en/cases/2010/august/dec-e2010-147-full-case-report.html and *McDonagh v McHale*, DEC-S2011-025, 30.06.2011, https://www.workplacerelations.ie/en/cases/2011/june/dec-s2011-025-full-case-report.html.
[51] Bruges Labour Tribunal, 10 December 2013, *Centrum voor gelijkheid van kansen en voor racismebestrijding and B.D. c. V.H.K. and B.V.B.A.*, RG No. 12/25521/A and 12/2596/A, https://www.unia.be/fr/jurisprudence-alternatives/jurisprudence/tribunal-du-travail-de-bruges-10-decembre-2013.
[52] Court of Cassation, Criminal Chamber, Decision No. 04-87354, 7 June 2005.
[53] Court of Cassation, Social Chamber, 6 February 2013, No. 11 23738, https://www.legifrance.gouv.fr/affichJuriJudi.do?oldAction=rechJuriJudi&idTexte=JURITEXT000027052467&fastReqId=1477888016&fastPos=1.

was admissible considering that it was necessary to the exercise of the claimant's 'right to proof' (*droit à la preuve*) and that the restriction of the respondent's privacy was proportionate to the aim pursued.[54]

(ii) *Statistics*

As already noted, statistical evidence is especially used in the context of indirect discrimination cases in order to show that the contested provision, criterion or practice entails a particular disadvantage for persons belonging to a protected group. Recital 15 of the Racial and Employment Equality Directives specifies that national rules on evidence 'may provide, in particular, for indirect discrimination to be established by any means including on the basis of statistical evidence.' Both the Irish[55] and Belgian[56] anti-discrimination legislation explicitly provides that statistics are admissible as means of proof. In France, the admissibility of statistics as means of evidence has been recognised by the Court of Cassation[57] and by the Council of State.[58]

Statistics may also be relevant as means of proof of direct discrimination. Statistical data showing a pattern of discrimination by the respondent may contribute to a presumption of direct discrimination where they corroborate and reinforce other evidence adduced by the complainant. For instance, where a complainant alleges discrimination in hiring based on his ethnic origin, statistical data showing that the employer, over a significant period of time, has recruited no workers of the same origin – or very few – can contribute to the creation of a presumption of direct discrimination.[59] In a landmark case concerning allegations of ethnic profiling in police checks, the French Court of Cassation held that research findings showing that discriminatory identity checks carried out by French police on persons belonging to certain ethnic minorities are especially frequent can constitute a contextual element which, combined with witness reports, may lead to a shift in the burden of proof.[60]

In order to be conclusive, statistics must meet certain conditions. In *Enderby*, in the context of indirect discrimination, the CJEU noted that '[i]t is for the national court to assess whether it may take into account those statistics, that is to say, whether they cover enough individuals, whether they illustrate purely fortuitous or short-term phenomena, and whether, in general, they appear to be significant.'[61] Ascertaining whether the statistical data adduced by a complainant are adequate to establish the alleged detrimental effect of the contested measure on a protected group may raise difficult methodological questions, such as how to choose the pool of comparators and what constitutes a statistically significant disparate impact.[62]

In its case law on sex discrimination in employment, the Court has specified that in order to determine whether a national law affects a considerably higher number of women than

[54] Toulouse Court of Appeal, Decision No. 2019/315, RG 17/02966, 10 May 2019. On the concept of the 'right to proof', see Bergeaud, A. (2010), *Le droit à la prevue*, LGDJ, Paris.
[55] Ireland, Equal Status Acts 2000-2018, Section 3(3A); Employment Equality Acts, Sections 22(1A) and 19(4).
[56] Belgium, General Anti-Discrimination Federal Act, Article 28(3); Racial Equality Federal Act, Article 30(3); Federal Gender Act, Article 33(3).
[57] Court of Cassation, Social Chamber, No. K 10-15873, *Airbus*, 15 December 2011 (case of ethnic discrimination in employment); Court of Cassation, First Civil Chamber, Nos 15-24.207 to 15-25.877, 9 November 2016 (liability of the state for racial profiling in police identity checks), https://www.courdecassation.fr/jurisprudence_2/premiere_chambre_civile_568/relatifs_contr_35473.html.
[58] Council of State, No. 16-102017, 16 October 2017 (age discrimination case).
[59] See Court of Cassation, Social Chamber, No. K 10-15873, *Airbus*, 15 December 2011.
[60] Court of Cassation, First Civil Chamber, Decision No. 15-25873, 9 November 2016. In Ireland, complainants in direct discrimination cases occasionally use statistical data in attempting to establish a pattern of discrimination. See *Cleary* v. *UCD,* DEC-E2018-009, 26.03.2018, https://www.workplacerelations.ie/en/cases/2018/march/dec-e2018-009.html (age discrimination case).
[61] *Enderby*, para. 17. See also: CJEU, judgment of 9 February 1999, *Regina* v. *Secretary of State for Employment, ex parte Nicole Seymour-Smith and Laura Perez*, C-167/97, ECLI:EU:C:1999:60, para. 65.
[62] See Schiek, D., Waddington, L., Bell, M. (eds) (2007), *Cases, Materials and Text on National, Supranational and International Non-Discrimination Law*, Hart, Oxford and Portland, pp. 397-422.

men, national courts must take into account all workers subject to this legislation and that the best approach to the comparison of statistics is to compare the proportion of male workers who are affected and who are not affected by this regulation and the same proportions among female workers.[63] A common problem encountered by complainants, however, is that relevant statistical data on the impact of a specific law may be broadly inaccessible or not available at all. This issue was brought to the attention of the Court in *Minoo Schuch-Ghannadan*. The complainant alleged that the Austrian legislation that allowed universities to set different maximum durations of successive fixed-term work contracts for full-time workers and part-time workers entailed indirect discrimination against women. She presented statistical data on the Austrian employment market in general, which showed that a considerably higher proportion of women than men were working part time. However, she was unable to provide specific data on workers employed by Austrian universities subject to the contested legislation as she had no access to such data. The Court acknowledged that the unavailability or inaccessibility of specific statistical data may compromise the achievement of the objective of the special rule on the burden of proof. Considering the need to ensure the effectiveness of this rule, it held that where workers alleging indirect discrimination have no access or little access to statistics or facts on workers specifically concerned by the national legislation at stake, they should be allowed to present general statistical data on the employment market of the Member State concerned.[64]

The production of statistics to substantiate a discrimination claim may moreover be hampered by the fact that certain discrimination grounds – in particular racial and ethnic origin, religion, sexual orientation and disability – constitute sensitive data under personal data protection law. Accordingly, the treatment of such data is restricted and subject to stringent conditions. Moreover, in some countries, such as France and Belgium, there is significant resistance towards collecting data on self-identified race or ethnicity.[65] In France in 2007, the Constitutional Council held that studies relating to diversity of origin, discrimination and integration can be based on 'objective' information – which, in the Council's view, includes an individual's name, geographic origin or national origin – but could not, without infringing Article 1 of the Constitution, which guarantees equality, be based on the processing of data on race or ethnicity.[66] In Ireland by contrast, since 2006, the census has included a question on race and ethnicity.

In practice, statistics are used relatively often by complainants in Ireland, mainly in indirect discrimination cases. In France, statistics based on a comparison between the situation of employees working for the same employer are frequently used in labour law proceedings. One particular statistical method, called the 'panel method', was developed in France in the 1990s to serve as an evidential tool in discrimination cases. Initially created in the context of trade union discrimination, it consisted in comparing the career development of workers employed by the same employer to determine whether one or several given workers have experienced a drop or difference in development compared to the average worker, from the point at which they were elected as a union representative.[67] It was subsequently applied *mutatis mutandis* in cases concerning sex discrimination and, to a lesser extent, in cases on discrimination based on origin.[68] It has been recognised by the

[63] *Seymour-Smith*, para. 59; judgment of 6 December 2007, *Voss* v. *Land Berlin*, C-300/06, ECLI:EU:C:2007:757, para. 40.
[64] Judgment of 3 October 2019, *Minoo Schuch-Ghannadan* v. *Medizinische Universität Wien*, C-274/18, ECLI:EU:C:2019:828, para. 55-57.
[65] Ringelheim, J. and De Schutter, O. (2010), *Ethnic Monitoring. The Processing of Racial and Ethnic Data in Anti-Discrimination Policies: Reconciling the Promotion of Equality with Privacy Rights,* Bruylant, Brussels.
[66] French Constitutional Council, Decision No. 2007-557 DC November 15h 2007, para. 29. See also the explanatory comment of this decision published in the *Cahiers du Conseil constitutionnel* n°23.
[67] Chappe, Vincent-Arnaud (2011), 'La preuve par la comparaison: méthode des panels et droit de la non-discrimination', *Sociologies pratiques*, 23(2), pp. 45-55.
[68] See Paris Court of Appeal, Decision of 31 January 2018 (discrimination of Moroccan workers by the French National Train Company *SNCF*, the 'Chibanis' case).

Court of Cassation and the Council of State as a valid basis on which to infer a presumption of discrimination.[69]

(iii) *Situation testing*

Situation testing consists of a real-life experiment aimed at testing the selection practices of employers or providers of goods or services in order to ascertain whether they are tainted by discrimination. It requires the selection of pairs of individuals who have similar profiles for all the characteristics relevant for accessing the job, goods or service in question, but who differ with regard to one protected ground, such as sex, origin or disability. Each pair responds to the same job vacancy or attempts to access the same goods or service. The experiment is repeated for dozens or hundreds of times. If a significant number of members of the 'experimental group' are treated less favourably than members of the 'control group', this can be interpreted as revealing discrimination: insofar as the two groups have equivalent profiles, the difference in treatment can only be explained by the protected ground.[70] This method was initially developed in the 1960s by British social scientists who sought to document discrimination in specific sectors, such as employment and housing.[71] It was later used as a means of proof of discrimination in litigation. In various countries, including the United Kingdom, the Netherlands, France, Denmark, Finland and Sweden it has been admitted as a valid form of evidence.[72]

There are two ways in which situation testing can serve as means of proof in discrimination litigation. The first possibility is where a complainant – who did not participate in a situation test, but was refused a job he was applying for or goods or a service he was trying to access – invokes, among other evidence, a situation test documenting the discriminatory behaviour of the same employer or goods or service provider. In this case, the findings of the situation test serve to corroborate other evidence adduced by the complainant. The second possibility is where a person who took part in a situation test and was refused a job, goods or a service in this context – or an equality body or an NGO acting on their behalf – sues the 'tested' organisation for discrimination. In this case, the test constitutes the central evidence on which the complaint is based.

In France, the use of situation testing as evidence of discrimination has been admitted in criminal proceedings by the Court of Cassation in 2005.[73] In 2006, Article 225-3-1 was inserted in the Penal Code.[74] This provision indicates that the fact that the victim sought access to goods, an act, service or contract *with the aim of demonstrating the existence of a discriminatory behaviour*, does not impede a finding of discrimination if proof of this behaviour is provided. It thus expressly allows for the use of situation testing in the second hypothesis identified above. In practice, this tool has been mainly used by anti-racism NGOs and the equality body. Situation tests have been invoked in proceedings relating to race or ethnic origin as well as in those relating to disability and age discrimination, to a lesser extent. However, in order to support a finding of discrimination, the situation testing must be deemed reliable and conclusive by the court. The case law is quite strict in this

[69] Court of Cassation, Social Chamber, ***P+B Fluchère, Dick and CFDT* v. *SNCF*, No. 1027, 28 March 2000;** Council of State, No. 16-102017, 16 October 2017.
[70] Bendick, M. (2007), 'Situation Testing for Employment Discrimination in the United States of America', *Horizons stratégiques*, 5(3), pp. 17-39, esp. pp. 20-22.
[71] Bendick, M. (2007), 'Situation Testing for Employment Discrimination in the United States of America', p. 31.
[72] Rorive, I. (2009) *Proving Discrimination Cases. The Role of Situation Testing,* Center for Equal Rights and Migration Policy Group, Brussels.
[73] Court of Cassation, Criminal Chamber, Decision No. 04-87354, 7 June 2005. See also Court of Cassation, Criminal Chamber, Decision No. 15-87378, 28 February 2017. https://www.legifrance.gouv.fr/affichJuriJudi.do?oldAction=rechJuriJudi&idTexte=JURITEXT000034140789&fastReqId=1149594191&fastPos=1. On the practice of situation testing in France more generally, see du Parquet, L., Petit, P. (2019), 'Discrimination à l'embauche: retour sur deux décennies de testings en France', *Revue française d'économie*, 34(1), pp. 91-132.
[74] France, Law No. 2006-396 on Equal Opportunities of 31 March 2006, Article 45. Note that the special rule on the burden of proof does not appy to criminal proceedings. In this context, situation testing will be used to prove discrimination, not to establish a presumption.

regard. Courts generally consider that the results of a test must be supported by other sources of evidence in order to lead to a finding of discrimination.[75]

Interesting developments relating to situation testing have also taken place in Belgium.[76] Previous anti-discrimination legislation, adopted in 2003, explicitly mentioned the findings of a situation test as one example of facts on the basis of which a presumption of discrimination could be established,[77] but this law was replaced by the 2007 law, which no longer refers to situation testing. However, it mentions among the facts upon which a presumption of discrimination could be established, 'elements revealing a certain recurrence of unfavourable treatment towards persons sharing a protected characteristic', as well as 'elements revealing that the situation of the plaintiff is comparable to that of a person who does not present the protected characteristic and was treated better'. In practice, situation testing that is conclusive would be a combination of these two elements. It should thus still be admitted under current Belgian legislation as a fact leading to the establishment of a presumption of discrimination. Yet, the question of the conditions to be respected in the operation of such a test in order for it to be admitted as valid evidence remain debatable. In a 2017 ordinance, the Brussels Region explicitly recognised that where a situation test is conclusive, it constitutes a fact on the basis of which a presumption of direct or indirect discrimination can be established. The ordinance also specified the conditions to be met.[78] Such testing – called 'discrimination test' in this legislation - may be carried out by civil servants designated by the regional government, by victims themselves or by an equality body or NGO acting in support of a victim. It cannot amount to provocation within the meaning of criminal law. This implies in particular that the test 'cannot have the effect of creating, reinforcing or confirming a discriminatory practice where there was no strong indication of practices likely to be characterised as discrimination'.[79] In order to be admissible in court as means of proof, the testing cannot be carried out randomly; the decision to carry out a test must be based on elements raising a suspicion of discriminatory behaviour on the part of a given employer or in a specific activity or sector. Furthermore, where the test is carried out by civil servants or an NGO,[80] it can only be used 'following complaints or reports of discrimination and based on strong indication of practices likely to be characterised as discrimination within one employer or activity sector'.[81] The same ordinance also allows regional labour inspectors to carry out such discrimination tests in the context of their general employment regulations monitoring. At the federal level, a law adopted in 2018 has authorised social inspectors to carry out – under certain conditions – situation testing in order to monitor compliance with criminal provisions of the anti-discrimination legislation.[82] This law, however, remains silent about the issue of the admissibility of such tests as means of evidence in courts.

In Ireland, the legislation is silent about situation testing and it has not been used in court in discrimination cases.

(iv) *Discriminatory Public Statements*

[75] See Paris Court of Appeal, *Billau v. SOS Racism*, Decision No. 07.04974, 17 March 2008.
[76] See Ringelheim, J. and van der Plancke, V. (2018) 'Prouver la discrimination en justice', in Ringelheim, J. and Wautelet, P. (eds), *Comprendre et pratiquer le droit de la lutte contre les discriminations*, Anthemis, Brussels, pp. 137-173, pp. 158-165.
[77] This legislation however required the adoption of a royal decree to regulate the practice of such tests. This royal decree was never adopted.
[78] Belgium (Brussels-Capital), Ordinance of 4 September 2008 relating to the fight against discrimination and equality of treatment in the field of employment, Article 22(3)(2), inserted by the 16 November 2017 Ordinance aimed at fighting discrimination in the field of employment in the Region of Brussels-Capital.
[79] Belgium (Brussels-Capital), Ordinance of 30 April 2009 relating to the monitoring of regulations in the field of employment which fall within the competence of the Region of Brussels-Capital, Article 4/3(4)(1), inserted by the 16 November 2017 Ordinance (our translation).
[80] Belgium (Brussels-Capital), Ordinance of 4 September 2008, Article 22(3)(3).
[81] Belgium (Brussels-Capital), Ordinance of 30 April 2009 relating to the monitoring of regulations in the field of employment which fall within the competence of the Region of Brussels-Capital, Article 4/3(4)(2).
[82] Belgium, Social Criminal Code, Article 42/1(1), inserted by the Law of 15 January 2018 containing diverse provisions in the field of employment.

It has become rare for employers or service providers to express a discriminatory inclination publicly. As a matter of course, where this is the case, a person who alleges that they have been discriminated against by such an employer or service provider could adduce these statements in court as evidence in support of their case. The Court of Justice, however, has been faced with the peculiar situation where an employer or a person assumed to represent an employer was sued for discrimination after having made discriminatory declarations, but where no identified victim had made herself known. In the *Feryn* case,[83] a Belgian employer who advertised a job vacancy had declared in a press interview that he would not recruit applicants of Moroccan origin and the legal proceedings were initiated by the Belgian equality body. In *Accept*,[84] a man who presented himself and was perceived by the public as playing a leading role in a Romanian football club stated in an interview that the club would not hire a homosexual footballer – here, the case was brought by an NGO defending lesbian, gay and transgender rights. In both cases, the Court of Justice held that such public declarations were sufficient to establish a prima facie case of discrimination despite the fact that there was no identified victim: 'public statements by which an employer lets it be known that under its recruitment policy it will not recruit any employees of a certain ethnic or racial origin are sufficient for a presumption of the existence of a recruitment policy which is directly discriminatory.'[85]

Section 3. Complainants' access to evidence held by the respondent

Victims of discrimination face a particular difficulty in that in many cases the only documents or information that would allow them to substantiate their claim are in the hands of the discriminator. Typically, a worker who believes her job application was rejected because of her ethnic origin does not have access to information about the person who was recruited. Comparing her qualifications to that of the successful applicant may, however, be crucial to giving credence to her claim that she was treated less favourably due to her origin. As emphasised by Advocate General Mengozzi in *Meister*, an employer who refuses to disclose information may 'in that way, make his decisions virtually unchallengeable. In other words, the employer continues to keep in his sole possession the evidence upon which ultimately depends the substance of an action brought by the unsuccessful job applicant and, therefore, its prospects of success.'[86] On the other hand, giving alleged victims of discrimination a right to obtain any information that they request may not only upset the balance between complainants and respondents regarding the burden of proof, but may also affect the right to confidentiality and the protection of personal data of third parties mentioned in the documents submitted.[87]

Accordingly, the question arises whether complainants in discrimination proceedings have the right to require the disclosure of certain information retained by the respondent. A further issue is whether the respondent's refusal to provide the requested information may be taken into account to establish a presumption of discrimination. These questions were raised before the CJEU on two occasions. In *Kelly*, a teacher who was unsuccessful in his application for a place on a vocational training course at a university complained of sex discrimination, arguing that he was better qualified than the least-qualified female candidate to be offered a place. During the proceedings before national courts, he requested copies of the application files and 'scoring sheets' of the candidates who had

[83] Judgment of 10 July 2008, *Centrum voor gelijkheid van kansen en voor racismebestrijding* v. *Firma Feryn NV*, C-54/07, ECLI:EU:C:2008:397.
[84] Judgment of 25 April 2013, *Asociaţia Accept* v. *Consiliul Naţional pentru Combaterea Discriminării*, C-81/12, ECLI:EU:C:2013:275.
[85] *Feryn*, para. 34. See, mutatis mutandis, *Accept*, para. 53, in which the Court also highlights the fact that the club had not distanced itself from the public declarations.
[86] Opinion of Advocate General Mengozzi, 12 January 2012, *Galina Meister* v. *Speech Design Carrier Systems GmbH*, C-415/10, ECLI:EU:C:2012:8, para. 32.
[87] *Meister*, Opinion of Advocate General Mengozzi, 12 January 2012, para. 23.

been successful.[88] In *Meister*, a Russian national who held a Russian degree in systems engineering, the equivalence of which had been recognised by German authorities, responded to a job advertisement in a German company. Although her qualifications matched the job offer, her application was rejected. Not long afterwards, the same company published a new advertisement with identical content. Ms Meister re-applied and was again unsuccessful. She was not invited for an interview and received no information on the reasons for the rejection of her application. She sued the company for discrimination on the grounds of sex, origin and age, and requested that it produce the file of the person who was recruited.[89]

In both cases, the domestic court asked the Court of Justice to clarify whether complainants in discrimination cases are entitled under EU law to obtain from the respondent the disclosure of information capable of constituting facts from which it may be presumed that there has been discrimination, such as information on whether another applicant was recruited or on the qualifications of other applicants. The Court responded that EU anti-discrimination directives do not provide such a right.[90] Nevertheless, it acknowledged that in some circumstances a respondent's refusal to disclose information may risk compromising the achievement of the objectives pursued by the directives and deprive the burden of proof provision of its effectiveness.[91] Accordingly, it accepted that such an attitude on the part of the respondent could be one of the factors to be taken into account when establishing facts from which it may be presumed that there has been direct or indirect discrimination.[92] However, it insisted that 'all the circumstances of the main proceeding' had to be taken into consideration by the referring judge.[93] Thus, the respondent's unwillingness to grant access to information is not sufficient in and of itself to trigger a presumption of discrimination; it must be combined with other contextual elements to have this effect, such as the fact that the complainant's qualifications fitted with the job advertisement and that, notwithstanding this, she was not invited to a job interview.[94]

The Court further observed that in assessing the respondent's attitude, national judges need to have regard to personal data protection norms.[95] In this respect, there was an important difference between the two cases: in *Kelly*, the university had provided Mr Kelly access to redacted information and the refusal concerned disclosure of confidential data concerning individual, identifiable applicants' qualifications,[96] while in *Meister*, the respondent denied access to *any* information. The Court's rulings suggest that disclosing only partial information may be justified by personal data protection requirements, but where the respondent refuses access to any information, even in redacted form, this may constitute an element to be taken into account in establishing a presumption of discrimination.[97]

However, in the *Danfoss* case in the specific context of alleged pay discrimination, the Court had taken a firmer stance on the issue of what inference can be made from an employer's lack of transparency. At stake was the wage policy of a business that was paying the same basic wage to employees in the same wage group, but that awarded individual pay supplements calculated on the basis of various criteria (such as mobility, training and seniority). The claimant had shown that as a result of this system, in two wage

[88] Judgment of 21 July 2011, *Patrick Kelly* v*. national University of Ireland (University College, Dublin)*, C-104/10, ECLI:EU:C:2011:506.
[89] Judgment of 19 April 2012, *Galina Meister* v. *Speech Design Carrier Systems GmbH*, C-415/10, ECLI:EU:C:2012:217.
[90] *Kelly*, para. 38 and 48; *Meister*, para. 46.
[91] *Kelly*, para. 39 and 54; *Meister*, para. 40. See also *Minoo Schuch-Ghannadan*, para. 55.
[92] *Meister*, para. 45. See also *Kelly*, para. 39 and 54.
[93] *Meister*, para. 42.
[94] *Meister*, para. 45.
[95] *Kelly*, para. 55.
[96] Farkas, L. and O'Farrell, O. (2014), *Reversing the burden of proof: Practical Dilemmas at the European and national level*, pp. 28-31 and 51-57.
[97] *Meister*, para. 44.

groups, a man's average wage was higher than that of a woman's. However, the system of individual supplements was implemented in such a way that employees were unable to find out the reasons for pay differences between them. The Court ruled that 'where an undertaking applies a system of pay which is totally lacking in transparency', 'if a female worker establishes, in relation to a relatively large number of employees, that the average pay for women is less than that for men', these two elements combined trigger a shift in the burden of proof: 'it is for the employer to prove that his practice in the matter of wages is not discriminatory.'[98]

Be that as it may, in many cases, victims of discrimination remain in an uncomfortable situation regarding access to information.[99] Two elements at the national level may however mitigate this situation.

First, some judicial authorities have investigatory powers allowing them to order the delivery of certain documents. In Ireland, the Workplace Relations Commission (WRC), which is competent to hear complaints under the Employment Equality Acts 1998-2015 and the Equal Status Acts 2000-2018, has an investigative role. It has significant powers to carry out its functions, including the power to obtain information and to seek court orders directing that persons cooperate with investigations. Adjudication officers need not rely exclusively upon material introduced by the parties to arrive at a decision. In practice, they often request additional factual information from the parties, notably when seeking to establish whether or not a pattern of differential treatment can be demonstrated.[100] Such material can assist in establishing a prima facie case and, therefore, in shifting the burden of proof. The WRC can formally order the production of information needed from recalcitrant respondents.[101] In France and Belgium, rules of civil procedure entitle the civil judge to order certain 'investigative measures' (*mesures d'instruction*), including the disclosure of a document by one of the parties or by a third person.[102] However, the issuing of such an order is conditional on the existence of other evidence.

Secondly, in some countries, including Ireland and the United Kingdom, a person who thinks that they have been discriminated against may resort to a formal information-seeking procedure (called a 'questionnaire procedure' in the United Kingdom): prior to starting a legal action, they can contact the alleged discriminator and seek clarification of his or her conduct through the submission of a standardised questionnaire. Courts may draw inferences from the answers provided to such a questionnaire or a lack of response.[103] This tool can be useful to help complainants marshal the evidence required to establish a prima facie case.[104] In Ireland, Section 76 of the Employment Equality Act (EEA) allows a person seeking redress for discrimination to request information from the person who may have discriminated against them. Regulations prescribe the forms to be used in asking such questions and in replying to them.[105] The Director General of the WRC or the circuit court may draw such inferences as are appropriate from a failure to supply the information sought under Section 76.[106] In practice, however, there seem to be few cases in which

[98] *Danfoss*, para. 16.
[99] Farkas, L. and O'Farrell, O. (2014), *Reversing the burden of proof: Practical Dilemmas at the European and national level*, p. 57.
[100] See, for example, *MacMahon v. Department of Physical Education and Sport, University College Cork*, DEC-S2009-014, at para 4.14. CCTV footage was sought by the adjudication officer in *A Customer* v. *A Nightclub*, ADJ-00001797.
[101] See e.g. *A University Lecturer* v. *A University*, ADJ-00002790, 21.08.2018, https://www.workplacerelations.ie/en/cases/2018/august/adj-00002790.html.
[102] France, Civil Procedure Code, Articles 143 to 154; Belgium, Judicial Code, Article 877.
[103] Farkas, L. and O'Farrell, O. (2014), *Reversing the burden of proof: Practical Dilemmas at the European and national level*, pp. 36-37.
[104] Palmer, F. (2006), 'Re-dressing the Balance of Power in Discrimination Cases: The Shift in the Burden of Proof', p. 28.
[105] Ireland, S.I. No 321 of 1999, Employment Equality Act 1998 (Section 76—Right to Information) Regulations 1999, http://www.irishstatutebook.ie/eli/1999/si/321/made/en/print.
[106] Ireland, Employment Equality Act (EEA), Section 81.

adjudicators explicitly drew an inference from a failure to supply information.[107] Instead, the WRC officers tend to state that they have taken note of the omission.[108] In addition, under the Equal Status Act (ESA), complainants have a mandatory obligation to notify respondents in writing, within two months of the occurrence, of the nature of the allegation and of their intention to seek redress under ESA.[109] The complainant 'may in that notification […] question the respondent in writing so as to obtain material information and the respondent may, if the respondent so wishes, reply to any such questions.'[110] The Director General of the Workplace Relations Commission may draw such inferences as are appropriate from a failure to reply to the notification or to supply the information sought in this context.[111]

Section 4. Conclusion

The requirement of a lightening of the burden of proof weighing on claimants in discrimination cases has been part of EU anti-discrimination law since the late 1980s. Initially articulated by the CJEU, it is now enshrined in the various anti-discrimination directives. By providing that when claimants establish facts from which it can be presumed that discrimination has occurred it falls upon the respondent to prove that there has been no discrimination, the system arranges a sharing of the burden of proof between both parties. However, probably because it constitutes a derogation from the standard rule applicable in civil proceedings, its implementation at the domestic level is not without difficulties. Nonetheless, as the examples of Belgium, France and Ireland show, the special rule governing the burden of proof in discrimination litigation has had an impact on the practices of domestic judges. It has given rise to a sophisticated case law at the national level, which contributes to enriching the understanding of this rule. Combined with CJEU judgments, this case law helps to clarify the operation of the rule and in particular, the kind of facts that have the potential to form the basis of a presumption of direct or indirect discrimination. Interesting developments have also taken place at the national level regarding means of evidence that can be used to establish a prima facie case of discrimination. Statistics and situation testing are two specific tools that have been developed to counterbalance the fact that in many cases ordinary means of proof, such as witness statements or written documents, are unavailable to victims of discrimination. Questions remain, however, regarding the use of these tools in court and especially the conditions under which situation testing can be admitted as valid means of proof. Another thorny issue is that of the complainant's access to information held by the respondent. The Court of Justice clearly denied that EU law provides complainants in discrimination cases with the right to obtain specific documents or information from the other party. At the same time, however, it acknowledged that the respondent's refusal to disclose certain information, when considered in conjunction with other circumstances, may constitute a fact from which a presumption of discrimination could be inferred. The CJEU thereby attempts to conciliate contradictory imperatives, although the guidelines that it provides to domestic authorities remain vague. However, Member States may offer victims of discrimination a higher level of protection regarding access to information. In particular, this is the case where potential claimants have the right to seek clarification from the alleged discriminator through a standardised procedure, such as the 'questionnaire

[107] See in particular Irish Labour Court, *Irish Ale Breweries Ltd* v. *O'Sullivan*, EDA 0611, 18.08.2006, https://www.workplacerelations.ie/en/cases/2006/august/eda0611.html. The employer failed to provide the information requested under Section 76 and offered no explanation for that omission at the hearing. The Labour Court inferred that the information, if given, would have provided evidence of 'like work' between the complainant and her comparator.
[108] See in *Kennedy* v. *ADC Plasticard Ltd*, DEC-E2010-019, paras. 5.7 https://www.workplacerelations.ie/en/Cases/2010/February/DEC-E2010-019-Full-Case-Report.html. See also *Cleary* v. *UCD,* DEC-E2018-009, 26.03.2018, https://www.workplacerelations.ie/en/cases/2018/march/dec-e2018-009.html. On the ability to draw inferences more generally, see High Court, *Iarnród Éireann* v. *Mannion* [2010] IEHC 326, 27.07.2010, http://www.courts.ie/Judgments.nsf/0/5F91DF4D09234675802577AE004A9E7B.
[109] Ireland, Equal Status Act (ESA), Section 21(2).
[110] Ireland, ESA, Section 21(2)(b).
[111] Ireland, ESA, Section 26.

procedure' or where judges have the power to order the production of documents needed to decide a case.