Shift in the Burden of Proof – Mechanism to Ensure Enforcement of Anti-Discrimination Legislation

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Abstract

The inclusion of Article 141 (former Article 119 EEC) and Article 13 in the EC Treaty and the subsequent adoption of the gender and anti-discrimination Directives provides a comprehensive mechanism for addressing discrimination on the grounds of racial or ethnic origin, gender, religion or belief, disability, age or sexual orientation accordingly. One of the central aims of these Directives is to widen and strengthen access to effective redress. As the practice reminds us, 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 shift in the burden of proof is one of the main mechanisms which aims to ensure adequate levels of enforcement across the board of the European Union and its correct application is imperative to ensure victims are not deprived of an effective means of enforcing the principle of equal treatment.

The shift of the burden of proof based on the principle of effectiveness 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. If the respondent fails to discharge the burden of proof, the court must make a finding of unlawful discrimination.

This paper elaborates the existing anti-discrimination legislation, specifically provisions dealing with shifting of the burden of proof. The paper analyzes the definition of the principle of the shifting of the burden of proof and its historical development rooted in the gender discrimination case law of the Court of Justice of the European Union. Furthermore, the paper presents the current situation, especially emphasizing when and how the burden of proof shifts in practice, assessing what evidence may be considered at each stage of the process. Finally, the paper identifies the key challenges in this area. The text uses results from research that have been conducted in the EU and draws conclusions from the case law of the Court of Justice of the EU and the European Court of Human Rights related to the shift of the burden of proof as an illustration of trends and patterns.

Key words: burden of proof, discrimination, prima facie case

INTRODUCTION

The principle of equality is a fundamental principle of human rights, which is based on the equal worth and dignity of all human beings. This principle is articulated in all international and regional human rights instruments (Poposka, 2013, pp.1-2). Equality is an evolving concept and distinction should be made between formal, *de jure* equality and substantive, *de facto* equality. Namely, the formal equality that draws from the Aristotelian teaching (*Ethica Nicomachea*, V.3), or as legally provided equality, is established when a legal framework exist that treats all persons equally in relation to their enjoyment of rights and freedoms disregarding the effect of that treatment. This model is reactive in its nature and it is an individual complaints led model. From another side, substantive equality assures equal opportunities for all and objective equality in the result, not only in the treatment. Differences between groups are taken into consideration. As a proactive model that promotes disadvantageous groups, the substantive equality requires further steps to be taken in order to realise true, genuine equality in social conditions. The aim of a democratic society is to accomplish the substantive equality (Poposka, 2012, pp.29-30). This can be confirmed with the recent case law of the European Court of Human Rights. Furthermore, this type of equality is stipulated in clear manner in the contemporary theory of *multidimensional inequality*, especially when it tackles multiple discrimination. The theory emphasizes the existence of multi-disciplinary individual and group identities that result in the increase of the vulnerability of the protected individual and/or group that is presented in interlink with complex structural social factors (Arnardóttir, 2009).

The legal definition of the term discrimination (lat. *discriminare*, *discriminatio*) encompasses unequal, less favourable treatment on the grounds of a personal protected characteristic, the discriminatory ground, that includes qualifications and differentiations in specific legal context. Discrimination can be done with or without an intention, and can be the result of individual behaviour, state policy, or even legislation. These differentiations are based on existing prejudices and stereotypes affecting particular groups with protected characteristics respectively. Discrimination can be observed in different forms such as direct and indirect discrimination, harassment and instruction to discriminate, and in some countries in the *sui generis* form of reasonable accommodation. Combating discrimination is part of the social objectives of the European Union (*Defrenne II case*) and in the words of the Court of Justice of the EU in *Schröder case* "[t]he social dimension is equally if not more important than the economic dimension (paragraph 56)."

Often discrimination, disregarding the form in which is presented, is not manifested in a clear and easily recognizable manner. It is almost impossible task

to bring forward evidence on which a straightforward case of discrimination can be based. Even in the cases of direct discrimination, which at its heart has less favourable treatment of individuals only on the basis of their protected characteristic, it is very difficult to prove that the discrimination has been perpetrated because of the protected feature (such as racial or ethnic origin, gender, religion or belief, disability, age or sexual orientation) of the concerned person. This is rather difficult because the motives for the discriminatory treatment are quite individual for each alleged discriminator and depend on his/her view on that concrete person or the group to whom this person belongs. As stated above, this particular view often is encouraged by prejudices and stereotypes about that concrete group, which prevails in the society. In cases of indirect discrimination, in light of its specific features around this legal institute, proving the disproportionately negative effect on the group that has that concrete protected characteristic is even more difficult.

With a view to facilitating proving discriminatory treatment or the effect of a certain apparently neutral norm, criteria or practice in cases of discrimination, it is allowed to divide the burden of proof between the claimant and respondent (Houtzager, 2006). Namely, taking into consideration the principle of legal certainty, the burden of proof in countries with an inquisitorial legal system lies with the claimant - *actori incumbit probation* (ECtHR, *Aktaş v. Turkey case*, paragraph 272, *D.H. and Others v. Czech Republic case*, paragraph 179). The general rule is that where a given allegation forms an essential part of a party's case, the burden of proof of such an allegation will rest on him. However, due to the existing unequal power relationships between the two parties in the proceedings, mostly in the beginning of the case law employers and employees, the Court of Justice of the EU in its rulings on pay discrimination on grounds of sex introduced a principle which eased the evidentiary burden of the claimant (Palmer, 2006, pp.23-24). Due to this in cases of discrimination the burden of proof is shifting from the claimant to the respondent after the claimant establishes a *prima facie* case of discrimination. *Prima facie* means at first appearance, or on the face of things, and stands for evidence of a fact that is of sufficient weight to justify a reasonable inference of its existence but does not amount to conclusive evidence of that fact (Palmer, 2006, pp.25). Namely, the claimant must prove the primary facts to establish *prima facie* case and the court must evaluate the facts in question and must be satisfied that they are of sufficient significance to raise a presumption of discrimination. And then the burden of proof shifts from the claimant to the respondent to provide adequate explanation to discharge the burden of proving that a prohibited ground was not any part of the reason/s for the treatment in question. Finally, if the respondent fails to rebut the facts in question the court must make a finding on unlawful discrimination. This principle today is deeply rooted in the European anti-discrimination legislation.

1. SHIFTING OF THE BURDEN OF PROOF IN EU ANTI-DISCRIMINATION LEGISLATION

1.1 Historical development

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 (Houtzager, 2006, pp.8-9) Faced with this challenge in the 1980s, the Court of Justice of the EU in rulings concerning sex discrimination cases, *Danfoss case* and *Enderby case*, created the rules on the shifting of the burden of proof. Namely, in the *Danfoss case* the female workers earned on average 7% less than male co-workers and the Court of Justice of the EU stated that if the system of pay is totally lacking in transparency and statistic 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. The view emerged from the Court of Justice of the EU was that if normal division of proof is applied in cases where the employer does not have easily accessible and understandable pay system, it will be impossible to show the that pay discrimination had take place. In the *Enderby case*, the Court of Justice of the EU further elaborated the concept of shifting of the burden of proof stating that "[i]f the pay of speech therapists is significantly lower than that of pharmacists and if the former are exclusively women while the latter are predominately men, there is *prima facie* case of sex discrimination, at least where the two jobs in question are of equal value and the statistics describing that situation are valid (paragraph 16)". It continued "[w]here there is *prima facie* case of discrimination, it is for the employer to show that there are objective and non-discriminatory reasons for the difference in pay (paragraph 18)".

Aiming to codify the above stated case law into legislation and with the intention to make the enforcement of the principle of equal treatment more effective, the Council Directive 97/80/EC so called Burden of Proof Directive was adopted. Article 4 paragraph 1 of this Directive states that "[m]ember states shall take such measures as are necessary, in accordance with their national judicial system, to ensure that, when persons who considered themselves wronged because the principle of equal treatment has not been applied to them establish, before a court of 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".

In the case that followed, *Seymour case*, the Court of Justice of the EU provided more guidelines on how to establish presumption of *prima facie* case of indirect discrimination (paragraph 58-65) stating that it is the respondent that needs to provide an objective justification for the indirect discriminatory criteria or practice. In the same case, the Court considered that mere generalization

concerning the capacity of a specific measure to encourage recruitment are not enough to show that the aim of the disputed rule is unrelated to pay discrimination based on sex. In addition, it was necessary for the respondent to provide evidence on the basis of which it could be reasonably considered that the means chosen were suitable for achieving that aim (EU Gender Equality Law, 2010, pp.17).

1.2 Current state of affairs

As stated above, today the shift of the burden of proof is explicitly provided in the European anti-discrimination legislation. Namely it can be observed in the Directive 2000/78/EC, recital 31 and 32 and Article 10, Directive 2000/43/EC, recital 21 and 22 and Article 8, Council Directive 2006/54/EC, recital 30 and Article 19 paragraph 1 (repealing Council Directive 97/80/EC on the burden of proof explained above since 15 August 2009), and Council Directive 2004/113/EC, Article 9.

As stated in the Article 10 of Directive 2000/78/EC shifting of the burden of proof is a 'two-stage' test. First stage is when the claimant must establish facts from which it way be presumed that there has been direct or indirect discrimination. If the first stage is fulfilled, then in the second stage the respondent must prove, on a balance of probability, that the reasons for the treatment complained to is not caused by any discrimination whatsoever.

On the implementation in the Member States of the European Union, the practice shows that a minority of states appears to have failed to transpose the burden of proof provision in line with the Directives. For example, in Latvia the shift of the burden of proof applies only to employment, natural persons who are economic operators and access to goods and services (Developing Anti-Discrimination Law in Europe, 2012, pp.90).

In the Republic of Macedonia the shift of the burden of proof has been explicitly envisaged in the Law on Promotion and Protection against Discrimination, Article 38, in the Law on Labour Relations, Article 11, paragraph 1 and paragraph 2, and in the Law on Social Protection, Article 23. The relevant laws do not contain any provisions about the shift of the burden of proof in cases of reasonable accommodation. It should be noted that the Law on Promotion and Protection against Discrimination places the burden of proof to a great extend on the claimant, as he or she must submit facts and evidence from which the act or action of discrimination can be established, contrasting with the Directives, which merely require the establishment of the facts.

In cases of discrimination, it is necessary to prove less favourable treatment (in cases of direct discrimination) or less favourable effect (in cases of indirect discrimination) on a protected ground that cannot be justified. This means that it is

not necessary to establish several accompanying facts in cases of discrimination in order to prove the case. *First,* it is not necessary to prove whether the perpetrator has been motivated by prejudices, i.e. it is not necessary to prove that the alleged discriminator has prejudices about persons with protected characteristic in order to prove a case of discrimination. The law cannot regulate views people hold, because they are exclusively individual states of mind. However, the law can and does regulate treatment as an expression of such views. *Second,* it is not necessary to prove that a certain provision, criterion or practice is aimed at producing a particular disadvantage on persons belonging to a group that shares a protected characteristic. On the contrary, if it is proven that the concerned provision, criterion or practice has been set forth in good faith, yet it produces a particular disadvantage on persons with protected characteristic, then the provision will still be discriminatory. *Third,* it is not necessary to prove existence of a specific victim according to the judgement on the *Firma Feryn case*. This applies only to EU anti-discrimination legislation, while the same does not apply to the European Convention on Human Rights, because if there is no specific victim, then the case cannot fulfil the admissibility criteria in accordance with Article 34 of the European Convention on Human Rights (Poposka, 2013).

The rules for the shift of the burden of proof do not apply to criminal proceedings, unless otherwise provided by the Member States, (Directive 2000/78/EC, Article 10, paragraph 3, and Directive 2000/43/EC, Article 8, paragraph 3). This is due to the fact that a higher level of probability is required in proving criminal liability, and because of the principle of the presumption of innocence.[1] Furthermore, states may determine that rules on the shift of the burden of proof are not applied in cases in which the Court or other competent body performs investigative activities itself, i.e. in proceedings that are inquisitorial rather than adversarial, in light of the independence of that body. (Directive 2000/78/EC, Article 10, paragraph 5, Directive 2000/43/EC, Article 8, paragraph 5, and Directive 2006/54/EC, Article 19 paragraph 3 and paragraph 5). For example, this is the case with Portugal and France. Nevertheless, the French Council of State (the Supreme administrative court) held in 2009 that, while in discrimination cases it is the responsibility of the claimant to submit the facts in order to presume a violation of the principle of non-discrimination, the judge must actively ensure that the respondent provides evidence that all elements which could justify the decision area based on objectivity and devoid of discrimination objectives (Developing Anti-Discrimination Law in Europe, 2012, pp.89-90). Finally, states can introduce more favourable rules for plaintiffs.

[1] As regards this approach to shift the burden of proof in the context of racism based violence see: *Nachova and Others v. Bulgaria case*, paragraph 144-159.

2. WHEN AND HOW THE BURDEN OF PROOF SHIFTS

In order that the burden of proof is transferred from the claimant to the respondent, the claimant must present facts establishing the presumption of discrimination, i.e. the claimant must establish a *prima facie* case of discrimination, which will clearly show that the protected ground is the circumstance that has lead to the alleged victim's less favourable treatment, different from the others. The fact that a person has a protected characteristic and another person does not is not sufficient in order that the burden of proof is shifted. Because there will be always such a distinction and if it is accepted as sufficient, then there will always be established *prima facie* cases of discrimination, and this is legally absurd. Thus, there must be additional facts not proving that discrimination has occurred, but supporting its likeliness. For example: if a transgender person had better qualifications than another person and the employer chooses the other person, or if people are allowed access to a restaurant and a person in a wheelchair is not allowed to enter the restaurant a *prima facie* case is already established and the burden of proof is shifted to the respondent who needs to prove the opposite.

Another example would be if in addition to the protected characteristic, there were additional circumstances that point to existence of stereotypes, prejudices, segregation or past discrimination of the particular group of persons who have that concrete protected characteristic, upon which the decision maker has adopted the decision in question. Such circumstances would be for example: comments indicating the intention to discriminate, former cases of discrimination against persons with protected characteristic issued against the natural or legal person concerned, questions asked during an interview (for example about the type of disability the concerned person has or pregnancy), non-transparency or unexplained violations of relevant procedures, requests for additional information, for example information from the medical records of the concerned person with disability or marriage status of the candidate for employment, and similar.

In the *Brunnhofer case*, in which the claimant presented allegations about gender based discrimination, because she was paid less than her male co-workers, who performed work of equal value as she did, the Court of Justice of the EU explained what is needed from the claimant to establish *prima facie* case. Namely, the Court stated that the claimant needed to prove *first* that she had received less salary than her male co-workers who were at the same level with her and *secondly* that she was performing work, which was of equal value as the work of her male co-workers. This was sufficient to establish the probability that her being treated differently could be explained only on the basis of her gender, by which the burden of proof automatically was shifted to the employer who had to prove the opposite (paragraphs 51-62).

Very often the *prima facie* case of direct discrimination is proven if the claimant proves a clearly discriminatory policy of the concerned legal person or a rule, which is applied, and under which persons with protected characteristic are affected disproportionately negatively in comparison with others. For example, if it is proven that the swimming pool applies the practice of not admitting Roma, or if a cafe denies access to migrants or if a restaurant applies a rule of not admitting persons accompanied by guide dogs. This is especially important in proving cases of indirect discrimination in which it is necessary to prove that an apparently neutral provision, criterion or practice has disproportionately negative effect on particular group of people with protected characteristic. However, the fact that these persons do not sufficiently participate in the enjoyment of a certain benefit is not sufficient to establish a *prima facie* case of a disproportionately negative effect. It is necessary that the claimant prove that this disproportionately negative effect is a result of the application of the concerned provision, criteria or practice, which is disputed. In other words, the claimant must prove the causal link between the disputed measure and the imbalance among different groups in the enjoyment of a given benefit. This derives from the case law of the Court of Justice of the EU in above explained *Danfoss case* (paragraph 10-16) and *Brunhofer case* (paragraph 51-62).

The *Fyrma Feryn case* illustrates that, according to the Court of Justice of the EU publicly stated policy, the fact that the employer does not employ certain ethnic minorities may constitute facts of such a nature as to give rise to a presumption of a discriminatory recruitment policy. And then it is for the employer to produce evidence that it has not breached the principle of equal treatment. Furthermore, the Court held that the national court is the one that must verify that the facts alleged against the employer are established and to assess the sufficiency of the evidence which the employer presents in support of his or her contentions that they have not breached the principle of equal treatment (paragraph 29-34).

After the burden of proof has been shifted from the claimant to the respondent, the respondent should present evidence in rebuttal of the presumption of perpetrated discrimination. Namely, he should prove that the claimant was not in fact in a similar situation with the suggested comparator, or prove that the different treatment is not based on the protected characteristic, but it is based on another objective distinction. If the protected characteristic has not been the decisive factor, then there could be no discrimination.

In the *Brunnhofer case* explained above, the Court of Justice of the EU has given guidance on how a presumption for perpetrated discrimination can be rebutted. *First*, if it is proven that employed men and the women were not in a comparable situation, because they were not performing work which was of equal value, and *second* by establishing that there were other objective factors which had

contributed to a difference in pay, instead of the fact of belonging to a particular gender, in this case to the female gender.

If the respondent does not succeed in the rebuttal of the presumption of discrimination in either of these two manners, then the respondent has to justify the different treatment/different effect proving that this is objectively justified and proportionate. In established *prima facie* cases of discrimination, the respondent must prove that the concerned distinction on the basis of the protected characteristic pursues a legitimate aim, which is objective and justified, and the distinction itself is appropriate and necessary for the pursued aim.

In addition to the case law of the Court of Justice of the EU, the shift of the burden of proof can be noticed in the case law of the European Court of Human Rights. Namely, the European Court of Human Rights considers the presented evidence in their entirety, owing to the fact that states are most often those that have the information (facts and evidence) that can support the application claim. In other words, if the Court deems the facts as presented by the applicant to be credible and consistent with other presented evidence, the Court will accept them as proven facts, unless the state presents a different credible explanation. The Court will accept as fact the allegations that are "[i]n its view, supported by the free evaluation of all evidence, including such inferences as may flow from the facts and the parties' submissions. … Proof may follow from the coexistence of sufficiently strong, clear, and concordant inferences or of similar unrebutted presumptions of fact. Moreover, the level of persuasion necessary for reaching a particular conclusion and, in this connection, the distribution of the burden of proof are intrinsically linked to the specificity of the facts, the nature of the allegation made and the [Convention] right at stake." (ECtHR, *Nachova and Others v. Bulgaria case*, paragraph 147, *Timishev v. Russia case*, paragraph 39, *D.H. and Others v. Czech Republic case*, paragraph 178).

3. EVIDENCE THAT MAY BE CONSIDERED AT EACH STAGE IN SHIFTING THE BURDEN OF PROOF

In relation to evidence presented for shifting the burden of proof it should be taken into consideration that the national legislation is the one that determines what type of facts/evidence will be necessary to be presented before national bodies and how they will be presented (Directive 2000/78/EC, recital 15 of the Preamble, and Directive 2000/43/EC, recital 15 of the Preamble). These determinations can be more strictly defined than those in the European Court of Human Rights or the Court of Justice of the EU. There are different types of evidence for claimant to establish facts from which it may be presumed that there has been direct or indirect discrimination. As mentioned above, the evidence accepted by the national courts

is key to the prospects of the claimant case. In the *Kelly case*, the Court of Justice of the EU states that Member States may not apply rules, which are liable to jeopardise the achievement of the objective pursued by a directive and therefore deprive it of its effectiveness.

Some of the evidence can include statistics, situation testing, questionnaires, audio or video recording (for example in Slovakia), expert opinions or inferences drawn from circumstantial evidence. The latter exists in France, where the chronological order of relevant events, the foreign physical appearance or a foreign surname were accepted as means of proof in discrimination cases on ground of racial or ethnic origin.[2]

In the recent ruling on the *Asociaţia ACCEPT case*, on discrimination on the grounds of sexual orientation in the recruitment of players by a professional football club, the Court of Justice of the EU held that "[i]n the overall assessment carried out by the national body or court hearing the matter, a *prima facie* case of discrimination on ground of sexual orientation may be refuted with a body of consistent evidence. … [S]uch a body of evidence might include, for example, a reaction by the defendant concerned clearly distancing the club from public statements on which the appearance of discrimination is based, and the existence of express provisions concerning its recruitment policy aimed at ensuring compliance with the principle of equal treatment (paragraph 58)". The Court continued by stating that the shift of the burden of proof would not require evidence impossible to adduce without interfering with the right to privacy (paragraph 59).

In *Johnston case,* the Court of Justice of the EU found that the evidentiary role in the Northern Ireland sex discrimination legislation that deprived the national courts of the power to decide an issue arising in relation to the Equal Treatment Directive (76/206) was incompatible with the requirements of effective judicial control. Namely, according to the Court the effective judicial control is a general principle of law which underlines the constitutional traditions common to the Member States and which is also laid down in the European Convention on Human Rights (EU Gender Equality Law, 2010, pp.20).

3.1 Statistical evidence

Often in cases of indirect discrimination, statistical data play an important role, helping the claimant to establish the probability of existence of a particular disadvantage on the protected group of an apparently neutral provision, criteria or practice, and then the respondent has to explain the referred data. This has been

[2] See: *Airbus Operations SAS* no. K10-15873 where the Court of Cassation inferred discrimination from the list of staff surnames of the company.

demonstrated by the European Court of Human Rights and by the Court of Justice of the EU in *Enderby*, *Brunnhofer* and *Nikoloudi cases*. In *Seymour-Smith and Perez case*, the Court suggested that the conditions for obtaining certain employment rights or privileges would constitute a *prima facie* case of indirect discrimination if available statistics indicated that a considerably smaller percentage of women than men were able to satisfy the condition.

When taking into consideration statistical data, courts do not require a strict ceiling as regards the necessary number/percentage in order to consider the data as relevant in the given case. In the *Rinner-Kűhn case*, *Nimz case*, then in the *Kowalska case*, and in the *De Weerd, née Roks and Others case*, the Court of Justice of the EU stated that a significant number needed to be established. While in the *Seymour case*, the Court considered that even a lower level of disproportion could prove indirect discrimination, if it was demonstrated that the disproportion prevailed in a longer period. The European Court of Human Rights is of the opinion that statistical data are not always necessary to prove cases of indirect discrimination, and the proof will depend on the facts of the case, as clearly shown in the *case Oršuš and Others* and in the *case Opuz*. However, in *D.H and Others vs. Czech Republic*, the European Court of Human Rights accepted statistics in supporting claim of indirect discrimination on ground of ethnicity, i.e. Roma segregation into special schools for persons with disabilities.

Issues around collecting and using statistics can be presented, mostly around the issue relating to the use of sensitive personal data. For example, in Hungary, Spain and Germany is explicitly forbidden the collection and processing of personal data based on racial or ethnic origin of the person (Houtzager, 2006, pp.11-12). However, it is up to the national court to judge the reliability of statistics, as provided by the Court of Justice of the EU in the *Saymour case*. For example how many individuals covered, or whether the records are purely fortuitous or short-term phenomena and whether in general, they appear to be significant.

3.2 Situation testing

Situation testing is an experimental method, a technique aiming at establishing discrimination on the spot. The aim of this method is to bring to light practices whereby a person who possesses a particular characteristic is treated less favourably than another person who does not possess this characteristic in a comparable situation. Namely, the method of testing means setting up a situation where a person is placed in a position where s/he may discriminate without suspecting that s/he is being observed (Handbook Proving Discrimination Cases - the Role of Situation Testing, Migration Policy Group and the Swedish Centre For

Equal Rights, 2009, pp.42-47). Several legal criticisms have been levelled against situation testing such as: it does correspond to the principle of fairness of evidence; could it amount to provocation to commit a crime and does it threaten the right to privacy (De Schutter, 2003, pp.35-37).

The use of situation testing depends on what the national legislation allows to be admitted as evidence for shifting the burden of proof from the claimant to the respondent. Situation testing is accepted in Belgium, Hungary, Sweden, the Netherlands and Romania.

3.3 Refusal to grant access to information

In the recent *Meister case*, Ms. Meister claimed a right to information on the basis of the Directive 2000/43/EC, Directive 2000/78/EC and Directive 2006/54/EC from the company that rejected her application for employment twice. Namely, Ms. Meister alleged discrimination on grounds of sex, age and ethnic origin after the company Speech Design did not invite her to an interview even though she claimed to be qualified, and did not tell her on what grounds her application was unsuccessful either time. She requested disclosure from Speech Design whether the company engaged another applicant at the end of the recruitment process. The Court of Justice of the EU in its ruling interpreted the above stated Directives as not entitling a worker who claims plausibly that he meets the requirements listed in a job advertisement and whose application was rejected to have access to information indicating whether the employer engaged another applicant at the end of the recruitment process (paragraph 46). However, the Court goes further in stating that "[n]evertheless, it cannot be ruled out that a defendant's refusal to grant any access to information may be one of the factors to take into account in the context of establishing facts from which it may be presumed that there has been direct or indirect discrimination. It is for the referring court to determine whether that is the case in the main proceedings, taking into account all the circumstances of the case before it (paragraph 47)".

4. CONCLUSIONS

Shifting of the burden of proof is a principle developed by the Court of Justice of the EU in sex based discrimination cases. Today, this legal concept is incorporated into the anti-discrimination law of the Union that underpins effective enforcement of the principle of equal treatment. Regretfully some states failed to transpose the burden of proof provision in line with the Anti-discrimination and gender equality Directives. The same can be concluded for the Republic of

Macedonia due to the fact that the Anti-discrimination Law in order to shift the burden of proof requests from the claimant to submit facts and evidence from which the act or action of discrimination can be established, contrary to the Directives, which merely require the establishment of the facts.

Furthermore, on the actual shifting of the burden of proof, challenges still remains in the practice such as: when the burden of proof actually shifts from the claimant to the respondent i.e. when *prima facie* case is establish; what fact/s should the claimant submit to make the presumption of discrimination probable; and how the respondent should build its case to rebut the presumption of perpetrated discrimination. The international judicial jurisdictions in their case law presented guiding principles on what kind of facts and evidence can be presented in establishing *prima facie* case of direct as well as indirect discrimination. National jurisdictions such as the Macedonian need to follow them and develop their own case law, thus, effectively enforcing the anti-discrimination legislation.

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