



Changing Perspectives:

Shifting the burden of proof in racial equality cases



european network against racism

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Abbreviations

COM	European Commission document
CRE	Commission for Racial Equality (UK)
EC	European Community
ECHR	European Court of Human Rights
ECJ	European Court of Justice
ENAR	European Network against Racism
EOC	Equal Opportunities Commission (UK)
ERRC	European Roma Rights Centre
ETA	Equal Treatment Act (Hungary)
ETC	Equal Treatment Commission (The Netherlands)
EU	European Union
EUMC	European Monitoring Centre on Racism and Xenophobia
MPG	Migration Policy Group
NGO	Non-governmental organisation
RRA	Race Relations Act (UK)
SDA	Sex Discrimination Act (UK)
TEU	Treaty on European Union
UK	United Kingdom
UNAR	Ufficio Nazionale Antidiscriminazioni Razziali (Italy)

Glossary

Advocacy: the act or process of supporting a cause or issue. An advocacy campaign is a set of targeted actions in support of this cause or issue, with the objective to build support for the issue, influence others to support it or try to change legislation that affects it.

Burden of proof: the responsibility to produce sufficient evidence in support of a fact or issue and favourably persuading the court regarding that fact or issue.

Civil liability: liability imposed under civil laws and processes as distinguished from criminal laws; the state of being subject to civil sanctions (as restitution or damages). Civil law is the area of law in a common law system governing relations between private individuals; in this sense the term is different to criminal law and other areas of public law.

Claimant: the person who initiates a lawsuit or claim (see plaintiff).

Direct discrimination: where one person is treated less favourably than another is, has been or would be treated in a comparable situation on grounds of racial or ethnic origin.

Disparate impact: an unnecessary discriminatory effect on a protected group caused by a practice or policy that appears to be non-discriminatory.

Evidence: something (such as testimony, writings or objects) presented at a judicial or administrative proceeding for the purpose of establishing the truth or falsity of an alleged matter of fact.

Ex officio: by virtue or because of an office or position.

Indirect discrimination: where an apparently neutral provision, criterion or practice would put persons of a racial or ethnic origin at a particular disadvantage compared with other persons, unless that provision, criterion or practice is objectively justified by a legitimate aim and the means of achieving that aim are appropriate and necessary.

Jurisdiction: determines which court system should properly adjudicate a case. Questions of jurisdiction also arise regarding quasi-judicial bodies (such as administrative agencies) in their decision-making capacities.

Justification: a legally sufficient reason or cause (such as self-defence) for an act that would otherwise be criminal or tortious.

Litigation: to seek resolution of a legal contest by judicial process; contest or resolve in court.

Plaintiff: the person who initiates a lawsuit or claim (see claimant).

Prima facie case: a case established by evidence that is sufficient to raise a presumption of fact or establish the fact in question unless rebutted.

Prima facie evidence: evidence that is sufficient to prove a factual matter at issue and justify a favourable judgment on that issue unless rebutted.

Respondent: one who answers or defends in various proceedings.

Strategic litigation: Strategic or impact litigation uses the court system to attempt to create broad social change.

Victimisation: where someone is treated badly or differently for having made a complaint about discrimination or supporting a colleague who has made a complaint.

Foreword by Claude Moraes, MEP



The inclusion of Article 13 in the EC Treaty and the subsequent adoption of the two anti-discrimination Directives represented a watershed in European history. Despite the fact that many states have so far failed to adequately implement the equality Directives, they are a crucial step in realising the objective of developing the European Union as an area of freedom, security and justice and giving effect to the principles of liberty, democracy, the protection of fundamental rights and the rule of law.

The Racial Equality Directive provides a comprehensive mechanism for addressing racial discrimination in Europe. However, as we have learned in the UK, legislation on its own is never enough, and must be supplemented by strategies which positively promote equality for everyone in society. Nonetheless discrimination is against the law, and those who discriminate on the grounds of race or ethnic origin must be made to face the consequences of their actions. As this report reminds us, racial discrimination can be very difficult to prove, and that is why European Union Member States introduced a mechanism to shift the burden of proof, from the claimant to the respondent. The fact is that the perpetrator will often be in a much stronger position than the victim of discrimination to prove or disprove discrimination.

Everyone who is concerned with the fight against discrimination has an essential role to play to ensure that the Racial Equality Directive is fully implemented and realises its objective of giving effect to the 'principle of equality treatment'. NGOs who work with the victims of discrimination have a particular role, as they are often in a unique position to meet the needs of those who suffer discrimination and have a detailed analysis and understanding of what racial discrimination looks like in 21st Century Europe.

With this report ENAR provides a comprehensive analysis of what the shift of the burden of proof means for the victims of discrimination, highlights the situation in six EU Member States, and suggests practical strategies to ensure that the full potential of the shift of the burden of proof is reached. I believe that by focusing on one mechanism that aims at making it easier to prove discrimination, this report can make a practical and timely contribution to realising the full potential of the Racial Equality Directive.

1. Introduction

One of the main objectives of the two non-discrimination directives¹ is to provide victims of discrimination with a set of tools to take action against discrimination on the grounds of race or ethnic origin, religion or belief, disability, sexual orientation and age. As

the European Court of Justice (ECJ) stated in relation to pay discrimination between men and women, combating discrimination is: ‘part of the social objectives of the Community.’² The

principle that non-discrimination is central to the values of the EU has been reinforced by the Charter of Fundamental Rights, which declares in Article 21 (1) that discrimination on a number of grounds ‘shall be prohibited’. More specifically, the Racial Equality Directive (2000/43/EC) acknowledges that racism and discrimination are stumbling blocks for social and economic integration.

However, five years after the adoption of the two Article 13 equality Directives, a number of serious obstacles remain to fulfilling their objectives. Proving discrimination is a significant hurdle in implementing legal principles and protections, and for this reason the Member States of the European Union used the two Article 13 Directives, building on existing law and practice in the field of gender discrimination, to introduce the shift of the burden of proof. In court procedures, the burden of proof usually lies with the person who brings the case, the claimant. In cases of discrimination however, it is often difficult to obtain information about the existence of discrimination.³ Often, the relevant information lies with the other party. The shift of the burden of proof provides that if the claimant establishes facts from which the presumption of discrimination arises, then the responding party needs to prove that discrimination did not occur.

This study intends to make a contribution to the debate on how to maximise the impact of the Racial Equality Directive. In its analysis of the impact of the Directive, ENAR has been acutely aware that one of the key tools in facilitating suc-

cessful cases against discrimination – the shift of the burden of proof – appears to be under-utilised. The purpose of this study is to provide information about the application, in practice, of the shift

of the burden of proof in racial equality cases; and to provide strategies for NGOs who seek to realise the full potential of the Racial Equality Directive, including Article 8 on the burden of proof.

This report consists primarily of desk research. The methodology included analysing existing EC-laws and case law of the ECJ, as well as the state of affairs in six European Union Member States. The criteria for the country selection were: geographic coverage, diverging legal systems, state of implementation, and the availability of case law and other materials. ENAR members were consulted through a questionnaire, the results of which are incorporated in the body of the report.

The report is divided in three parts. The first part describes the relevant legislation and existing case law at the level of the EU and other relevant international jurisdictions. The second part takes a closer look at six Member States and assesses to what extent the provisions regarding the burden of proof have been implemented. The final part discusses issues, strategies and recommendations for NGOs who are involved in the fight against racism.

“The shift of the burden of proof provides that if the claimant establishes facts from which the presumption of discrimination arises, then the responding party needs to prove that discrimination did not occur.”

¹ Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin and Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation

² ECJ 25 May 1971, case 43/75 [1976] ECR 455 (Defrenne II).

³ Jacobsen, Björn Dilou and E.O. Rosenberg Khawaja, ‘Legal assistance to individuals. Powers and procedures of effective and strategic individual enforcement’, in: Strategic enforcement. Powers and competences of equality bodies, Brussels: Equinet Secretariat/MPG, 2006 p. 20.

2. Development of the shift of the burden of proof

Combating discrimination through court cases can be an effective means of redress and can have a lasting impact beyond the situation of a particular individual. In practice, however, there are many challenges and difficulties in successfully bringing legal cases against discrimination, not least of which is the fact that discrimination is difficult to prove. Rarely will an individual admit to having discriminated, added to which discrimination is often hidden or indirect.

For a person who is confronted with discrimination, it is a difficult and sometimes impossible task to bring forward evidence on which a straightforward case of discrimination can be based. A job applicant who is rejected may have the impression that he did not get the job because of his ethnic origin, but it will be difficult to hand over to the court the company's internal note in which the selector refers to his ethnic origin as the reason for rejecting him. It is for this reason that, building on developments in the field of sex discrimination, the Racial Equality Directive as well as the Framework Employment Directive introduced specific provisions with regard to easing the burden to establish proof in cases of discrimination.

2.1 Developments in proving sex discrimination

The provision in the Directives cannot be discussed in isolation from the developments in the legal approach of sex discrimination. The EC Treaty, Article 141 (former Article 119) addresses the issue of equal pay for work of equal value and equal treatment in a broader sense in the field of gender. The motivation for the inclusion of this article was both social and economic.

A competition problem arose where Member States that had introduced equal pay schemes for men and women were disadvantaged compared to Member States that allowed differences in pay based on sex, and consequently would be able to produce more cheaply. Discrimination against women was also recognised as a social problem: discrimination in payment was seen as a breach of one of the fundamental human rights as laid down in international and European instruments. From the 1970s, the ECJ has dealt with cases

concerning unequal pay. The Court stated repeatedly that in EC law and policies, the social dimension, amongst which equal treatment, is equally if not more important than the economic dimension.⁴

In 1975, the European Commission introduced Directive 75/117, which was aimed at harmonizing national legislation with regard to the principle of equal pay for work of equal value. The intention was to overcome the problem of applying the equal-pay principle when the work performed by two employees is different, but is alleged to be of equal value. In practice, however, claimants faced the problem that employers did not always maintain a clear and transparent system of payment. Providing proof of unequal pay before a court was a daunting task and the lack of proof often made it impossible to substantiate a difference in payment. In the Danfoss case, the ECJ acknowledged that problem for the first time.

DANFOSS CASE

A claim was brought by a trade union on behalf of female workers who, on average, earned 7% less than a comparable group of male workers. Although the two groups earned the same basic wage, the employer supplemented the basic rate according to a number of criteria, which the trade union alleged created indirect discrimination against female workers. The ECJ established that Equal Pay Directive 75/117 means that where a company applies a system of pay which is totally lacking in transparency, and statistical evidence reveals a difference in pay between male and female workers, the burden of proof shifts to the employer to account for the pay difference by factors unrelated to sex.⁵

The view emerged from the ECJ that if the normal division of proof is applied in cases where the employer does not have an easily accessible and understandable pay system, it would be excessively difficult or impossible to show that pay discrimination had taken place.⁶ In later cases the ECJ

⁴ Case 80/70, Defrenne I [1971] ECR 445, and more recently: C-50/96 Deutsche Telekom v. Schröder [2000] ECR I-743, para 56.

⁵ Case 109/88 Danfoss [1989] ECR 3199.

⁶ Craig, Paul and G. De Búrca, EU Law. Text, cases, and materials. Third Edition. Oxford: Oxford University Press, 2003, p. 851.

ruled more specifically on the use of statistical evidence by female employees to indicate that a pay gap existed with their male colleagues. The ECJ found that the use of statistics, indicating that men earned more than women in work of the same value, could lead to 'apparent discrimination'. As a consequence, the burden to prove that the difference in pay was not based on discrimination needed to shift to the employer. These developments were reinforced in the Enderby case.

ENDERBY CASE

Mrs Enderby argued that within the same public health service, the job of speech therapists was predominantly carried out by women, whereas the job of pharmacist was mainly carried out by men. Although the work was of the same value, which could be established by the weight of the study needed to do these jobs, speech therapists earned significantly less than pharmacists. The ECJ ruled that:

'it is normally for the person alleging facts in support of a claim to adduce proof of such facts... However, it is clear from the case-law of the Court that the onus may shift when that is necessary to avoid depriving workers who appear to be the victims of discrimination of any effective means of enforcing the principle of equal pay. Accordingly, when a measure distinguishing between employees on the basis of their hours of work has in practice an adverse impact on substantially more members of one or other sex, that measure must be regarded as contrary to the objective pursued by Article 119 [currently Article 141] of the Treaty.'

Although the Court established that in the Enderby case the system of pay applied by the employer was transparent, the burden of proof shifted to the employer. The ECJ said:

'if the pay of speech therapists is significantly lower than that of pharmacists and if the former are almost exclusively women while the latter are predominantly men, there is a prima facie case of sex discrimination... 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...'⁷

These developments with regard to the use of statistical data were reinforced in a ruling of 1999 regarding indirect discrimination. If a national court finds that statistical data

show there is apparent indirect discrimination, the employer should prove that the difference is justified by factors unrelated to sex. The ECJ declared that it is for the national court to judge the reliability of the statistics used, for example in terms of the number of individuals covered, or whether the records are purely fortuitous or short-term phenomena and whether in general, they appear to be significant.⁸

2.1.1 The burden of proof Directive

Despite the existence of this case law, in many Member States it continued to be difficult for women to win cases of unequal pay before their national courts. Not all judges were informed about the ECJ jurisprudence or were willing to apply the guidelines set forth in the European Court's decisions. Therefore, after long deliberations, in 1997 the European Council adopted Directive 97/80/EC on the burden of proof in cases of discrimination based on sex. The aim of the Directive was to:

'ensure that measures to implement the principle of equal treatment are made more effective, in order to enable all persons who consider themselves wronged because the principle of equal treatment has not been applied to them to have their rights asserted by judicial process'.

With the implementation of the Directive in 2001, women workers are now able to invoke the provision about the shift of the burden of proof directly before national courts.

2.2 Article 13 and the non-discrimination Directives

The idea that values based on human rights principles were central to the European Union was reinforced with the coming into force of the Treaty of Amsterdam in 1999. This Treaty introduced Article 13 in the EC Treaty. Without actually saying that discrimination is prohibited, this Article states that:

'within the limits of the powers conferred by it upon the Community, the Council, acting unanimously on a proposal from the Commission and after consulting the European Parliament, may take appropriate action to combat discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation.'

Although the Treaty increased the number of protected grounds beyond sex, the levels of protection across the various grounds is different. This became apparent with the swiftly developed proposals for the two equality Directives in 2000. The Racial Equality Directive protects persons irrespective of racial or ethnic origin in a wide scope of social

⁷ Case C-127/92 Enderby v. Frenchay Health Authority [1993] ECR I-5535, 5573.

⁸ Case C-167/97 R. v. Secretary of State for Employment, ex parte Seymour Smith and Perez [1999] ECR I-623.

activities: employment, self employment, social security, health care, education, housing and the supply of goods and services. The Framework Employment Directive covers religion or belief, disability, age and sexual orientation, but only in the area of employment.

In the chapters on remedies and enforcement, both directives have included a provision on shifting the burden of proof. Article 8 of the Racial Equality Directive and Article 10 of the Framework Employment Directive use the same terminology as the Burden of Proof Directive in sex discrimination

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.

This article provides broad guidelines for the implementation of the shift of the burden of proof, however it is up to Member States to realise this provision in practice. Consequently, while the detailed provisions may vary across Europe, they should reflect the key provisions of the directive.

2.2.1 National jurisdictions

The provision must be implemented in accordance with the Member State's national judicial system. This implies that the circumstances under which the burden of proof is shifted may vary according to the legal norms in the Member States, and therefore the way in which the provision on shifting the burden of proof is applied may be different from country to country.

2.2.2 Claimant's requirements

The claimant is required to 'establish facts' from which a presumption of discrimination arises. The establishment of facts needs to be addressed both in cases of direct discrimi-

nation and indirect discrimination.⁹ In order to prevent an unjustified or flimsy accusation of discrimination by a person, the claimant must substantiate or prove that the facts he presents are actual incidents or measures. In various Member States, the text of the transposed provision on the burden of proof mentions that facts need to be proven before the burden of proof of discrimination shifts to the responding party.

The Spanish implementation act requires the claimant to put forward 'evidence that allows for the conclusion of the existence of proven indications of discrimination'.¹⁰ Whether this double requirement of proof falls in line with the wording of the Directive, which refers to a presumption of discrimination, will need to be assessed by the Spanish courts and eventually by the ECJ. The Estonian Law on Employment Contracts requires the claimant to 'submit to a labour dispute resolution body or to the Legal Chancellor an application containing the facts in proof (author's emphasis) of the unequal treatment'. The question arises whether the 'facts in proof' that need to be submitted put a heavier burden on the claimant than was envisaged by the Directive.¹¹ In the UK, the complainant needs to 'prove facts' from which the tribunal may conclude that a discriminatory act took place.¹² In The Netherlands, the implementation bill also makes it clear that the established facts should fulfil the criteria of the regular standard of proof in the Civil Code.¹³

The application of the shift of the burden of proof depends on the type of discrimination: direct or indirect.

2.2.3 Direct discrimination

Where direct discrimination is concerned, the claimant needs to establish that he has been treated less favourably than another is, has been or would be treated in a comparable situation. This requires a concrete comparator or, in a situation where a comparator is not available, a possible comparator. In the latter situation, the claimant needs to make it plausible that a comparator is not necessary. For example when a patient makes a disparaging comment towards a nurse of ethnic minority background, it would be enough for the nurse to prove that the patient has made

⁹ See in more detail: M. Miné, 'Le régime probatoire de la discrimination'. Paper for the European Academy of Law (ERA), Trier: ERA, 2004, available at: www.era.int (05.05.2006).

¹⁰ Act 62/2003 of 30 December 2003, Article 36.

¹¹ The question arises whether the personal scope of the law is in agreement with the Directive: the law seems to exclude witnesses as well as associations or organisations from the shift of the burden of proof. Moreover, Estonian law only requires the respondent to 'explain' the reasons for his conduct, rather than to 'prove that there has been no breach of the principle of equal treatment', as the Directive prescribes.

¹² Article 54A Race Relations Act. A set of detailed guidelines has been given by the UK Court of Appeal in the case of *Igen v. Wong*, [2005] EWCA Civ 142, [2005] IRLR 258. See below for more details.

¹³ Parliamentary Documents II, 2002-2003, 28 770, no. 5, p. 33.

racist remarks, without having to establish that the remarks were not made towards fellow nurses of native origin.

The facts the claimant puts forward should have the effect that the court or competent body will start suspecting that the behaviour under discussion could be discrimination in the sense of the law. An example of such facts could be a mass lay-off where more ethnic minority members are affected.

2.2.4 Indirect discrimination

Cases of indirect discrimination concern apparently neutral criteria, practices or measures that would put persons belonging to racial or ethnic minorities at a particular disadvantage as compared to others. The facts that the claimant needs to establish will have regard to the effect of the criterion, measure or practice. The comparator is not a single other person but rather a group of persons.

Proving indirect discrimination may require the claimant to produce significant quantitative data or statistics, although this is not an obligation. According to consideration 15 in the preamble of the Racial Equality Directive: 'such (national) rules may provide in particular for indirect discrimination to be established by any means including on the basis of statistical evidence'. The definition of indirect discrimination in the Racial Equality Directive is based on the assumption that the effect of a distinction is liable to be disadvantageous, intrinsically or by its very nature, to persons belonging to a category of persons protected from discrimination. The disadvantage does not have to be determined statistically to have a disparate impact on the group concerned; common knowledge suffices to create the presumption of discrimination.¹⁴ An example is the language requirement for job seekers: if a company requires applicants to speak the national language fluently, it is apparent that persons with a migrant background will be disadvantaged compared to native speakers.

When statistics are used, a slightly different approach is needed. Statistical data may lead to the conclusion that the measure, practice or criterion has a disparate impact on one group in comparison with another group. This is the approach taken in the burden of proof Directive in sex cases (97/80) as well as the ECJ case law in sex discrimination cases.¹⁵ The EC Directive requires evidence that the measure, practice or criterion affects a significantly larger proportion of members of one sex, unless the measure is appropriate and necessary and can be objectively justified.

¹⁴ De Schutter, Olivier, 'Methods of proof in the context of combating discrimination', in: Cormack, J. (Ed.) Proving discrimination. The dynamic implementation of EU-anti-discrimination law: The role of specialised bodies. Brussels: Migration Policy Group, 2003, p. 24.

¹⁵ A.O. Case C-167/97 R. v. Secretary of State for Employment, ex parte Seymour Smith and Perez [1999] ECR I-623.

An example would be the refusal by a bank to give mortgages for houses in certain parts of a city, a practice called redlining. If the claimant who is refused a loan can supply statistical data from which it appears that the majority population in that area is of ethnic minority background, the court may shift the burden of proof. In these cases, claimants need to give evidence of two facts: the statistical data they provide must be suitable to establish the facts from which the presumption of discrimination arises; and they need to convince the national court that such evidence is credible and plausible.

2.2.4.1 Gathering and using statistical evidence

De Schutter has described a methodology for the use of statistical evidence in indirect discrimination as follows:

'A comparison between the composition of two groups must be made: a reference group and a selected group of people who are targeted by the measure under scrutiny. Within each of these groups the individuals must be divided into two categories, A and B, corresponding to the dominant or majority category and the traditionally disadvantaged or minority category. In race discrimination cases, the distinction between the two categories will be based on race or ethnic origin. The ratio of category A to category B represents the proportion of the members of each category within the reference group, while the ratio of category A* to category B* will represent the proportions within the selected group. The measure under scrutiny is said to be "suspect" (leading to a reversal of the burden of proof) if the members of the protected group (B) are clearly less well represented in the selected group (at the end of the selection) than in the reference group (at the beginning of the selection), that is, if $A / B < A^* / B^*$. If this is the outcome, the court or the competent authority judging the case should shift the burden of proof to the respondent. The use of this type of statistical data assumes that a) the reference group can be sufficiently defined, b) each individual can be classified to a category (A or B) and c) a threshold can be defined on the basis of which the impact of the measure can be considered to be disproportionate.'¹⁶

This method, based on ECJ case law, could be used for reference by courts in different Member States. However, its application by an individual claimant in a case of indirect discrimination seems to be a rather difficult task. It requires the existence of discernable groups and information about the ethnic composition of the groups. It is typically this kind of information that lies with the respondent, who may not be willing to share it with the claimant.

¹⁶ De Schutter, Olivier, 'Methods of proof in the context of combating discrimination', in: Cormack, J. (Ed.) Proving discrimination. The dynamic implementation of EU-anti-discrimination law: The role of specialised bodies. Brussels: Migration Policy Group, 2003, p. 27.

A similar method has been developed by the Equal Opportunities Commission (EOC), which is responsible for enforcing gender equality in the UK. The EOC has published guidelines on the evidence needed to establish disparate impact in unequal pay cases¹⁷ which could be used in cases of race or ethnic discrimination. In this method, an important role is attached to the use of a questionnaire the claimant can send to the respondent. If the respondent refuses to fill in the questionnaire, this fact could be added to the facts that may presume the existence of discrimination.

According to the EOC guidelines, evidence is needed on:

- details of the remuneration packages of the claimant and of comparable men (to establish the difference in pay);
- details of the gender composition of the claimant's and comparator's groups (to see if there is a predominance of women and men in the two groups).

A questionnaire or written answers may be used to elicit the relevant information from the employer should he refuse to provide it on a voluntary basis. Once the statistics are to hand, it is necessary to take the following steps:

- calculate the proportions of men and women in the claimant's and comparator's groups;
- look at the figures over several years (5 to 10) to see if a trend can be identified;
- put the proportions to the employer for his agreement and invite him to concede that there is disparate impact prior to the tribunal hearing;
- where the level of significance is not immediately obvious and disparate impact is in dispute, it will also be necessary to obtain expert evidence from a statistician;
- assuming the statistician's report is favourable, disclose the report to the employer and invite him again to concede the point.

To ensure that the statistics do not illustrate purely fortuitous or short-term phenomena, the tribunal will want to examine the pattern over several years (five to ten years is not unusual in these cases) to see if there is a discernable trend. If no agreement can be reached, it will be necessary to call the statistician to give evidence.¹⁸

There may be issues relating to the use of sensitive personal data. Data protection laws at both the European and national levels are strict and sometimes forbid the use of data which reveal information on racial or ethnic origin, political opinions, religious or philosophical beliefs, trade union membership and the processing of data concerning health or sex

life.¹⁹ There are a number of exceptions mentioned in the Data Protection Directive. These exceptions refer to a) the explicit consent given by the person to use the data, b) the processing by a non-profit organisation, trade union or similar on the condition that it concerns data of the members of the organisation, c) data which are manifestly made public by the data subject or d) the necessity of processing the data for the establishment, exercise or defence of legal claims.

Some countries, such as Hungary, Spain and Germany, have explicitly forbidden the collection and processing of personal data based on the racial or ethnic origin of persons.²⁰ In those Member States it will therefore often be impractical to collect the required data to establish a prima facie case of indirect discrimination. Other Member States allow the collection and the use of ethnic data with regard to immigrant minorities. Establishing statistics in individual cases may be easier in those countries.

2.2.5 Requirements of the respondent

If the presumption of discrimination is accepted by the court or another competent authority, it is for the respondent to prove that there has been no breach of the principle of equal treatment. The proof the respondent has to put forward in order to exonerate himself amounts to bringing forward facts that explain and justify the measure, practice or incident. Again, the question of delivering the proof of non-discrimination is different in cases of direct and of indirect discrimination.

2.2.5.1 Direct discrimination

In principle, direct discrimination cannot be justified, as the Directive only allows for an objective justification in cases of indirect discrimination.²¹ The respondent must prove that there was no case of unequal treatment, such as showing that the situation of the person who is presumed to have been discriminated is not equal to that of the comparator. In cases of pay discrimination, the employer may for example argue that the work was not of the same value as that of the comparator.

2.2.5.2 Indirect discrimination

In cases of indirect discrimination, the respondent may deliver proof that the statistics that were used to create the presumption of discrimination could be interpreted other-

¹⁷ Based on ECJ *Specialarbejderforbundet i Danmark v. Dansk Industri, acting for Royal Copenhagen A/S* [1995] IRLR 649 ECJ.

¹⁸ See: <http://www.eoc-law.org.uk/Default.aspx?page=2697> (28.04.2005).

¹⁹ Article 8 Directive 95/46/EC on the protection of individuals with regard to the processing of personal data. OJ L 281, 23.11.1995, p. 31.

²⁰ However, it is noted that despite official resistance, both local governments and private institutions in these countries do collect ethnic data. See: Goldston, James A., 'Ethnic data as a tool in the fight against discrimination', in: Simo Mannila (ed.) *Data to promote equality*. Proceedings of the European Conference, Helsinki: Finnish Ministry of Labour, 2005, p. 126-128.

²¹ In pay discrimination cases, the ECJ has given Member States a certain margin to apply this provision: see Craig, Paul and G. De Búrca, *EU Law. Text, cases, and materials*. Third Edition. Oxford: Oxford University Press, 2003, p. 864.

wise. In addition to factual counter-evidence, the respondent can bring forward an objective justification for the measure, practice or incident under scrutiny.

The criteria for objective justification of indirect discrimination were developed in the ECJ case of *Bilka-Kaufhaus and others*.²² The requirements entail that the measure, practice or incident can be objectively justified on grounds other than the relevant discrimination ground, that the measure corresponds to a real need on the part of the employer, is appropriate with a view to meeting that need, and is necessary to meet that need.²³

2.2.6 Other provisions

Paragraphs 2 to 5 of Article 8 of the Racial Equality Directive provide more detail on the shift of the burden of proof. Paragraph 2 allows Member States to introduce rules of evidence that are more favourable to claimants and paragraph 3 excludes criminal procedures from the shift of the burden. In criminal cases it will be the prosecutor who needs to produce the evidence of a criminal act. This principle, based on the rule of law as well as the principle of the presumption of innocence, prevents the courts from shifting the burden of proof to the defendant.²⁴

Paragraph 4 says that the rules with regard to the burden of proof also apply to cases where an association or legal entity engages in a procedure on behalf of a victim of discrimination.

Paragraph 5 allows Member States to make an exception for procedures in which it is for the court or competent body to investigate the facts of a case. If such a body carries out the investigation, it may be presumed to be neutral and objective; if these courts have powers to request evidence, including statistics, it seems obvious that the need to put the burden of proof on the respondent does not exist.

²² Case 170/84 *Bilka-Kaufhaus* [1986] ECR 1697 and consequently developed in later case law, such as in Case C-381/99 *Susanna Brunnhofer v. Bank der österreichischen Postsparkasse AG*.

²³ Also see: M. Miné, 'Le régime probatoire de la discrimination'. Paper for the European Academy of Law (ERA), Trier: ERA, 2004, www.era.int, p. 8-11.

²⁴ It must be noted, however, that in breaches of international human rights law, the burden of proof may be shifted to a government. In the case of *Nachova v. Bulgaria*, the Grand Chamber of the European Court of Human Rights stated that: 'in certain circumstances... the burden of proof may be regarded as resting on the authorities to provide a satisfactory and convincing explanation of, in particular, the causes of the detained person's death.' ECHR, 6 July 2005, 43577/98; 43579/98 [2005] ECHR 465.

3. State of implementation

This chapter takes a closer look at the situation in six Member States: Belgium, the Czech Republic, Hungary, Italy, The Netherlands and the United Kingdom. Although these countries only constitute a quarter of the EU Member States, they represent a general picture of the manner in which the burden of proof provision in the Racial Equality Directive has been implemented.

Three of the countries have had specific equal treatment legislation for a number of years: in the UK, the first race equality legislation was introduced in 1965; in 1981 the Belgian anti-racist law came into force and in 1994 The Netherlands introduced a general law on equal treatment. Hungary and Italy introduced specific anti-discrimination laws as a result of the implementation process of the Article 13 Directives, although provisions regarding non-discrimination already existed in their labour or immigration laws. So far, the Czech Republic has not introduced an equal treatment act. A draft was accepted by the House of Representatives, only to be rejected by the Senate. Czech NGOs however, have been able to use existing non-discrimination provisions to expose and counter discrimination practices.

3.1 Belgium

In Belgium, a law against racial discrimination was first introduced in 1981 as a consequence of the ratification of the International Convention on the Elimination of Racial Discrimination (ICERD). The law making racism a criminal offence was not very effective; indeed lack of evidence often made the prosecutor dismiss cases. In 1993, the Centre for Equal Opportunities and Opposition to Racism was founded as one of the first specialised bodies against discrimination in Europe.

In 2003, a general Equal Treatment Act entered into force.²⁵ The law includes both criminal as well as civil provisions

and it covers a number of non-discrimination grounds including national or ethnic origin. One of the main objectives of the Act is to make it easier for a victim of discrimination to institute a quick civil action before the Court of First Instance or, where appropriate, before a Commercial Court or Labour Court.

The law introduced the shift of the burden of proof in two articles: article 19 and article 21. Article 19, paragraph 3 reads:

‘When the victim of discrimination (...) produces before the competent court facts such as statistical data or field trials that lead to the supposition of direct or indirect discrimination, the burden of proof that no discrimination has been committed shall fall on the defendant.’

The text of the Belgian Equal Treatment Act differs from the text of Article 8 of the Racial Equality Directive, as it adds two examples of ‘facts’ that may be established by the victim: statistical data and field trials, the latter are often described as

situational tests. Article 19, paragraph 4, adds: ‘Proof of discrimination on the grounds of sex, sexual orientation, marital status, birth, fortune, age, religion or belief, current or future state of health, disability or physical characteristic can be provided by means of a field trial which can be carried out by a bailiff.’ It must be noted that this paragraph does not mention race or ethnic origin. The law also announces that a definition of ‘field trial’, providing a number of minimum requirements, will be included in a Royal Decree. So far, this Decree has not been adopted. The promised adoption of a decree defining field trials or tests has caused concern for NGOs; a strict interpretation of field trials could mean that the burden on the victim of discrimination to establish facts from which discrimination may be presumed may be too high.²⁶

²⁵ Act of February 25, 2003 pertaining to the combat of discrimination and to the amendment of the Act of February 15, 1993 pertaining to the foundation of a centre for equal opportunities and opposition to racism.

²⁶ Rorive, Isabelle and Perrouy, Pierre-Arnaud, ‘Réflexions sur les difficultés de preuve en matière de discriminations’, in: *Revue du droit des étrangers*, no. 133, April-June, 2005.

SITUATIONAL TESTING

A number of issues can arise in the use of situational tests: the risk of provocation and the fairness of the evidence. In order to ascertain that a test is properly carried out, an independent person, such as a bailiff, may look into these two aspects to ensure that nothing in the test process gives rise to a suspicion that the wrongful or negligent behaviour was provoked by those conducting the test. As De Schutter describes it:

“The test must simply be able to confirm or record an action which would have taken place even without this construction of an artificial situation. Secondly this person must guarantee the methodological integrity of the situational test and look into the comparability of the people in the “experimental” group who have a suspect characteristic (for example, because they are of a particular ethnic origin or visibly wear a particular religious symbol) with the people of the “control” group.”²⁷

An unconditional shift of the burden of proof is included in Article 21 of the Belgian Act, which only applies to employment situations. The first paragraph sets out a prohibition of dismissal in cases where the employee has lodged a discrimination complaint as a protection against victimisation. The second paragraph lays the burden of proof on the employer:

‘if the employee is dismissed or the working conditions are altered unilaterally within twelve months following the filing of the complaint. Said burden of proof shall likewise fall on the employer in the event of dismissal or unilateral alteration of the working conditions after legal action was taken, up to three months after the entry into force of the definitive judgement of the court’.

3.1.1 Case law

So far little civil case law has been published in which the shift of the burden of proof has been applied. However there is some emerging relevant case law.

COURT OF ARBITRATION, 6 OCTOBER 2004

In a case published by the Belgian Court of Arbitration in 2004 two applicants, board members of the Vlaams Blok,²⁸ challenged the amended Equal Treatment Act of 2003. They argued that the shift of the burden of proof in civil cases prejudiced the burden of proof in criminal cases, especially with regard to the use of situational tests. According to the

court, the provisions of Article 19 of the Act are pertinent to guaranteeing the objective of an efficient protection against discrimination, and are proportionate. If, however, the evidence which is collected in a civil case leads to separate criminal prosecution, the court may be required to judge the proof separately and respect the presumption of innocence of the suspect.²⁹ As a consequence of this decision, the 2003 Act was amended.

COURT OF FIRST INSTANCE, BRUSSELS, 3 JUNE 2005

A Belgian couple of immigrant origin were discriminated against when they sought to rent an apartment. The couple took the case to court and, with the presented facts and a witness account, the judge considered that there were facts that permitted him to presume the existence of discrimination based on the national origin of the claimants. The owner of the apartment could not prove that her decision was not motivated by the ethnic origin of the claimants.³⁰

3.1.2 Conclusion

With the amendments to the Equal Treatment Act in 2003, Belgium has a comprehensive law on equal treatment. The provision on the shift of the burden of proof, which had not been part of the law until the implementation of the Directives, still requires secondary legislation. There is a fear that a narrow description of the terms of allowing evidence will raise too high a hurdle for claimants. Lower courts, however, have begun to apply the shift of the burden of proof in their proceedings.

3.2 Czech Republic

Despite the fact that the Racial Equality Directive has not been transposed in the Czech Republic, some laws were amended to introduce certain principles from this Directive. The Labour Code now states that the employer has an obligation to ensure equal treatment to all his or her employees in respect of remuneration for work, including other benefits of monetary value, professional training and opportunity for advancement at work (section 1 (3)). The equal treatment principle relates to all employees’ labour relations and to the whole duration of these relations from the start until the termination of the employment relationship.

With regard to the shift of the burden of proof, in 2003 the Czech law on civil procedures³¹ was amended. Section 133a of this law refers to discrimination and puts the burden of

²⁷ De Schutter, Olivier, ‘Methods of proof in the context of combating discrimination’, in: Cormack, J. (Ed.) *Proving discrimination. The dynamic implementation of EU-anti-discrimination law: The role of specialised bodies*. Brussels: Migration Policy Group, 2003, p. 35-36.

²⁸ The Vlaams Blok, known as Flemish Interest (Vlaams Belang) since 2004, is a right-wing nationalist political party in the Flemish region of Belgium.

²⁹ Court d’Arbitrage, no. 157/2004, 6 October 2004.

³⁰ Court of first instance, Brussels, no. 05/1289/A, ref. T. no. 1264/05, 3 June 2005. Quoted from Rorive, Isabelle and Perrouty, Pierre-Arnaud, ‘Réflexions sur les difficultés de preuve en matière de discriminations’, in: *Revue du droit des étrangers*, no. 133, April-June, 2005.

³¹ Law No. 99/1963 (Civil Procedure Code), as amended by Law No. 151/2002 (Coll.)

proof on the respondent, where the facts create a prima facie case of indirect or direct discrimination. In labour issues, the shift of the burden of proof is applicable in cases of discrimination on grounds of sex, racial or ethnic origin, religion, belief, conviction, disability, age or sexual orientation. As far as racial or ethnic origin are concerned, the Czech law also allows the shift of the burden of proof to health and social care, access to education and vocational training, access to public commissions, access to membership of employers' and employee organisations, access to membership of professional organisations and professional associations, and the supply of goods or services. Housing related issues are not included.

The shift of the burden of proof is not new to Czech law. The Commercial Code also contains rules on shifting the burden of proof. Section 54 (2) of the Commercial Code applies to certain actions brought by consumers against unfair competition practices. The provision stipulates that where a consumer claims the right to request that the offender desist from an unlawful act or remove the unlawful state of affairs, the defendant must prove that his acts did not involve acts of unfair competition.

3.2.1 Case law

There have been some successful court cases against discrimination in the Czech Republic. However proving discrimination has been a difficult task. So far the shift of the burden of proof has been applied in only one court case, but it was subsequently rejected in appeal by the Supreme Court (see below). Czech courts have accepted situational testing as a way of proving discrimination. Successful tests have been accepted as evidence, rather than 'facts, from which discrimination may be presumed'. Courts in the Czech Republic have accepted evidence of discrimination in cases of refusal of entry in discotheques as well as in employment cases through witness accounts and have allowed the use of tape recorded evidence in situational tests.

SUPREME COURT, 17 AUGUST 2004

The verdict of the Supreme Court reversed a finding by a regional court. The regional court had applied section 133a of the Civil Procedure Act and had shifted the burden of proof to the respondent. The case concerned the denial of service to clients of Roma origin by the staff of a restaurant. The Roma clients had been ignored and, after asking to be served, were told that they would not be served. After 20 minutes, a sign indicating that the table was reserved was put on their table. The court found inconsistencies in the owners' and the employees' accounts of the situation and concluded that a presumption of discrimination was present. According to the regional court, the defendant could not successfully prove that

it did not concern discrimination. The defendant appealed the court's decision, including the payment of 20,000 CZK (640 €). The Supreme Court reversed the regional court's decision. In weighing the facts, the Court discovered inconsistencies in the claimants' account and decided that the defendant proved beyond doubt that the reservation was the reason for the denial of services.³²

3.2.2 Conclusion

Despite the fact that the Czech Republic has introduced a number of non-discrimination provisions in employment and civil legislation, so far it has failed to adopt a comprehensive anti-discrimination law. However, the Civil Procedure Act as amended in 2003, this law has made the shift the burden of proof possible. The Supreme Court in the Czech Republic has so far rejected the shift of the burden of proof in one case.

3.3 Hungary

In Hungary, the principle of equal treatment and non-discrimination is enshrined in Article 70/A of the Constitution. Until 2004, when the Equal Treatment Act³³ (ETA) across into force, equal treatment provisions were scattered over a number of laws, mainly in legislation relating to employment and education.

The ETA is a comprehensive non-discrimination law, covering the grounds in both Directive 2000/43 and 2000/78, and adding a number of other grounds with an open-ended list. The material scope of the law is wider than the Racial Equality Directive. The ETA covers all the actions, measures, and practices of most public entities and private actors in all fields. Of these, the ETA attributes special importance to five sectors specifically: employment, social protection and healthcare, housing, education and access to goods and services. In the definition of direct discrimination, the ETA allows for an objective justification of discrimination. Although this provision is included on the basis of the practice of the Constitutional Court, it seems to be in breach of Directives 2000/43 and 2000/78: in principle, the Directives do not allow any justification of direct discrimination.³⁴

A victim of discrimination can choose the forum before which he wants to submit a claim. The Hungarian specialised body, the Equal Treatment Authority (Egyenlő Bánásmód Hatóság), can handle complaints with regards to the

³² 1 Co 321/2003-196, European Anti-discrimination Law Review, no. 1-2005, p. 43-44, available at www.migpolgroup.com

³³ Act CXXV of 2003 on equal treatment and the promotion of the equality of opportunities.

³⁴ Kádár, A. and L. Farkas, Report on measures to combat discrimination, Directives 2000/43 and 2000/78. Country Report Hungary, Utrecht/Brussels: human european consultancy/Migration Policy Group, 2005, p. 10.

ETA, but a victim can also initiate court proceedings before a civil court, or in employment situations, go to a Labour Court. In consumer cases, the Consumers' Protection Authority is competent as well.

The ETA provides for a shift of the burden of proof in Article 19. However, the terminology is different from the text of the Racial Equality Directive and it may put a heavier burden on the claimant than provided for in the Directive. The Hungarian provision demands the injured party to prove that he has suffered a disadvantage and that the injured party *'possesses characteristics'* defined in Article 8' of the law (emphasis added), this refers to the grounds of discrimination. If proof of these facts has been delivered, the respondent 'shall prove that it has observed or, in respect of the relevant relationship, was not obliged to observe the principle of equal treatment'. The provision is not limited to procedures before a court of law, as it generally refers to 'procedures'. Hence the Equal Treatment Authority may apply the shift of the burden of proof. As the Directive requires a claimant to 'establish facts' from which discrimination may be presumed, rather than establish proof of having suffered disadvantage or having certain characteristics, the provision in the ETA may be non-compliant with the Directive.

In order to clarify the duties of the Authority in relation to the application of the burden of proof, the advisory body to the Authority, consisting of experts in the field of non-discrimination, has published a position paper. In that paper, the advisory body states that:

'The injured party needs to prove that he has suffered a disadvantage and that he possesses the protected characteristics, but he does not prove the causal relation between the protected characteristics and the suffered disadvantage. The injured party does not have to prove the suffering of a legal disadvantage, but an ordinary disadvantage. This means that he does not have to prove that the treatment violated a special legal rule, but that it was disadvantageous for him from a certain point of view. The respondent is exempted if he proves that there is no causal relation between the two facts and with this he successfully shows that he has observed the requirement of equal treatment. Besides this, by admitting the causal relation he also has the possibility to prove that he has not been obliged to observe the requirement of equal treatment.'³⁵

The ETA is under no obligation to follow the advisory body's advice.

3.3.1 Case law

In Hungary case law in relation to the shift of the burden of proof is still rather scarce. Some cases that have dealt with the burden of proof date back to the period before the Equal Treatment Act came into force.

SUPREME COURT, 11 FEBRUARY 2004

A case was initiated by a Roma woman who alleged that she was discriminated at her job interview. The Supreme Court found in her favour, quashed the judgment of second instance and ordered retrial. Interpreting the Labour Code's burden of proof provision, since then amended to comply with the directives, the Supreme Court found that for the courts to shift the burden of proof, claimants must establish that they suffered a disadvantage. Whether the claimant complained on the basis of a protected characteristic was not disputed. Though handed down before the ETA came into force, this judgement is in full compliance with the latter's relevant provision (Article 19). It provides ordinary courts with guidance compatible with the Directives, when clarifying that the rationale behind the shift of the burden of proof is to persuade employers to come forward with evidence to exempt them from civil liability. The judgment explained how indirect evidence can form the basis of proof on the part of claimants. Seemingly more lenient than Article 19 of the ETA but still fitting within its confines, this judgment will undoubtedly be used to bridge the gap between the wording of the Directives' relevant provisions (presume) and Article 19 ETA (prove).³⁶

EQUAL TREATMENT AUTHORITY CASES

The Equal Treatment Authority has given a number of relevant judgements since its establishment in 2005. For example, in 2006 the Authority shifted the burden of proof in a case relating to employment discrimination:³⁷

'A legal aid office, representing a woman of Roma origin, filed a complaint with the Authority. The office alleged that the client experienced disadvantageous treatment on the ground of her Roma origin, when she applied for a job by telephone. The plaintiff called from an official room and one of the staff members could overhear the conversation. The legal aid office also carried out a situation test. The respondent could not give a reasonable justification of his behaviour in relation to the plaintiff and could not prove that there was no causal relation between the refusal and the Roma origin of the plaintiff. The Authority asserted that the rejection for the job could be attributed to the plaintiff's Roma origin.'

³⁵ Position paper no. 10.007/1/2006 TT.

³⁶ BH2004, 255. Complex CD Jogtár.

³⁷ Taken from the website of the Equal Treatment Authority, www.egyenlobanasmod.hu.

3.3.2 Conclusion

The Hungarian law on equal treatment allows people who have encountered discrimination within the scope of the Racial Equality Directive to bring forward cases of discrimination to different bodies as well as a judicial court. The provisions regarding the shift of the burden of proof may be too strict for victims and could be out of line with the Racial Equality Directive. Despite this, a number of successful cases have been processed.

3.4 Italy

In Italy, non-discrimination provisions existed before the implementation of the Racial Equality Directive. Criminal provisions against hate speech were introduced in 1993, and in 1998, the Immigration Act was amended in order to give protection to non-EU citizens against discrimination through civil law. Article 43 of the Immigration Act includes a definition of direct and indirect discrimination and a list of forbidden discriminatory acts is included in an annex. This list corresponds to a large degree to the scope of Article 3 of the Racial Equality Directive. The 1970 Workers Act contains provisions making it unlawful to dismiss or discriminate against a person on the basis of his political or religious conviction or because of his race, sex or linguistic background.

The transposition of the Racial Equality Directive took place through the adoption of Legislative Decree No. 215/2003, entering into force on 9 July 2003. The Decree covers the issues of the Racial Equality Directive; the material scope is identical to the areas enumerated in Article 3 of the Directive. The previous non-discrimination provisions were not revoked and therefore the existing protection against discrimination is based on both the implementation decree as well as on the previously existing laws. The enforcement of the non-discrimination legislation is the responsibility of the National Office against Racial Discriminations (Ufficio Nazionale Antidiscriminazioni Razziali - UNAR). The office, which was officially established in November 2004, is part of the Department of Equal Opportunities.

With regard to the burden of proof provision, in transposing the Directive the government chose to alter the terminology from the Directive. Rather than mentioning the shift of the burden of proof, the Decree reads:

‘The plaintiff, who considers himself wronged, may, in order to demonstrate the existence of discriminatory conduct, submit in serious, exact and consistent terms before a court elements of fact, also on the basis of statistical data, suitable for the judge to evaluate such elements on the basis of the rule of the Civil Code (Article 2729).’

The law thus seems to be in breach of the Racial Equality Directive,³⁸ because the requirement of ‘serious, exact and consistent terms’ puts a heavier burden on the claimant than foreseen in the Directive. It should be noted that in the implementation of the Burden of Proof Directive in gender cases (1997/80), the Italian government utilized terminology closer to that of the Directive in Article 4 of the law 125/91.³⁹ It has been argued that the wording of this law should be used in Law Decree 215/2003.⁴⁰ Case law on the provision in the sex-discrimination law 125/91 shows that the law attributes a presumptive element to statistical data, which could establish the existence of direct and indirect discrimination.⁴¹ It remains to be seen whether the courts will accept statistical data in cases relating to racial or ethnic discrimination.

In its first report to the parliament, UNAR points to a number of weaknesses in the law as far as the protection of victims of discrimination in legal cases is concerned. The case law shows some inherent difficulties in proving discrimination and UNAR concludes that the position of the victim would be improved if the terminology of Article 4 of Decree 215/2003 would be brought in line with the Racial Equality Directive.⁴²

3.4.1 Case law

Case law relating to the shift of the burden of proof is not yet available. Cases related to the Racial Equality Directive are only slowly appearing before the courts. As mentioned, problems relating to access to justice are an important issue for victims of discrimination in Italy. There is, however, some case law under the non-discrimination provisions of the Immigration Act 1998, in which proof of discrimination was at stake.

TRIBUNAL PADUA, 19 MAY 2005

A bar in Padua charged higher prices for non-Italian customers than for Italian clients. A customer of non-EU origin complained about this practice and initiated a court procedure, supported by two NGOs. The court heard the claimant, who brought some witnesses. The witnesses declared that the

³⁸ Vassalo Paleologo, F., Analytical report on legislation. RAXEN National Focal Point Italy. Vienna: European Monitoring Centre on Racism and Xenophobia, 2004, p. 36.

³⁹ ‘If the claimant establishes elements of fact, from which it may be presumed in precise and non-contradictory terms that there has been a discriminatory act or behaviour on the grounds of sex, it shall be for the respondent to prove that there has been no discrimination.’

⁴⁰ See a.o: Scarponi, S., *Le discriminazioni nel lavoro*. Paper for the Consiglio Superiore della Magistratura, Progetto di formazioni sulle direttive comunitarie contro la discriminazione, Rome, 2004, p. 20 and Simoni, A., *Report on measures to combat discrimination*, Directives 2000/43/EC and 2000/78/EC. Country Report Italy. Utrecht/Brussels: human european consultancy/Migration Policy Group, 2004, p. 29.

⁴¹ Court of Bologna, 27 June 1998, in *Rivista giuridica del lavoro* 1999, II, p. 703, ann. L. Calafà.

⁴² Ufficio Nazionale Antidiscriminazioni Razziali (UNAR): *Efficacia degli strumenti di tutela nel contrasto alle discriminazioni razziali e proposte di modifica della normativa vigente*. Relazione al Parlamento sull’effettiva applicazione del principio di parità di trattamento ex articolo 7, comma 2, lett. f), decreto legislativo 215/2003, December 2005, p. 23.

bar owner charged higher prices for foreigners, because he wanted to keep these people away from his premises. On the basis of the witnesses account, the court stated that the practice was discriminatory and therefore unlawful. The two NGOs were denied legal standing with reference to a provision in Decree 215/2003. This provision states that associations wanting to bring cases on behalf or in support of victims of discrimination need to be registered with the Ministry of Equal Opportunities. But, because a decree which establishes the list of organisations had not been published, the NGOs were denied standing before the court.

3.4.2 Conclusion

Although the transposition of the Directive has improved the legal protection against discrimination in Italy, the implementation law has some limitations. The provision on the shift of the burden of proof has not been transposed properly, leaving victims of discrimination with a high threshold of proof.

3.5 The Netherlands

A general non-discrimination law was introduced in The Netherlands in 1994. This law, the Equal Treatment Act, covers a wide range of grounds: religion, belief, political conviction, race, gender, nationality, sexual orientation, civil status, duration of employment relation (full-time or part-time) and temporary or permanent employment contract. The implementation process of the Racial Equality Directive and the Framework Directive was concluded on 1 April 2004. Separate laws were introduced for age and disability.⁴³ The Equal Treatment Act addresses the areas of employment, self-employment, public services, housing, education, health care, cultural affairs and the public supply of goods and services. The enforcement of the law is the responsibility of the Equal Treatment Commission (ETC), which was established in 1994. The ETC acts as a semi-judicial body: persons who feel they are treated unequally can request the Commission to judge whether the law was violated in their particular case. In contrast to a court judgment, an opinion given by the ETC is not binding upon the parties.

With the transposition of the Article 13 Directives in April 2004, the shift of the burden of proof was introduced. The Equal Treatment Act states:

‘if a person who considers that he has been wronged through discrimination as referred to in this Act, establishes before a court facts from which it may be presumed

that discrimination has taken place, it shall be for the respondent to prove that the action in question was not in breach of this Act.’

The provision applies to group actions before a civil court as well as to relevant administrative procedures, for example in cases relating to social advantages. It must be noted that the provision only applies to court procedures and not necessarily to procedures before the Equal Treatment Commission. The Dutch government has not used Article 8 of the Racial Equality Directive to extend the shift of the burden of proof to another ‘competent authority’. However, the ETC has applied the shift of the burden of proof in order to implement the Dutch law.

During the debate in parliament on the transposition of the Directives, the government made clear that the facts that the victim needs to establish in order to bring a presumption of discrimination, need to fulfil the criteria laid down in sections 149 and 150 of the Civil Procedures Act. These articles concern the standards of evidence. According to the government, statements made by the complainant need to be sufficiently motivated before the burden of proof is transferred to the respondent.⁴⁴

In Dutch civil law, a shift of the burden of proof has been applicable in other legal fields. In general, section 150 of the Civil Procedures Act maintains that the burden of proof of facts and rights lies on the person who invokes the legal consequences of these facts before a court. However, another division of the burden of proof ‘may ensue from specific regulations or from reasons of fairness or reasonableness’. For example, in cases of medical liability, courts have applied the shift of the burden of proof to the hospital, because hospitals generally dispose of more information than an individual patient.⁴⁵

3.5.1 Case law

No court judgements could be found in which the provision of the shift of the burden of proof has been applied. However the provision is not new to the case law of the ETC. In particular in cases of sex discrimination in employment the Commission has applied the provision.⁴⁶

In a number of opinions issued before the transposition of the non-discrimination Directives in Dutch law, the ETC anticipated the burden of proof provision. In a number of opinions, the Commission considered:

‘consistent with the division of proof in cases relating to unequal treatment on the ground of sex (Article 6a Equal

⁴³ For more information see: Commissie Gelijke Behandeling: Equality law and the work of the Dutch Equal Treatment Commission, available from http://www.cgb.nl/_media/downloadables.

⁴⁴ Parliamentary Documents II, 2002 – 2003, 28 770, no. 5, p. 33.

⁴⁵ Supreme Court, 18 February 1994, NJ 1994, 368.

⁴⁶ Article 6A Equal Opportunities Act men/women. This Act was amended with the implementation of the Burden of Proof Directive 1997/80/EC.

Opportunities Act men/women) and anticipating the implementation of the Directive no. 2000/43/EC (...), the following standard with regards to the burden of proof is applied. It is on the applicant to establish facts and circumstances that presume discrimination. A presumption thus risen may be refuted by the respondent by proving that there has been no violation of the non-discrimination legislation.⁴⁷

SUPREME COURT, 10 DECEMBER 1982 (BINDEREN v. KAYA)

Mr Kaya, a Dutchman of Turkish origin, had been waiting years for a suitable house. Because of his income, he relied on a social housing scheme. This housing scheme was the responsibility of, amongst others, the social housing corporation Binderen. Before the court, Kaya could establish the fact that over a number of years, Binderen had allocated 157 houses, of which only one had been given to an immigrant family. The proportion of immigrant families in the town was 4.6% and of the persons registered for social housing, 10.2% was of immigrant background. Other corporations had allocated 7.2% of their housing stock to immigrant families. With these statistics, the Supreme Court decided that a reasonable and fair application of the principle of the burden of proof, as found in the Civil Procedure Code, made it necessary to shift the burden of proof to the housing corporation in order to justify its policy was not discriminatory against immigrants. The evidence failed and the court judged that discrimination had taken place.⁴⁸

EQUAL TREATMENT COMMISSION, 7 JULY 2000

An employer, a car manufacturer, terminated the contract of an employee of Congolese origin. According to the employer, the employee's performance was not adequate; there had been complaints. The employee denied having received complaints and suspected discriminatory reasons for the dismissal. He contested the dismissal before the District Court of Maastricht. The court found no proof of discrimination and dismissed the request to shift the burden of proof to the employer.⁴⁹ After the court decision, the employee requested an opinion from the Equal Treatment Commission. The ETC considered that the employee was never informed about complaints about him and that the job assessment procedure had been insufficiently transparent. This led to the conclusion that the decision of the employer to dismiss the employee on the grounds of his performance was insufficiently substantiated. According to the ETC, it was for the employer to prove that discrimination did not play a role in the dismissal. On the basis of the facts, the ETC decided that the employer

could not prove the non-discriminatory grounds for the dismissal. He had therefore violated the law.

EQUAL TREATMENT COMMISSION, 1 MARCH 2004

A woman moved house and took her pay TV subscription with her. When the decoder stopped working she called the service provider and asked for a technician to check the connection. The provider refused, stating that there are postcode areas where they do not send technicians for security reasons. Supported by a local NGO, the woman lodged a complaint with the ETC, claiming indirect discrimination. On the basis of local statistics, the woman argued that two-thirds of the inhabitants of this particular post code area consists of people with an ethnic minority background. Therefore the company policy had a disparate impact on members of ethnic minority groups. The ETC accepted the proof and found that the company had no objective justification for this type of indirect discrimination.

3.5.2 Conclusion

With the transposition of the Article 13 Directives, some changes were made to the equal treatment legislation in The Netherlands, including the introduction of the shift of the burden of proof. In its investigations, the ETC tests the evidence before it and where a presumption of discrimination is established, it requests the respondent to prove that discrimination did not take place. The case law shows that the applicant has to bring forward motivated facts and circumstances, before the burden of proof is shifted. Proof on the basis of statistics in indirect discrimination is often acknowledged.

3.6 United Kingdom

Non-discrimination legislation in the United Kingdom was first adopted in 1965 under the Race Relations Act. The Race Relations Act (RRA 1976) became the 'successor' of the original Act. In 2000, as a result of the Stephen Lawrence inquiry,⁵⁰ a number of changes were introduced in the Race Relations Act. From then on, the Act also applied to policing and other public functions, and gave public authorities a positive duty to promote racial equality.⁵¹ Apart from legislation pertaining to race or ethnic origins, the UK has legislation for other grounds of discrimination. Separate laws exist for sex, disability, religion or belief and sexual orientation.

⁴⁷ E.g. Equal Treatment Commission, 9 July 2002 (2002-84) and 14 October 2003 (2003-127).

⁴⁸ HR 10 december 1982, NJ 1983, 687 (Binderen v. Kaya).

⁴⁹ District Court, Maastricht, 26 April 2000.

⁵⁰ A Parliamentary inquiry into the police investigations of the death of a teenager of Caribbean origin led to the conclusion that institutional racism in the UK existed and needed to be tackled.

⁵¹ The United Kingdom consists of four different parts (England, Wales, Scotland and Northern Ireland), each of which has a certain degree of autonomous legislative powers. The RRA 1976 is valid for England, Wales and Scotland, whereas in Northern Ireland the Race Relations (Northern Ireland) Order 1997 applies. Because of the specific nature of the situation in Northern Ireland, for the purposes of this report only the RRA 1976 will be addressed.

With regards to age, the government has announced it will introduce legislation at the end of 2006.

In the UK, a legal distinction is made between 'race or ethnic origins' and 'colour'. The previous RRA 1976 applied to 'colour, race, nationality or ethnic or national origins'. The Racial Equality Directive applies only to discrimination on the grounds of 'race or ethnic or national origins'. This has led to a dual system in the UK legislation. Claims of discrimination on the basis of 'colour' or 'nationality' must be brought under the unrepealed provisions of the RRA 1976, whereas the grounds 'race' and 'ethnic origins' fall under the scope of the amended provisions of the RRA. The Commission for Racial Equality (CRE) is responsible for the enforcement of racial equality norms in England, Scotland and Wales. Proposals have been adopted to create a single equality body in the UK, the Commission for Equality and Human Rights, which will replace the CRE from 2009.

In general, British courts require the claimant to bring forward proof of a legal claim against the opposing party. However, over the years it has become apparent that claimants in discrimination cases faced particular problems in collecting proof of discrimination. For that reason, under certain circumstances courts have shifted the burden of proof to the respondent.⁵² The implementation of the burden of proof Directive 97/80 in sex discrimination cases resulted in changes in the Sex Discrimination Act (SDA) in 2001. With the implementation of the Racial Equality Directive in 2003, a provision on shifting the burden of proof was introduced in the RRA 1976. The provisions apply to employment cases before an Employment Tribunal and to cases relating to the provision of goods and services before County and Sheriff Courts. The provisions are similar and read:

'Where, on the hearing of the complaint, the complainant proves facts from which the tribunal could, apart from this section, conclude in the absence of an adequate explanation that the respondent (a) has committed such an act of discrimination or harassment against the complainant, or (b) is (...) to be treated as having committed such an act of discrimination or harassment against the complainant, the tribunal shall uphold the complaint unless the respondent proves that he did not commit or, as the case may be, is not to be treated as having committed, that act.'⁵³

The text of the provision is different from Article 8 of the Racial Equality Directive. Whereas the RRA requires the claimant to prove facts from which the court could conclude

discrimination in the absence of an adequate explanation, the Directive compels the claimant to establish facts from which a presumption of discrimination arises. However, in order for the court to be convinced of the facts, the establishment of these should hold a high degree of certainty, amounting to proof. Therefore, the RRA text is seen as being in line with the Directive.⁵⁴

3.6.1 Case law

The Court of Appeal issued three important decisions relating to the shift of the burden of proof on 7 and 8 February 2004. Two of the three cases concerned racial discrimination and one concerned sex discrimination. The Court gave a set of practical instructions to lower courts and employment tribunals which are valid for both sex and race equality cases. The guidelines are an expansion of existing guidelines issued in a previous decision by the Employment Appeals Tribunal.⁵⁵

The guidance given in the *Igen v. Wong*, *Chamberlin* and *Emezie v. Emokpae* and *Webster v. Brunel University*⁵⁶ decisions explains how tribunals should assess whether a claimant has established a prima facie case of discrimination and when they should shift the burden to employers to provide a satisfactory explanation for their actions. This makes shifting the burden of proof a two-stage approach for a claimant in court. In the first instant the claimant needs to prove the existence of facts from which the tribunal could conclude, on the balance of probabilities, that the respondent has committed an unlawful act of discrimination. If the first stage is achieved, the second stage is for the respondent to prove that he did not commit the unlawful act.

The detailed guidelines in these decisions give a clear picture of the division of the burden of proof, both for claimants and for respondents. They may serve as an example for courts and organisations in other Member States where these need to interpret the requirements on shifting the burden of proof of both the Racial Equality and the Framework Directive.

3.6.2 Conclusion

Non-discrimination law in the UK has had a long-standing history. Although the act implementing the Racial Equality Directive used different terminology than the Directive with regard to the shift of the burden of proof, the content seems to be in conformity with the Directive. Important case law by the Court of Appeal has given a set of guidelines to lower courts for the application of the shift of the burden of proof.

⁵² See *a.o. King v. Great Britain-China Centre*, [1991] IRLR 513.

⁵³ Sections 54A and 57ZA RRA 1976.

⁵⁴ Cohen, B., Report on measures to combat discrimination, Directives 2000/43/EC and 2000/78/EC. Country Report United Kingdom. Utrecht/Brussels: human european consultancy/Migration Policy Group, 2005, p. 48.

⁵⁵ *Barton v Investec Henderson Crosthwaite Securities Ltd*, [2003] IRLR 332.

⁵⁶ [2005] EWCA Civ 142, [2005] IRLR 258..

**GUIDELINES ISSUED BY THE COURT OF APPEAL,
FEBRUARY 2004**

- (1) Pursuant to section 63A of the SDA, it is for the applicant who complains of sex discrimination to prove on the balance of probabilities facts from which the tribunal could conclude, in the absence of an adequate explanation, that the respondent has committed an act of discrimination against the applicant which is unlawful by virtue of Part II or which by virtue of s. 41 or s. 42 of the SDA is to be treated as having been committed against the applicant. These are referred to below as "such facts".
- (2) If the applicant does not prove such facts he or she will fail.
- (3) It is important to bear in mind in deciding whether the applicant has proved such facts that it is unusual to find direct evidence of sex discrimination. Few employers would be prepared to admit such discrimination, even to themselves. In some cases the discrimination will not be an intention but merely based on the assumption that "he or she would not have fitted in".
- (4) In deciding whether the applicant has proved such facts, it is important to remember that the outcome at this stage of the analysis by the tribunal will therefore usually depend on what inferences it is proper to draw from the primary facts found by the tribunal.
- (5) It is important to note the word "could" in s. 63A(2). At this stage the tribunal does not have to reach a definitive determination that such facts would lead it to the conclusion that there was an act of unlawful discrimination. At this stage a tribunal is looking at the primary facts before it to see what inferences of secondary fact could be drawn from them.
- (6) In considering what inferences or conclusions can be drawn from the primary facts, the tribunal must assume that there is no adequate explanation for those facts.
- (7) These inferences can include, in appropriate cases, any inferences that it is just and equitable to draw in accordance with section 74(2)(b) of the SDA from an evasive or equivocal reply to a questionnaire or any other questions that fall within section 74(2) of the SDA.
- (8) Likewise, the tribunal must decide whether any provision of any relevant code of practice is relevant and if so, take it into account in determining, such facts pursuant to section 56A(10) of the SDA. This means that inferences may also be drawn from any failure to comply with any relevant code of practice.
- (9) Where the applicant has proved facts from which conclusions could be drawn that the respondent has treated the applicant less favourably on the ground of sex, then the burden of proof moves to the respondent.
- (10) It is then for the respondent to prove that he did not commit, or as the case may be, is not to be treated as having committed, that act.

- (11) To discharge that burden it is necessary for the respondent to prove, on the balance of probabilities, that the treatment was in no sense whatsoever on the grounds of sex, since “no discrimination whatsoever”⁵⁷ is compatible with the Burden of Proof Directive.
- (12) That requires a tribunal to assess not merely whether the respondent has proved an explanation for the facts from which such inferences can be drawn, but further that it is adequate to discharge the burden of proof on the balance of probabilities that sex was not a ground for the treatment in question.
- (13) Since the facts necessary to prove an explanation would normally be in the possession of the respondent, a tribunal would normally expect cogent evidence to discharge that burden of proof. In particular, the tribunal will need to examine carefully explanations for failure to deal with the questionnaire procedure and/or code of practice.

⁵⁷ While the language of ‘no discrimination whatsoever’ is used in the SDA and not the RRA the guidelines apply not only to cases of sex discrimination, but also to race or ethnic origin.

4. Recommendations and strategies

This report has sought to outline the rationale and history of introducing the shift of the burden of proof under European legislation. These developments were discussed in the context of six European Union Member States, with diverging experiences. However legislation on its own is never enough; and legislation which sits on the statute book without being utilised provides little assistance to the victims of discrimination. Consequently this report seeks to provide a tool for advocates and NGOs who want to ensure that the provisions on shifting the burden of proof make a real difference to the lives of those who experience discrimination.

This report has highlighted a range of challenges in shifting the burden of proof. It is essential that these challenges are acknowledged and addressed by individuals and organisations who work in the field of non-discrimination.

4.1 Lack of or wrongful transposition of the Directives

In some countries, the Directives have not been transposed, such as in Germany, the Czech Republic and Luxemburg, or, where the burden of proof is concerned, the transposition is inadequate. Although the Directive gives Member States a certain margin to manoeuvre, when the text on the burden of proof is too restrictive, it may constitute an infringement of European legislation.

NGOs should try to overcome this by explicitly referring to the text of the Racial Equality Directive in cases they bring before courts. Where the respondent is the government or a governmental body, the Directive may be directly applicable. This means that a court or other competent body must use the text of the Directive. In cases where the respondent is a private actor (for example an employer or service provider), the text of the Directive may not be invoked nonetheless it could prove a useful reference.

As the guardian of the European Treaties, the European Commission will take infringement proceedings against those Member States who fail to adequately transpose the Directive. NGOs should actively notify the Commission of their concerns and encourage them to take action. It can also be

useful to ask Members of the European Parliament to ask parliamentary questions of the Commission in this regard.

4.2 Restrictive terminology/interpretation

In a number of Member States, the transposition laws have introduced terminology that differs from the text of the Directives. Sometimes the requirements to establish facts are such that it almost amounts to giving proof of discrimination. Although this does not necessarily infringe European legislation, it may create an additional hurdle for victims to establish a presumption of discrimination, after which the burden of proof shifts to the respondent.

When this is the case, NGOs could refer to the text of the Directive, in order to convince the court to apply an open and broad interpretation of the national law. In court procedures, the NGO may suggest the court ask the European Court of Justice about the interpretation of the national provisions. In matters of European law, all courts have the option of asking preliminary questions to the ECJ concerning the interpretation of EC law. Much of the important case law from the ECJ developed on the basis of preliminary questions by national courts.

4.3 Lack of awareness among (potential) victims

Surveys among (potential) victims suggest that many people do not know that non-discrimination laws protect their rights; others are unaware of organisations or bodies that offer assistance and support. Many people are of the view that filing a complaint or starting a case against a perpetrator will not solve the situation or they believe that starting a case will have negative consequences for them.

For NGOs, the challenge is to give information about the law and possible procedures for seeking redress; victims need to be convinced that filing a complaint or initiating court procedures can make a difference. The provision in the Racial Equality Directive on the prohibition of victimisation is important in this respect.

4.4 Lack of knowledge among legal professionals

A specific issue that has been raised in a number of Member States is the lack of knowledge about equal treatment and non-discrimination law among legal professionals. This applies to advocates, judges and others in the field. In some countries, the legislation was only recently introduced and lawyers have had little opportunity to get familiar with the concepts and procedures. In other countries, there may be a small number of non-discrimination cases. As a consequence, legal professionals do not build up experience in this field. Lawyers and judges may come to a different understanding of discrimination incidents or practices.

NGOs often have specialised knowledge about issues relating to the non-discrimination laws at the national and the European level. They can use this knowledge in procedures but also in raising awareness among legal professionals by writing articles in legal periodicals, participating in conferences, etc. For instance NGOs who are involved in taking a case should always make sure that the judge is asked to reverse the burden of proof, it is feasible that legal practitioners will not be aware of this possibility.

4.5 Barriers in accessing justice

Victims of discrimination can face numerous barriers in accessing justice. Either the system of access to justice, such as financial thresholds or the lack of qualified lawyers, does not allow them to use legal services, or they are unaware of their rights with regards to access to justice.

NGOs can play a specific role as intermediaries between victims and the legal system. They can build a network of lawyers who are familiar with non-discrimination issues and give information to their target group about the ways and means of getting legal redress. It is important that NGOs try and map the minority groups among which potential victims of discrimination exist. They can then try and build connections between these groups and qualified lawyers.

4.6 Statistical data

In order to establish facts from which it may be presumed that (indirect) discrimination has taken place, it is often necessary to collect statistical data. In many countries, this type of data is hard to come by. Either data protection laws prohibit the storing and processing of personal data, or statistical data (e.g. the ethnic composition of the work force)

are only available to the responding party, who may not be willing to hand over the information.

In the first case, where data protection laws are strict, NGOs supporting victims may have to use other means to establish the facts from which a presumption of discrimination arises: situational testing or common knowledge. In any case, the use of statistics is not a requirement that follows from the Directive. According to the Directive, facts can be established 'by any means including on the basis of statistical evidence'. Another useful tool can be a questionnaire that can be sent to the respondent. Asking questions about issues relating to the situation in the respondent's organisation can be a way of collecting information. If the respondent is unwilling to reply to the questionnaire, this may in itself create a presumption of discrimination.

4.7 Situational tests

In many Member States, organisations use situational tests to demonstrate discrimination. Tests are an efficient tool for exposing discrimination and are often accepted by courts as evidence of discrimination or at least as facts from which a presumption of discrimination arises. The more transparent and well-organised such tests are, the more likely it will be that courts will accept them as evidence.

NGOs should ensure that they use the highest possible standards when using this methodology to collect evidence. It may be useful to develop a protocol for the use of situational tests. This protocol would contain rules about the situations in which the test can be applied. It needs to address the size, the behaviour and the dress code of both the victim group and the control group. It could also address calling in persons in an official capacity, such as a bailiff. A protocol would also need to look into the use of witnesses and the use of technical equipment such as tape recordings of telephone conversations or visual recordings. The judicial acceptance of these various types of evidence differs from country to country, so the protocol would best be discussed with legal professionals in the national context.

4.8 Strategic litigation

In the previous chapter, it became apparent that in some Member States, the legal provisions with regard to the shift of the burden of proof are ambiguous or even non-compliant with the Racial Equality Directive. As a result, the objective of the burden of proof provision in the Directive is hard to achieve. Where the aim of shifting the burden of proof is to

make it easier for people who have been confronted with discrimination to establish a case of discrimination, ambiguous or restrictive law texts still make it difficult to expose discriminatory measures, incidents or practices.

For that reason, NGOs may want to engage in strategic litigation to support their cause or issue. An NGO advocacy campaign can include court procedures or litigation. If litigation is used as a strategy, it can generally be useful to support the implementation process of the Directive, to educate lawyers

and others about discrimination issues, to document injustices or, when media attention is sought, to change public attitudes and empower groups vulnerable to discrimination. If the right case for strategic litigation is selected, a court decision could settle the issue of shifting the burden of proof, and provide guidelines for the application of this provision in future cases. The concept of strategic litigation encompasses the selection of cases, case planning and management, as well as ensuring that favourable outcomes are implemented.

SHIFTING THE BURDEN OF PROOF: NGO STRATEGIES

- Highlight restrictive legislation and practices nationally and to the European institutions.
- Always ask for the burden of proof to be shifted.
- Ask the Court to ask a preliminary question to the European Court of Justice.
- Raise awareness amongst victims about what the shift of the burden of proof means for them.
- Engage with a range of legal professionals and demonstrate that you are aware of the law and in particular raise their awareness.
- Create alliances with other organisations and NGOs working on anti-discrimination to ensure maximum impact; the more often a judge is asked to shift the burden of proof the better he/she will understand the impact of this provision.
- Keep detailed records and details of all the cases of discrimination you deal with, even those cases which are not pursued by the victim; NGO records are an essential source of information.
- Undertake campaigning activities to encourage government, service providers and employers to collect data by ethnicity and to engage in ethnic monitoring.
- Send a questionnaire to the alleged discriminator asking for all the information you want.
- Engage in high quality situation testing in order to provide evidence of discrimination.
- Point to approaches in other countries where the shift of the burden of proof has been implemented.

5. Conclusion

One of the greatest barriers in securing justice for those who experience discrimination has been the difficulty in proving that discrimination has occurred. This experience is not new or unique to racism. It was in the development of case law on sex discrimination that the ECJ first explored the possibilities of shifting the burden of proof from the claimant to the respondent in discrimination cases. In other words, putting into practice the assumption that the discriminator will often be the one in the stronger position when it comes to proving or disproving an allegation of discrimination. Case law of the ECJ was codified through a number of Directives, first in the area of sex discrimination (Directive 97/80/EC) and later in the two Article 13 Directives (Directives 2000/43/EC and 2000/78/EC).

This report examined the development of the provisions on shifting the burden of proof as defined in the Racial Equality Directive in six EU Member States. There are a wide variety of experiences in the way in which the burden of proof provisions are applied in EU Member States. In itself the diversity of experience is not problematic, however there are concerns that in some cases the objective of the Directive is not being achieved, and that the shift of the burden of proof is not benefiting the victims of discrimination.

All countries in the study have included provisions on the burden of proof in their national legislation. The Czech Republic has not enacted a general law on equal treatment, but the shift of the burden of proof was introduced in the law on civil procedures and in some other relevant laws. However the terminology used in some of the national laws is too restrictive. There are problems when it comes to the high threshold of proof which the claimant needs to establish before the burden of proof is shifted. As far as the application of statistical evidence is concerned, supplying records that are significant and are not purely fortuitous or short-term phenomena can be a difficult task. Establishing facts that create a presumption of discrimination in cases of indirect discrimination is therefore far from easy.

In some of the individual Member States, such as The Netherlands and the United Kingdom, a meaningful and significant body of case law has developed. This case law may well be a source of inspiration in other jurisdictions. In the other

countries, little case law exists, however this is not surprising given the relatively recent nature of the legislation. There are additional concerns which serve to undermine access to justice for the victims of discrimination, such as lack of awareness of both victims and legal professionals and an unwillingness to take claims, which continue to undermine the application of the Article 13 Directives and in particular the provisions on shifting the burden of proof.

The variety of experiences across these six EU Member States indicates that the application of the burden of proof is being enjoyed differently in different jurisdictions, and consequently there are inequalities of standards of protection across the European Union. This underlines the need for cases to be brought before the ECJ, so that the court can weigh the various provisions. NGOs have a crucial role to play in developing these protection standards.

This report has proposed a number of strategies for NGOs, which are aimed at making a lasting impact on the situation of those who suffer from discrimination by enhancing existing legal protections. These recommendations are not limited to those NGOs who take cases or engage in strategic litigation; all organisations who work to eliminate discrimination have a responsibility to ensure that everyone understands the law, so that it can be a tool in meeting the objective to put into effect the 'principle of equal treatment'.

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Notes

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Changing Perspectives:

Shifting the burden of proof in racial equality cases

This report intends to make a contribution to the ongoing debate on how to maximise the impact of Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin. Members of the European Network against Racism (ENAR) are very aware that one of the key tools in facilitating successful cases against discrimination – the shift of the burden of proof – is being under-utilised. The purpose of this study is to provide information about the application, in practice, of the shift of the burden of proof in racial equality cases; and to provide strategies for NGOs who seek to realise the full potential of the Directive. As Claude Moraes, MEP, points out in the foreword to this report: “by focusing on one mechanism that aims at making it easier to prove discrimination, this report can make a practical and timely contribution to realising the full potential of the Racial Equality Directive”.

ENAR is a network of some 600 European organisations working to combat racism in all EU Member States. Its establishment was a major outcome of the 1997 European Year against Racism. ENAR is determined to fight racism, xenophobia, anti-Semitism and Islamophobia, to promote equality of treatment between EU citizens and third country nationals, and to link local, regional and national initiatives with European strategies.

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