30 Whose Burden Is It Actually?

The Implementation and Application of the EU Rules on the 'Burden of Proof' in Employment Discrimination Cases in Hungarian Law

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30.1 Introduction

The problem referred to in the title can be regarded as the 'heart' or at least the most important element of discrimination cases, since the effective implementation of equal treatment related provisions depends on the evidence in each proceeding; namely, it depends on its special rules.[1] From another perspective, it seems that the effectiveness of anti-discrimination regulation – and practice – may be undermined by applying the law in a manner that, through the interpretation of statutory provisions, does not pay sufficient attention to the essence and importance of the special rules that should be applied in the case of a violation of the principle of equal treatment. In general, the problems this study focuses on emerge mostly from the fundamental difference between theory and practice which comes from the essence of the generally accepted rules of burden of proof and the 'reversed', or at least favourable rules for the injured party – i.e. the employee in labour disputes. Consequently, this makes the acceptance and interpretation of these rules in terms of legal application more difficult. At the same time it is important to note that the incorrect application ad absurd negligence of these rules may weaken the effectiveness of legal remedies available upon the violation of the principle of equal treatment.[2]

Furthermore, according to the correct interpretation of these rules and principles, it is not necessary to highlight the importance of proof and evidence in discrimination cases,[3] since its function is to make sure that the employer's possibilities for justification are

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1 T. Gyulavári, 'Burden of Proof: Differing ways of shifting the obligations?', *The Hungarian Labour Law in the Light of the European Labour Law – Development, Compulsion and Opportunity* (Conference), University of Pécs Faculty of Law, MTA-PTE Research Group of Comparative and European Employment Policy and Labour Law, Pécs 9th October 2014.

2 Parliament and Council Directive 2006/54/EC arts. 17 and 18, Council Directive 2000/78/EC Art. 9 and Council Directive 2000/43/EC Art. 7.

3 F. Palmer, 'Re-dressing the Balance of Power in Discrimination Cases: The Shift in the Burden of Proof', *European Anti-Discrimination Law Review*, Vol. 2, No. 4, 2006, p. 23.

examined and evaluated, and the elements of a certain case are to be analysed.[4] In accordance with the provisions of the relevant directives,[5] burden of proof is shared in the sense that the employee has to presume that he or she was discriminated against by the employer based on a protected characteristic,[6] and the relevant characteristic is to be identified. It would be impossible formally to claim any kind of discrimination without cause and effect, since, if it were possible, the aim of providing evidence would be only to show that the employee possesses the marked characteristic and has suffered a disadvantage. However, providing evidence is not the injured party's task. Altogether, the rule of reversed burden of proof[7] is enforced because it would not have the expected result if the employee had to prove that the employer failed to meet the requirement of equal treatment, since proving a negative fact is conceptually impossible.

In case of the employee's successful presumption, the employer's proving of justification can be stated exclusively,[8] and within its framework the employer has to prove that either it complied with the requirement of equal treatment or it was not required to comply with such requirements in a particular case. The following pages offer an analysis of the theoretical and regulatory background of reversed – shared or shifted – burden of proof. Furthermore, such fundamental questions are important regarding the case law of both the Court of Justice of the European Union (CJEU) and the Hungarian courts and influence the employer's justification possibilities interpreted within a narrow circle. Special attention is paid to exploring the controversial and divided Hungarian legal interpretation and practice and an attempt is made to compare the results of the research with the European rules and practice in connection with the current and complicated legal problems regarding anti-discrimination.

30.2 The Norms of EU Law Regarding the Burden of Proof in Employment Discrimination Cases

In the following paragraphs it is advisable to take, as a basis, the principal and most up-to-date interpretation of European judicial practice, since – despite the provisions laid down in various directives – it must be taken into consideration that the operation and

4 G. Bindman, 'Proof and Evidence of Discrimination', in: B. Hepple – E. M. Szyszczak (eds.), *Discrimination: The Limits of Law*, Mansell, London 1992, p. 50.

5 Para. 1. of Art. 19 of Parliament and Council Directive 2006/54/EC, Para. 1. of Art. 10 of Council Directive 2000/78/EC and Para. 1. of Art. 8 of Council Directive 2000/43/EC.

6 T. Gyulavári Tamás, 'Egyenlők és egyenlőbbek (8. rész)', *Humán Szaldó*, Vol. 6, No. 10, 2009, pp. 263-265.

7 According to Palmer, the use of the expression 'reversed' burden of proof is not correct because, regarding its content, the burden of proof is in fact not reversed, but – on the basis of the directives – there is a change in the sequence of proving and in the level of justification. It would be more correct to define it in the Equal Treatment Act as 'changed', 'devolved' or 'shifted' burden of proof. Palmer, p. 26.

8 Palmer, pp. 25-26.

dynamics of these rules can be understood only through the analysis of actual cases. Therefore it is justified to first briefly sum up the provisions of relevant directives as the basis of judicial practice.

30.2.1 Victim Protection Challenged – Analysis and Criticism of the Rules of the Directives

European case law operates within the framework of Directive 97/80/EC, which – even though having been repealed – still serves as basis for the present directive regulation. However, due to the increasingly complicated and varying judicial cases, this judicial practice being developed and shaped continuously. At present, the directives regulating the principle of equal treatment on the basis of protected characteristics – i.e. Directives 2006/54/EC, 2000/78/EC and 2000/43/EC – contain the enforced rules, and, in this regard, the legal protection mechanisms laid down by these directives are quite similar, and the requirements of burden of proof are the same in these three directives. It should be added that the directives themselves also show numerous similarities regarding their features and the particular rules.[9]

It is necessary to add that Directive 97/80/EC containing the original rules of burden of proof declared the norms of sharing the burden of proof with regard to gender based discrimination. As the regulation developed toward emphasising the essence of the reversed burden of proof, the plaintiff's obligation of presumption and the defendant's need to disprove became separated more emphatically, confirming that the plaintiff only has the obligation of presumption, not the obligation to prove.[10]

At the centre of these special rules of proof lie the contending parties' different obligations of proof, which means presuming on the side of the party who suffered discrimination, and the obligation of proof on the side of the defendant. It must be added that presuming and actually proving something are not only different expressions, but this pair of concepts reflect different levels of justification, and substantiation must be considered to be at a lower level, that is 'easier' to be performed. Consequently, the difference based on principles and, at the same time, performing definitely practical aspects makes the situation of the

9 For example their aim, structure, and method of regulation is almost the same.

10 According to Council Directive 97/80/EC Para. 1. Art. 4 '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.' This fundamental difference between presumption and proving is the basis of the preferable rules of proving in discrimination cases.

employee more favourable, which is – in our opinion – justified in any case due to the parties' different possibilities regarding position and proof.[11]

Furthermore, another special feature of these rules is that the plaintiff is the first to presume facts pertaining to discrimination in the procedures based on discrimination. If the plaintiff is successful, the defendant is given the possibility to show that neither direct nor indirect discrimination took place. Even if the defendant provides effective justification, the injured party is allowed to prove that the defendant violated the principle of equal treatment. It is clear that in this section of proving, the burden of proof also lies with the plaintiff, and it is noteworthy that the provisions of the directive intend to guarantee an effective means of legal protection for the plaintiff this way. Furthermore, the directives make it possible for the Member States to introduce more preferable rules than the general rule.[12]

For the sake of better understanding, we must add that, according to European case law, justification based on objectivity is typically possible only with regard to indirect discrimination.[13] However, the rules of proving are the same regarding all kinds of discrimination.

Finally, keeping in mind the cases below, the main issue in such cases before the CJEU is to decide on the outcome of the justification or presumption of the cause and effect between the disadvantage suffered and the protected characteristic. We will also discuss later on what 'facts' and 'conclusions' from facts mean in legal practice.

First of all, it should be noted that the CJEU refers to the shared or reversed burden of proof in a consistent manner, meaning that if the injured party prima facie presumes the discrimination it suffered, the offender – according to the reversed burden of proof – has to prove that it acted in compliance with the principle of equal treatment.[14]

Nevertheless, we have to mention the dark side of this regulation that seemingly provides firm protection for the victim. Even if the analysis of relevant case law provides a clearer picture, the directive's provisions are vague and their meaning may be clarified only by proper and definite legal interpretation. It may be another problem that, while the fundamental concept of the directive's provisions are based on victim protection – i.e. the protection of the plaintiff's interests –, it seems that neither the legislator nor the courts pay attention to these important interests.

This does not necessarily mean that the directive's provisions are wrong or useless from the outset, but – regarding the complexity of the legal problem of sharing the burden

11 It is justified by the different legal status of the employer and the employee in an employment relationship.

12 Para. 2. of Art. 19 of Parliament and Council Directive 2006/54/EC, Para. 2. of Art. 10 of Council Directive 2000/78/EC and Para. 2. of Art. 8 of Council Directive 2000/43/EC.

13 J. Bowers – E. Moran, 'Justification in Direct Sex Discrimination Law: Breaking the Taboo', *Industrial Law Journal*, Vol. 31, No. 4, 2002, pp. 307-320.

14 Palmer, p. 24.

of proof – it would be expedient to draft the legislative text unambiguously, or at least the CJEU should show the way out of the legal labyrinth which has emerged as a consequence of the shift of the burden of proof. In spite of such ambiguities, it may be possible to interpret the directive's provisions correctly, since the Hungarian example that will be discussed in detail in Sections 30.3.1 and 30.3.2 – on the subject of regulation – understands these rules correctly and in our opinion they can be applied more easily than the original rules.

It is also due to complexity that the quoted provisions of the directive cannot reach their goal, though their content is appropriate, as they are too complicated and indistinct to create an effective form, which would really protect the actual or supposed victims of discrimination. This phenomenon can be observed in the CJEU decisions discussed below. It would not be right to blame only the legislator for these negative features, since the CJEU has a serious or even more serious responsibility regarding this matter, as the CJEU has the possibility in many cases to clarify these contradictions. Unfortunately, it seems that the CJEU has not been able to grasp the opportunity so far. All these contradictions diminish the level of legal protection and eliminate the plaintiff's advantages in terms of proving.

In our opinion, three elements can be observed in the directive's provisions that should either be interpreted by legal practice or corrected by legislation, as finding the right path among the rules is difficult, and, consequently, the final goal of the rules is not definite enough. Firstly, the directive's norms fail to make it clear what the contending parties' burden of proof and obligation for presumption mean. The proof of cause and effect is a difficult problem. It will be discussed later, but it is important to mention here that, for the sake of easier application of the law, the burden of proof regarding the cause and effect should be clarified. The terms 'presume' and 'establish the facts' as used by the directive raise a similar problem, since, as legal terms, they are inconceivable or at least too flexible. Naturally, a radical interpretation of these rules may provide an answer to these questions, but, in our opinion, the correct solution to the contradictions does not come definitely either from the text of the directive or from the case law of the CJEU.

Secondly – as it was already mentioned –, the existence or absence of cause and effect practically decides the matter of discrimination, but it is often argued in legal practice. However, the directive's provisions remain silent on this matter, and it seems rather difficult to reach any conclusion on the basis of the text of the directives. The CJEU should solve this problem, but it is very difficult to decide this question, because there is no middle course. In case this burden falls on the employee, the employee's successful proving will be extremely difficult, even impossible in many cases, considering that, in most of the cases, the employee does not have the objective possibility to justify this kind of cause and effect.

On the other hand, if we accept that proving the absence of cause and effect is the employer's burden, the employer is caught up in a disproportionately difficult situation, since proving something non-existent is even more difficult. Nevertheless, there are two arguments in favour of the latter approach, since the conditions of justification regarding the cause and effect are on the employer's side, and this kind of legal interpretation would serve to protect the victim to a significantly greater extent, as discussed above. In our opinion, the latter approach can be regarded as correct.

Thirdly, the content of proving and presumption should be examined, since the above-mentioned terms 'establish the facts' and 'presume' as used by the directive's provisions designate only the broad frames, as many things can belong to them. Consequently, it is not clear either what the plaintiff's burden of proof covers exactly or what the substance of the employer's justification is. The following rhetorical question provides an apt summary of the situation: how is it possible for any of the parties to presume or prove efficiently, if the extent and the content of the burden are not clear? In order to answer this question, I am going to analyse some relevant judgments of the CJEU and the Hungarian judiciary.

30.2.2 Legal Interpretation of the Court of Justice of the European Union

Accordingly, some judgments of the CJEU of cardinal importance completed by the latest possible directions of the judicial practice will be examined. During the examination, I am going to pay special attention to the above questions emphasizing the possibilities and limitations regarding the practical clarification of the directive's provisions.

The latest development we have to mention is Advocate General Paolo Mengozzi's Opinion of 20 May 2015 in *Case C-177/14. María José Regojo Dans v. Consejo de Estado* [2015], because – although the judgment is yet to be published – reversed burden of proof is cited in point 54 of the Opinion and point 54 of the footnotes. The Opinion states that the same circumstance cannot be taken into consideration for presuming the facts and for proving justification at the same time; furthermore there are no specific rules for justification in the case of fixed-term workers according to the Advocate General. Therefore, the main rule of shifted burden of proof has to be applied. Otherwise, it would be inappropriately difficult for the employee to prove that they have the same tasks and they do the same job as the permanently employed employees; so in this case they had to prove that their situation is comparable and this would be too complicated and disadvantageous for them. So it is important that the Advocate General tries to stress the very meaning of the rules of burden of proof in the Opinion.

Looking chronologically backwards at the judgments, we next judgement we must mention was delivered on 18 December 2014 in the Case C-354/13. *Fag og Arbejde (FOA) v. Kommunernes Landsforening (KL)* [2014]. This judgment discusses several important

issues in connection to equal treatment, the matter of burden of proof being one of them. It is only mentioned in the judgment, but the CJEU states that Article 10 of Directive 2000/78/EC lays down the rules pertaining to the shifted burden of proof, which means that the employee and the employer have different burdens to fulfil and that the Member States may also provide the employee with further advantages. This approach focuses on the interests of the victim of discrimination, of course.[15] The CJEU does not go into details in connection with the burden of proof in the judgment.

Referring to the interpretation of Article 10 of Directive 2000/78/EC, the Judgment of 25 April 2013 in *Case C-81/12. Asociația ACCEPT v. Consiliul Național pentru Combaterea Discriminării* [2013] can be regarded as a new development, since, in this relatively new resolution, the CJEU intends to clarify the ways of sharing the burden of proof. The main question is whether Article 10 requires that the Member States perform such a process of evidence, in which the existence or non-existence of discrimination can be justified effectively, only if this process would damage privacy. According to the CJEU, Article 10 cannot be interpreted this way, so sharing the burden of proof can be interpreted only within a reasonable framework. The latter fact confirms that special attention should be paid in discrimination cases to the fact that the plaintiff's interests should not be injured excessively, thereby proving that it is undoubtedly the employer's burden.

The CJEU also makes some further relevant remarks in this judgment that should be discussed here. Additionally, the judgment touches upon more aspects of equal treatment, but we focus on the legal consequences that are related to the burden of proof.

The CJEU affirms that the obligations of the Member States – based on the directive's provisions – cover that the Member States have to establish such a legally protective mechanism, which guarantees that the employer must prove that discrimination did not take place.[16] Also, this proving should be the second stage of the probation, because the first stage signifies the employee's presumption from which discrimination can be concluded ('to establish the facts'). The CJEU states that the phrase 'establish the facts' shall cover the public statement of a person who has any kind of actual connection to the employer;[17] so a discriminative public statement can be a 'fact that has to be established.' Of course, the plaintiff's presumption can easily be successful in such a situation, because it is almost impossible for the employer to justify its act;[18] although the directives set a simple rebuttable presumption. This kind of legal interpretation is appropriately synchronized with the

15 Judgment of 18 December 2014 in the *Case C-354/13. Fag og Arbejde (FOA) v. Kommunernes Landsforening (KL)*, point 63.

16 Judgment of 25 April 2013 in the *Case C-81/12. Asociația ACCEPT v. Consiliul Național pentru Combaterea Discriminării* [2013], point 42.

17 Judgment of 25 April 2013 in the Case C-81/12. *Asociația ACCEPT v. Consiliul Național pentru Combaterea Discriminării* [2013], point 48.

18 Judgment of 25 April 2013 in the Case C-81/12. *Asociația ACCEPT v. Consiliul Național pentru Combaterea Discriminării* [2013], points 56-57.

directives because – according to the CJEU – employers could have justified themselves if they immediately distanced themselves from the relevant public statement but this did not happen in this case. Accordingly, the CJEU declares among its final conclusions that the rules of burden of proof cannot lead to such probation that results in the invasion of privacy, even if the employers seemingly do not have any other possibility to prove that they did not commit discrimination against the employee.

In the two perhaps most important cases – i.e. Kelly and Meister[19] –, the CJEU analyzes in detail the directive's provisions relating to the shifted burden of proof and the employer's possibilities for justification. In our opinion, it is expedient to interpret the two cases together because doing so makes it is easier 'to make justice' between the two different directions described in connection with the Hungarian regulation and legal practice. Since the Hungarian regulation follows the EU directives, the judicial interpretation of the followed directives may serve as guidance for Hungarian legal practice.

In the Kelly case, the CJEU stated that it does not follow from the directive's provisions on proving that the party claiming discrimination should be entitled to look into the data and information owned by the employer with the aim of using it as support for their claim regarding discrimination.[20] At the same time, the refusal of access may endanger the proper enforcement of the rules of proving, so, in certain cases, the courts of the Member State have to decide whether the employee should be granted access.[21] While the CJEU finds it unjustified that this solution would make the employee's obligation of presumption any easier, it draws attention to the fact that taking into consideration all circumstances, and the refusal could be the employer's burden.

The Meister judgment was published just one year later, but it goes further than the Kelly judgment and makes an attempt to correct the special rules of burden of proof. According to point 22 of the Advocate General's proposal, the plaintiff's obligation of presumption means the proof of semblance, that is, it is not necessary that the presumption be well-founded, but in reality it means proving. On the other hand, the proving of semblance cannot be the same as the proving of facts. Consequently, the plaintiff's burden of proof is weaker, contrary to the general rules of proving, since it is not necessary that the plaintiff proves all the relevant facts showing the occurrence of discrimination, but it is enough to base the semblance on what is the basis of discrimination (to 'establish the facts'). The CJEU asks the question – from this point of view it is irrelevant that the plaintiff has 'only' to presume – how the directives could be implemented, i.e. how the

19 Judgment of 21 July 2011 in Case C-104/10. *Patrick Kelly v. National University of Ireland (University College, Dublin)* [2011], and Judgment of 19 April 2012 in Case C-415/10, *Galina Meister v. Speech Design Carrier Systems GmbH* [2012].

20 Judgment of 21 July 2011 in Case C-104/10. *Patrick Kelly v. National University of Ireland (University College, Dublin)* [2011], points 38 and 48, final conclusions point 1.

21 Judgment of 21 July 2011 in Case C-104/10. *Patrick Kelly v. National University of Ireland (University College, Dublin)* [2011], point 39.

burden of proof can be shared if the plaintiff cannot presume, since it is impossible because of objective reasons.[22]

Therefore, can the advantage originating from sharing the burden of proof be restricted to the employee's side to such an extent that the employee's burden would be that there are no data or informative facts on which basis they could justify the semblance of discrimination? Regarding the difficulties of interpretation arising in Hungarian legal practice, the courts would answer that, since the plaintiff's successful presumption is the requirement for the defendant's justification proving, it must be on the plaintiff's side, even if they cannot fulfil the requirement of presumption for objective reasons. On the contrary, the legal practice of the Hungarian Equal Treatment Authority[23] indicates that the plaintiff's lack of sufficient evidence to presume, either in terms of quality or quantity, on its own cannot have the result that the plaintiff bears the burden of unsuccessful proving, since the obligation of presumption cannot be interpreted in such a way that would make the situation of the plaintiff more burdensome.

If the employer refuses to provide such data, it would, according to the CJEU, be the employer's burden, since the employer prevents the plaintiff from fulfilling its obligation of presumption.[24] Furthermore, the CJEU notes that it is the fundamental principle of proving that the party who suffered discrimination should be put into a more advantageous situation during the evidence procedure, since it will be the defendant's task to justify himself.[25] In other words, the CJEU suggests that practically it is enough if the plaintiff presumes, since it contains the causal connection between the protected characteristic and the suffered disadvantage, so it is not necessary for the plaintiff to prove it. According to the CJEU, the defendant can justify himself only by successful excuse, proving, consequently, that the defendant has to justify that there is no causal connection, that is – concluding *á contrario* – as a consequence of presumption it is supposed to exist.[26] For its justification it is enough that the plaintiff presumes that on suffering a disadvantage his situation was comparable to the situation of those who did not suffer the same disadvantage.

Another important interpretation of the decision should be noted here, since the balance of burden of proof is a recurring problem in discrimination cases in Hungarian legal practice. According to the CJEU,[27] on the basis of relevant directives and governing legal

22 Judgment of 19 April 2012 in Case C-415/10, *Galina Meister v. Speech Design Carrier Systems GmbH* [2012], points 37, 39 and 47.

23 On the basis of the Position No. 384/4/2008. (III. 28.) of the Advisory Board of Equal Treatment.

24 Judgment of 19 April 2012 in Case C-415/10, *Galina Meister v. Speech Design Carrier Systems GmbH* [2012], point47 and final conclusions.

25 Judgment of 19 April 2012 in Case C-415/10, *Galina Meister v. Speech Design Carrier Systems GmbH* [2012], points 38-39 and 44-45.

26 Judgment of 19 April 2012 in Case C-415/10, *Galina Meister v. Speech Design Carrier Systems GmbH* [2012], point 40.

27 Judgment of 19 April 2012 in Case C-415/10, *Galina Meister v. Speech Design Carrier Systems GmbH* [2012], points 3-19.

practice,[28] EU law views with criticism the disruption of the balance of burden of proof, but it emphasizes that its repeal (meaning that the plaintiff would not even have required the obligation of presumption) would not be accepted. It is clear that the CJEU regards the rule of sharing the burden of proof to be the main priority, since its starting point is that EU law accepts it, but declares its limits at the same time, since it cannot be interpreted so broadly that it would in fact repeal the plaintiff's requirement of proving.

A particularly interesting feature of the judgment is that it attempts to describe the meaning of presumption, and – in our opinion – the provided description expresses the difference between proving and presumption clearly. According to the judgment, the requirement of presumption means that the plaintiff must justify that the semblance of discrimination exists, or – in other words – that: 'it rather exists than does not exist',[29] and, consequently, discrimination did take place. Furthermore – and we should agree with this – the concept of presumption holds that there is a bigger chance of committing discrimination, so, while proving this theoretical starting point, this aspect should also be taken into consideration.[30] In our opinion this viewpoint should be applied to Hungarian legal practice, mainly in the judicial practice, because without it, the expectation of justification and the application of the general rules of burden of proof in discrimination cases seems to be a wrong approach.

In our opinion – continuing the main conclusions of relevant European case law – it is unnecessary to prove a causal relationship – or the existence of a comparable situation – on the employee's side because it 'belongs to' the successful presumption regarding protected characteristics and disadvantages. Proving of comparability cannot be expected from the plaintiff and, while comparison is made with persons being in real comparable situations in many cases, such a comparison is not possible in numerous cases, so the subject of comparison is hypothetical.[31] In discrimination cases any comparison with hypothetical persons results in further difficulties, whose burden cannot remain on the plaintiff's side, so it cannot be justified to be expected from the party who suffered legal injury. It is difficult to identify the groups of persons as the basis of comparison, the directives' aspects, the expected standards, etc. However, the employee referring to either real or hypothetical persons can justify exemption, i.e. that discrimination did not take

28 Referring primarily to the Judgment of 10 July 2008 in Case C-54/07 *Centrum voor gelijkheid van kansen en voor racismebestrijding v. Firma Feryn NV* [2008] and the Judgment of 21 July 2011 in Case C-104/10. *Patrick Kelly v. National University of Ireland (University College, Dublin)* [2011].

29 L. Farkas, 'Getting it right the wrong way? The consequences of a summary judgment: the Meister case', *European Anti-Discrimination Law Review*, Vol. 8, No. 15, 2012, p. 25.

30 In other words: if the legislator's aim was not to make the situation of the party claiming that discrimination did take place easier, the legislator would not have divided proving into two – or three – different stages. See: Palmer, pp. 25-26.

31 Farkas, p. 27.

place, since in such cases the principle that because of their different legal positions the employer can more easily justify effectively than the employee is enforced.[32]

Finally, attention should be paid to the relevant Feryn judgment,[33] which was published at the earliest date, but the content of the decision make it relevant to the present issue. Practically, the CJEU had to form an opinion about certain issues relating to the meaning and the correct interpretation of the rules of burden of proof. Among other anomalies concerning equal treatment,[34] the referring Belgian court sought clarification as to, on the one hand, what the special rules of reversed burden of proof meant and, on the other hand, on what conditions courts or authorities could establish any form of 'probable cause' of discrimination.

The referring Belgian court went on examining the opposite side of this legal problem and intended to examine the possibilities of the employer's 'disclaimer', namely, proving for justification. In our opinion it also indicates the complexity of the legal questions in the judgment since the referring court did attempt to acquire information about the essence of the reversed burden of proof. Thus, it is clear that the CJEU needed to clarify the meaning of the terms 'presume' and 'establish the facts' on the plaintiff's side, as well as the content of the defendant's obligation for 'proving' as well.

In connection with the latter the question should be clarified as to whether the employer's justification with a simple 'disclaimer' or with a reason emerged in the employer's own organization or with the declaration that the employer employs employees from different nations can be regarded substantiated.

The CJEU also noted that all the above considerations were possible only if there is a 'probable cause', otherwise – conceptually – the employer did not need to justify themselves.[35] The employer's discriminatory statement may be regarded as 'probable cause', thus – according to the provisions of the directive – the defendant needs to prove that the defendant did not violate the requirement of equal treatment.

Consequently, the CJEU did not answer the other partial questions, since the employer's public statement could be justified only by proving that the employer meets the requirement of equal treatment regarding its policies on the selection of human resources. However, it is up to the national court to decide on this matter;[36] it seems that a verbal disclaimer itself

32 Palmer, p. 24.

33 Judgment of 10 July 2008 in Case C-54/07 *Centrum voor gelijkheid van kansen en voor racismebestrijding v. Firma Feryn NV* [2008], point 30.

34 See in connection with the importance of this case in general: R. Krause, 'Case C-54/07, *Centrum voor gelijkheid van kansen en voor racismebestrijding v. Firma Feryn NV* [2008] ECR I-5187', *Common Market Law Review*, Vol. 47, No. 3, 2010, pp. 917-931.

35 Judgment of 10 July 2008 in Case C-54/07 *Centrum voor gelijkheid van kansen en voor racismebestrijding v. Firma Feryn NV* [2008].

36 Judgment of 10 July 2008 in Case C-54/07 *Centrum voor gelijkheid van kansen en voor racismebestrijding v. Firma Feryn NV* [2008], point 33.

and an informal (and also verbal) commitment to non-discriminatory personnel selection is insufficient evidence to disprove the simple rebuttable presumption.[37]

Critically, the reasons for the above conclusions are not quite clear, or more accurately, the CJEU omitted details that should have been covered. In spite of this omission, the Feryn judgment – from among the judgments interpreted above – is the one in which the CJEU supports victim protection the most definitely in spite of the fact that the application of the concept 'probable cause' does not unite the correct interpretation of the directive's provisions, which are complex and rather difficult to apply.

The relevant case law of the CJEU may be summarized as follows. The CJEU does not make use of the opportunity to clarify the directive's provisions, because it gives only partial answers concerning the previously raised questions. In our opinion, specific legal consequences focusing on victim protection based on the directive's provisions are often missing from the judgments; but we have to take into consideration that the CJEU often tries to share the burden of proof – even if in a less than radical way, but – in a manner that is more advantageous for the employee.

30.3 Hungarian Regulation and Legal Practice

In the following section of the study, it is necessary to examine the Hungarian regulation formed by the above-mentioned directive and the relevant legal practice. This way we can answer the question which was posed in the title of the study. Though the regulation is relatively unambiguous, the two directions of Hungarian legal practice and case law represent two different viewpoints. Therefore, this is the most effective way to examine whose interpretation is closer to the interpretation of the CJEU discussed earlier.

30.3.1 The Directive-Conforming Provisions of the Equal Treatment Act

Going into detail, Section 19 of Act CXXV of 2003 on Equal Treatment and the Promotion of Equal Opportunities (Equal Treatment Act) contains the special rules of bringing an action in case of violation of equal treatment, essentially in the same manner as with the relevant directives. It is important that the Equal Treatment Act declares the regulations to be different from the general rules of proving, so they must be fulfilled in all similar procedures.[38] The burden of proof is shared and this sharing designates not only quantitative but also qualitative differences between the parties. Practically, the injured party's obligation

37 Judgment of 10 July 2008 in Case C-54/07 *Centrum voor gelijkheid van kansen en voor racismebestrijding v. Firma Feryn NV* [2008], point 34.

38 T. Gyulavári, 'Egyenlő bánásmód törvény – célok és eredmények', in: B. Majtényi (ed.), *Lejtős pálya – Antidiszkrimináció és esélyegyenlőség*, L'Harmattan, Budapest 2009, pp. 17-20.

of presumption opposes the strict obligation of proving that the party has committed a legal infringement. This sharing fulfils the extremely important principle of EU directives[39] that, in discrimination cases, the burden of proof must be put on the party who is in possession of the relevant facts and circumstances, namely, the side which is the 'source' cause of discrimination.[40] This also means that the favourable rules of proving must be formed in such a way that they would serve the injured party's interests, since their situation is more difficult during such a procedure[41] and on the basis of the burden and type of legal injury it is also justified to place the party who files for action in an advantageous position.[42]

The injured party's obligation of presumption has two sides, and these conditions – according to Sections 19(1)(a) and (b) of the Equal Treatment Act – are conjunctive. Consequently, the person or group has to presume suffering discrimination and having some protected characteristic defined in Section 8 of the Equal Treatment Act. Presuming means 'proving' in a manner on the basis of which common people would come to the conclusion that objectively the plaintiff's complaint is substantiated. Point (b) gives further details in connection to the protected characteristic, since the designated protected characteristic has to exist at the time of legal injury, so it must be real, and it is not enough if the complainant had the protected characteristic before the legal injury. Furthermore, it is also important whether the injured party does actually possess the protected characteristic or it is merely the defendant's supposition. It is not necessary to explain the first case, since – conceptually – presuming would be unsuccessful if the complainant simply felt that he suffered a disadvantage at the hands of the employer because of 'some' reason, but its base is not a protected characteristic.[43] It is the same case if the employee has this type of characteristic, but according to Article 8 of the Equal Treatment Act it is not a protected characteristic.[44] Accordingly, discrimination cannot be established if the party who suffered a supposed or actual breach of their right to equality does in fact possess a protected characteristic, but this attribute is not the basis of the disadvantage suffered. However,

39 O'Leary emphasizes that the employer's justification must be based on objective circumstances and at the same time turns attention to the fact that the rules of justification have an important role in strengthening the legal practice of indirect discrimination, mainly referring to gender discrimination. See: S. O'Leary, *Employment law at the European Court of Justice. Judical Structures, Policies and processes*, Hart Publishing, Oxford – Portlad Oregon 2002, p. 151.

40 C. Tobler, *A Case Study into the Development of the Legal Concept of Indirect Discrimination under EC Law*, Intersntia, Antwerpen – Oxford 2005, pp. 73, 252 and 280-281.

41 N. Cunningham, 'Discrimination Through the Looking-glass: Judicial Guidelines on the Burden of Proof', *Industrial Law Journal*, Vol. 35, No. 3, 2006, pp. 272-278.

42 Palmer, p. 23-25.

43 See: Resolutions No. 540/2008, 1869/2009. and 759/2009. of the Equal Treatment Authority because in these cases the complainant marked only their corrupted workplace relationship with the employer as the basis of disadvantage.

44 Typically, those cases belong to this group in which the plaintiff indicates point t) (other status, attribute or characteristic) of Section 8 of the Equal Treatment Act as protected characteristic.

proving the existence of such a causal relationship is not the employee's task, but the employer has the possibility to justify its absence in the case of successful presumption.[45]

In the second case, according to the supposition of the party causing legal injury, the injured person had the marked protected characteristic, and it is clear that it justifies that the disadvantage is based on the protected characteristic. With this rule the Equal Treatment Act intends to protect the injured party, since it may occur that the employer only supposes the existence of some protected characteristic and on this basis causes disadvantage for the complainant.[46] Naturally, justification cannot be substantiated in such cases as the plaintiff does not have the marked protected characteristic, since the employer's supposition is enough to commit discrimination.

According to the rules of shared burden of proof as stated in para. (1), in the case of successful presumption the employer needs to prove either that the circumstances presumed by the employee do not exist,[47] that the employer met the requirement of equal treatment, or that the employer was not obliged to meet this requirement.[48] These are not conjunctive conditions, but they are three different well-confinable cases in the Equal Treatment Act. In our opinion justification according to Section 19(2) of the Equal Treatment Act supposes the successful presumption, since without it we cannot speak formally about discrimination, otherwise there would not be a fact from which the employer could excuse themselves.

30.3.2 The Strict Interpretation of the Equal Treatment Authority

It is necessary to analyse Position No. 384/4/2008. (III. 28.) of the Equal Treatment Advisory Board,[49] because it covers the rules of sharing the burden of proof. Here it is analysed in detail as to what the complainant's obligation of presumption means, as well as regarding justification of what kind of evidentiary possibilities exist for those who have violated the principle of equal treatment. This Position complements the provisions of the Equal Treatment Act, making the regulation consistent with the provisions of the directives. Therefore the function of the rules of justification is that – against *ex lege* refutable presumption – it could be argued that the principle of equal treatment was not violated.[50] According to the logic of the law the violation of the principle of equal treatment must be

45 At least it can be concluded from the above-mentioned provisions of the directive.

46 T. Gyulavári – A. K. Kádár, *A magyar antidiszkriminációs jog vázlata*, Bíbor Kiadó, Miskolc 2009, pp. 65-70.

47 Section 19(2)(a) of the Equal Treatment Act.

48 Section 19(2)(b) of the Equal Treatment Act.

49 Positions of the Advisory Board of Equal Treatment are principal legal standpoints based on the legal practice of the Equal Treatment Authority. These positions are not legally binding but they are important guidelines for the Equal Treatment Authority and for the correct interpretation of the Equal Treatment Act as well.

50 Position No. 384/4/2008. (III. 28.) of the Advisory Board of Equal Treatment on the division of the burden of proof.

presumed, but this presumption can be refuted. At the same time, in the case of successful justification, it is not certain that the employer can justify that it met the principle of equal treatment, since, according to the Position, the injured party has the possibility of refuting the employer's (defendant's) justification claim in the next – and at the same time last – phase of the justification procedure. Agreeing with the Position, it is justified to apply rules, which are much more favourable to the injured party, since this way the disadvantage of not obtaining the evidence can be compensated, namely, the employer has this evidence.[51]

The Position should be examined further as it also interprets the meaning of the above-mentioned causes of justification mean in detail. In the first case the employer shows that the circumstances presumed by the employee do not exist, so the conclusion of fact does not reach the level of discrimination. In the second case the employer can show that it did meet the principle of equal treatment, and that the causal relationship between the suffered disadvantage and the protected characteristic is also missing. In the third case it is irrelevant which elements of conclusion of facts are performed, because in this case the employer can show that it was not obliged to meet the requirement of equal treatment (on the basis of a general or special rule), so it is excused from discrimination on an objective basis regardless to its conduct.

Furthermore, it is also important that, according to the Position, proving the existence of a causal relationship between the disadvantage and the protected characteristic is not the plaintiff's (employee's) obligation but of the Equal Treatment Authority. In this respect, the more beneficial provisions of the Equal Treatment Act appear again.

The Position also states that this approach is definitely strict and intends to keep the injured party's interests in mind. The starting point of the rules of proving is the above-mentioned refutable presumption, and on this basis the employer's possibilities for justification are greatly restricted.[52]

30.3.3 The Problem of 'Reversed' Burden of Proof in Judicial Practice

With regard to the legal interpretation of the Curia of Hungary (Curia), the most important question is to what extent courts apply the strict legal interpretation of the Equal Treatment Authority. If the strict interpretation is not followed fully, the stress of proving would be shifted. Presumably, the Curia does not follow the directions set by the above-mentioned principles and methods in a consistent manner, but it is more typical in judicial practice

51 Cunningham, pp. 272-278.

52 Further limits are the special justification rules of Section 22 of the Equal Treatment Act, since the employer has the possibility of justification only within narrow limits regarding the actual specialities of employment.

that the court attempts to balance the burden of proof and the tends to take into account the rules that more favourable for the plaintiff to a lesser extent.[53]

The following paragraphs examine relevant Hungarian judicial practice broken down into two groups according to the extent the courts follow the legal interpretation described above, namely, the regulation of the Equal Treatment Act and the legal practice of the Equal Treatment Authority. Furthermore, European legal developments also need to be taken into account, since they have a significant influence on both the regulation and practice. It is worth mentioning in connection with this distinction that the judgments will not be examined in chronological order, but in the logical order discussed above, since – with regards to the essence of the decisions – a chronological order cannot be applied. In addition, referring to the directive's provisions and the case law of the CJEU we focus on two subparagraphs on the differences between the two approaches, one of which ensures greater protection for the plaintiff, while the other affords a lesser degree of protection. First of all, another classification could be made on the basis of whether the judgment was made by Council I, II, or III of the Curia of Hungary but I have come to the conclusion that it cannot be an exclusive aspect of classification either, and, consequently, the above-mentioned distinction needs to be applied.

The following analysis focuses on judgments that faithfully represent the duality of Hungarian judicial practice.

30.3.3.1 Judicial Practice Focusing on Victim Protection

One group of Hungarian court judgements is based on a legal interpretation that is similar to the interpretation followed by the Equal Treatment Authority. In Judgment No. BH 255/2004 – which is of fundamental importance – the Curia declared that the importance and correct sharing of the burden of proof is as follows:[54] the entry-level and appelate courts were wrong when they held that the plaintiff – an employee – had to prove that he was discriminated against by the employer with regards to the conditions of employment. The lower courts concluded that discrimination cannot be established unless the employee can prove this. However, the Curia interpreted the enforced Directive 97/80/EC and held that it was true that, according to the general rules, the employee had to prove that an infringement was committed, but the violation of equal treatment resulted in such a special situation between the litigating parties that the general rule cannot be applied. The aim of the directive is to facilitate the employee's situation and to ensure that the employee would

53 The consistent case-law accepts the substantiation rules of Section 19 of the Equal Treatment Act but besides presuming the disadvantage, presumption of causality is also expected from the plaintiff. On the one hand, judicial interpretation sees presumption as the plaintiff's obligation, but, on the other hand, its scope is defined differently from the Equal Treatment Act. See: Z. Boda, 'Az egyenlő bánásmód megsértésének elbírálása', *Ügyvédek Lapja*, Vol. 55, No. 2, 2014, pp. 31-32.

54 The Curia came to similar conclusions in the following judgments: judgments No. Mfv.I.11.166/2010/7, Mfv.I.10.667/2010/38, Mfv.I.11.113/2009/3.and Mfv.I.10.642/2004/3. of the Curia of Hungary.

not be deprived of the adequate legal remedy because of difficulties of proving and/or justification. From the employee's perspective, it is almost impossible to reveal all the relevant facts and data, so the courts would put the employee into a disproportionately disadvantageous situation. On the other hand, the employer is in possession of all the relevant data and information about important circumstances, so the employer could be forced to advert all circumstances. This way, the employer can be relieved from its liability for discrimination.

Judgment No. KGD 5/2013 of the Curia of Hungary follows the same direction because the interpretation of the rules is in accordance with Article 19 of the Equal Treatment Act and confirms that in procedures relating to the violation of the requirement of equal treatment the injured party's obligation of presumption stands against the defendant's obligation of proving, and in case of the latter's efficiency the defendant can relieve himself from any liability successfully. The judgement only mentions Article 19 of the Equal Treatment Act, referring to the fact that the burden of proof is very special in such cases since the rules of burden of proof as laid down by the Equal Treatment Act are more favourable to the discriminated person and they should be applied in administrative or judicial procedures of actual or supposed violation of the principle of equal pay for equal work.

The above-mentioned ideas are crucially stressed in the recent judicial practice[55] as well since, in addition to sharing and inverting the burden of proof, it is also emphasized that the employee's obligation of presumption does not cover the probation of the causal relationship between the protected characteristic and the suffered disadvantage. In our opinion, this conclusion is of high importance because it does not necessarily follows from the ideas analysed above. The interpretation of the rules of proving in judicial practice can be criticized at the point of the exaggerated broadening of the obligation of presumption, that is, the fact that the employee has to presume or prove further facts, which are not in the Equal Treatment Act, otherwise the court would not regard the presumption to be at the appropriate level. It must be emphasized that, in this judgment, the content of the Equal Treatment Act is given sufficient attention, since the employer can show the lack of any causal relationship, thus that its action did not constitute discrimination.

30.3.3.2 Judicial Practice Focusing on the Balance of the Burden of Proof

The Curia of Hungary makes important statements in Judgment No. KGD 10/2011 in connection with the rules of proving, interpreting the provisions of Article 19 of the Equal Treatment Act. The Curia attempted to assess the special rules of burden of proof thoroughly, and finally interpreted the provisions of the Equal Treatment Act in a less strict manner.

55 See judgment No. Mfv.I.10.646/2012/4. of the Curia of Hungary.

According to this decision, the complainant had to presume the causal relationship between the protected characteristic and the suffered injury, and the justification on the basis of the Equal Treatment Act may then presented after this presumption arose on the employer's side. According to the Curia, accusations of any form of discrimination[56] are groundless without the existence of a causal relationship, meaning that the claim was inconsistent with Article 19 of the Equal Treatment Act

The judgment may be criticized on two grounds. On the one hand, it does not follow from Articles 8 and 19 of the Equal Treatment Act that the employee has to at least presume the causal relationship, since this way presumption would transform into proving and the injured party would find himself in a disproportionately difficult situation. This way the conclusion is not correct. On the other hand, the proving of a cause and effect connection is related to the concept of comparable situation, and discrimination can be claimed only in the case of a comparable situation (it also raises the problem of the correct interpretation of Article 8 of the Equal Treatment Act). Consequently, if the employee who has been discriminated against is in a situation that is comparable to the situation of other employees who have not suffered discrimination, practically, the causal relation exists. This is because the employee has to presume the protected characteristic and the disadvantage and the employer's justification is possible only if it can be shown that there is no comparable situation and the disadvantage is not based on the protected characteristic. Namely, the existence of the causal relationship is also the result of the employee's successful presumption – referring to the comparable situation –, since the only logical cause of a disadvantage could be the protected characteristic, if the other employees in a comparable situation did not suffer the the same discrimination that was presumed successfully. In our opinion this consideration 'must be implied' in the rules of proving, otherwise the general rule of sharing the burden of proof would be limitless, since the employee cannot prove that he suffered the marked disadvantage because of a protected characteristic, and the employer has the possibility of quasi elenchus.

According to the Curia of Hungary in order to claim discrimination, it is not enough that the complainant employee has the protected characteristic and presumes the suffered disadvantage successfully. In the understanding of the Curia, the employee should have submitted more substantial evidence[57] that there was a causal relationship between his protected characteristic and the disadvantage, but the presented pieces of evidence did not go beyond presumption. Namely, according to the Curia – and contrary to the Equal

56 Victimization is an exception from this, since – according to Section 10(3) of the Equal Treatment Act – causal relationship is not expected to exist between the employee's protected characteristic and the suffered legal injury, but between the objection or action against discrimination and the breach of equal treatment originated from it. See: A. Magicz, 'A megtorlással szembeni védelem gyakorlati kérdései és a jogi szabályozás továbbfejlesztésének irányai', in: Majtényi (ed.), pp. 167-168.

57 Or to justify but during the presumption their statements should have been supported more 'convincingly'.

Treatment Act – it is not enough for the plaintiff to presume a causal relationship indirectly, but it must be justified and based on actual facts. Regarding the correctness and further criteria of proving, the Curia does not provide detailed guidance, but it can be concluded from the reasoning of the judgment[58] that the Curia expects the complainant to present such evidence to which the employer can react with justification in merit.

Furthermore, according to the Curia, the Equal Treatment Authority would have examined in connection with causal relationship whether the complainant was in fact not employed in the proper position by the employer because of the protected characteristic. It can be confirmed by justifying that the employer stopped employing the applicant in her original position because the employer doubted that the complainant could perform her job at the same level on returning to work after childbirth. According to the Curia, the issue of causal relationship may only arise if the disadvantage is suffered due to such hidden reasons. If any further causes of this type cannot be observed, the complainant's presumption – probation? – fails and, consequently, the employer can be relieved from liability. It should be added that simultaneous existence of protected characteristics and the disadvantage itself does not mean that the employer acted in a discriminatory manner, and to justify discrimination, a 'real' causal relationship is required. In the absence of such a causal relationship, the employer's justification must be regarded as successful.

In our opinion the latter statements are inconsistent with the provisions of the Equal Treatment Act,[59] the EU norms, and the consistent practice of the Equal Treatment Authority,[60] and not even the earlier case law of the Curia of Hungary.[61] If Section 19 of the Equal Treatment Act was interpreted this way, then the advantage to the injured party's side would be forgotten, which – according to the law – would presume causal relationship in the administrative and judicial procedure, and not justify the causal relationship. It also follows from this special rule that the employer has the possibility of excusing itself but only in the case of successful justification and within strict limits. It should be added – and here we should refer to the conceptual difference between presumption and proving or probation – that the employee cannot confirm more definitely the performance of discrimination than the simultaneous existence of disadvantage and the protected characteristic, since it is ambiguous as to what else is required. The employee cannot justify causal rela-

58 'The intervenor (the complainant of the administrative case) presumed disadvantage in connection with the employment relationship properly, furthermore the complainant declared that in her opinion she had to suffer legal injury because of her motherhood, namely because of her characteristic that belongs to the protected sphere. The intervenor did not confirm the causal relationship between the protected characteristic and the disadvantage by any evidence – such as a letter, witnesses, etc.' So the Curia definitely expects more than presumption according to its interpretation of the Equal Treatment Act.

59 L. Farkas – A. K. Kádár – Kárpáti J, 'Néhány megjegyzés az egyenlő bánásmódról szóló törvény koncepciójához', *Fundamentum*, Vol. 7, No. 2, 2003, pp. 123-125.

60 See Position No. 384/4/2008. (III. 28.) of the Advisory Board of Equal Treatment.

61 Mainly judgment No. BH 255/2004. of the Curia of Hungary.

tionship with statistical data, figures, or official documents,[62] for example, meaning that successful presumption would be impossible in practice, contrary to the employer who has far more possibilities to support their standpoint concerning justification in this respect.[63]

The Curia referred to Directive 97/80/EC – replaced in the meantime by Directive 2006/54/EC – stating that the burden of proof must be put on the employer in reality, namely, on the party which has the real possibility of proving on the basis of all the circumstances of the case. Regarding the basis of the directives, the Curia added that with the presumption of a causal relationship – at least – the plaintiff can conclude direct or indirect discrimination from the stated facts. However, in our opinion, only the obligation of presumption can be concluded from the above-mentioned provisions of the directive,[64] but the scope and depth thereof are not defined. These provisions refer to the causal relationship only indirectly, as discussed in detail above. The provisions of the directive do not state that the causal relationship between the protected characteristic and the disadvantage would be presumed or proved by the employee because the acting authority or court has to conclude discrimination on the basis of the employee's successful presumption. In our opinion, if the Equal Treatment Act and the directives contained such additional provisions, they would place the obligation of proving onto the employee and would thereby invalidate the very essence of the rules of burden of proof.

In connection with sharing the burden of proof, the Curia made an interesting observation in Judgment No. Mfv.I.10.369/2008/8. On the one hand, the Curia referred to Judgment No. BH 255/2004 which was discussed in detail above. On the other hand, it confirmed the rules of sharing the burden of proof. At the same time, and similarly to the judicial practice described above, the Curia designated the obligation of proving for the plaintiff. Though the judgement itself refers to Section 5(8) of the Labour Code of 1992 – as in effect at the time – regarding the rules of proving, the relevant provisions of the Labour Code are fundamentally the same as those laid down in the current Equal Treatment Act, meaning that the decision needs to be reviewed at least shortly.

Though the Curia confirmed the provisions laid down in Section 19 of the Equal Treatment Act for the judicial practice, it then attempted to reach a balance regarding the

62 See: Judgment of 19 April 2012 in Case C-415/10, *Galina Meister v. Speech Design Carrier Systems GmbH* [2012].

63 Palmer, pp. 23-25.

64 According to Para. (1) of Art. 19 of Directive 2006/54/EC the complainant – plaintiff – '…, 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. As in the original English text: 'from facts which it may be presumed…') But the defendant – the employer – is obliged to prove that it did not breach the principle of equal treatment ('…it shall be for the respondent to prove…'). It can be seen from the differences of drafting that the reference – presumption – differs from proving in merit. The English language version confirms it properly regarding the difference in the meaning of the verbs 'presume' and 'prove'.

parties' burden of proof, since it noted that a simple reference to the principle of equal treatment by the complainant is not enough in itself to reverse the burden of proof and to place it onto the employer. Consequently, it is the employee's obligation to prove first that the employee suffered a disadvantage[65] and the proof of justification could follow this. We find the judgment to be interesting because even the Curia noted the basic rule of shifting the burden of proof correctly, but tries to ease it at once, emphasizing the obligation of the party referring to discrimination. We can agree that a simple reference to discrimination is not enough on the employee's side, but the problem rises again that, in spite of the shared burden of proof, the judgement of the Curia connects the employee's successful presumption (probation) to the employer's justification which leads to the negation of the very meaning and function of the rule.

It is important to add that the Curia often interprets[66] the rules of burden of proof less sctrictly than in the above cases, and it applies the sharing of the burden of proof according to the Equal Treatment Act quite differently. The first remarkable element of the judgment is that the Curia – in the lack of proper evidence – established that the plaintiff's inefficient proving 'substitutes' the employer's justification, i.e. it interpreted the sharing of the burden of proof more strictly than the Equal Treatment Act. However, this rigour also appears on the employee's side. It remains a fact that the Curia's findings regarding proving instead of presumption is inconsistent with the aim of the rules of the Equal Treatment Act. Furthermore, it seems to be disconcerting that the Curia discloses performance of discrimination in the case of a lack of proper evidence. First of all, this way the Curia does not intend to balance the parties' burden of proof according to the facts that were mentioned above, but, with the lack of proper evidence, the Curia makes the employer's situation easier and the employer can give evidence in merit. This kind of legal interpretation can be criticized – even if Section 19 of the Equal Treatment Act is not interpreted too strictly for the employee's side – since it is clear from the directive's provisions that the key to proving is the employer's justification, so from this point of view it is not justified or grounded that it is disclosed, since – according to the principles of the directive – the employer 'only' has the possibility of excusing itself.

30.4 Conclusions

To answer the question raised in the title of this paper, we can state that – according to EU law – it is certainly the employer's burden. According to the Equal Treatment Act, it is the employer's burden. According to the Equal Treatment Authority, it is mainly the employer's. However, according to Hungarian judicial practice, it is rather the employee's

65 And also the protected characteristic.

66 See typically: judgment No. Mfv.II.10.480./2013/3 of the Curia of Hungary.

burden. It is clear that when deciding where the burden of proof falls opinions differ greatly in administrative and judicial practice. This is dangerous because the incorrect interpretation of Section 19 of the Equal Treatment Act weakens the efficient application of the key concepts and does not simplify the interpretation of the complex justification rules.[67]

The special, preferable rules of proving with particular respect to the injured party's interests – in accordance with the directives[68] – definitely appear in the Equal Treatment Act. However, preferable rules do not mean that it is enough if the complainant simply refers to the violation of the requirement of equal treatment, but he has the obligation of presuming against the employer's obligation of proving justification. Or rather, it is more accurate to say that the complainant has to presume at least, since he makes his own situation easier if he can even prove within the framework of presumption. Of course, it is not obligatory and the plaintiff cannot be forced into this obligation during the procedure.

With regard to justification, it would be expedient to insist on the strict approach of the Equal Treatment Act and the Equal Treatment Authority, but the application of the rules of justification should be harmonized with the rules of proving. As for employment, it is important that justification – besides the general rule – should be built only on such objective aspects which necessarily come from the nature of work and are important.

Naturally, the proving of comparable situations is indispensable, but – in our opinion – the existence of a comparable situation itself also carries the existence of a causal relationship, so it seems to be unjustified that the latter should be proved or even presumed by the plaintiff according to paragraphs (1) and (2) of Section 19 of the Equal Treatment Act. Furthermore, it would be unjustified, since point a) of para. (1) supposes the concurrence of disadvantage and the protected characteristic, and practically this means a comparable situation. On the contrary, the defendant has to justify that the plaintiff's situation is not comparable, or there is no causal relationship between the presumed protected characteristic and the suffered disadvantage. Furthermore, it may also be an explanation that both criteria of comparability and causal relationship are questions of proving; that is, it must belong to the proving of justification following the plaintiff's successful presumption. This can be concluded from points a) and b) of para. (2) of Section 19 of the Equal Treatment Act, since the employer has the possibility of justifying that it kept to the requirement of equal treatment only within the framework of justification proving, and with its proving, it has effectively 'contradicted' the plaintiff's presumption. At the same time, it would be inadvisable to regulate the concept of a comparable situation in the Equal Treatment Act,

67 T. Gyulavári, 'A kimentési szabályok harmonizációja: elveszett jelentés?', *Csak a húszéveseké a világ? Az életkoron alapuló diszkrimináció tilalma a magyar és az uniós jogban* (Conference), Nemzetközi Tudományos Konferencia az Osztrák-Magyar Akció Alapítvány támogatásával és a Magyar Munkajogi Társaság szakmai támogatásával, Pázmány Péter Katolikus Egyetem Jog- és Államtudományi Kar, Budapest 11th December 2014.

68 Para. 1. of Art. 19 of Directive 2006/54/EC, Para. 1. of Art. 10 of Directive 2000/78/EC and Para. 1. of Art. 8 of Directive 2000/43/EC.

since it is a question of legal application and interpretation; thus it may be justified to refer to causality in Section 19(2) of the Equal Treatment Act as follows: the phrase 'the lack of a causal relationship between the protected characteristic and the suffered disadvantage' could be inserted into point a); that is the present point a) only refers to the latter two, and this way the judiciary's task would be made much easier, and consequently, the legal practice would be more consistent.

It is worth mentioning briefly what are the reasons for the dramatically fragmented legal practice of the Curia and what are the causes of the different directions of the administrative legal interpretation, since the examination above may be incomplete by all means because these reasons are not revealed in Chapter 3 even if it focuses on the neuralgic points of the legal interpretation. But this issue has good reasons for exemption from this deficiency because the causes of differences and contradictions can be revealed only with great difficulties and it is possible that these reasons cannot be even identified in the analyzed judgments.

We have already mentioned that neither chronology nor taking the cases according to the sometimes different judicial practice of the Curia will lead us to find the cause of these differences, so they have to be found somewhere else.

In our opinion, the complexity of the rules in Section 19 of the Equal Treatment Act plays a part in it as well as the courts' dramatic aversion to these special rules[69] even if these rules can be applied more easily than the provisions of the relevant directives. Naturally, in connection with the former, some proposals for a conceptual solution may be raised and, in connection with the latter, it can be stated that it is difficult to find the real reason for this aversion. Clearly, if the CJEU itself fails to establish a consistent case law on this matter, the courts of the Member States should hardly be expected to do so.

Importantly, the Hungarian courts should follow the practice of the Equal Treatment Authority, but this argument can be refuted by the courts since the fundamental differences between the two procedures hardly make it possible, or the issue of reduction in the effectiveness of the litigation may also be raised. Naturally, all these are suppositions, but I think that it is also a good example of the regulatory and aspectual complexity and uncertainty which characterize the special rules of burden of proof in these types of cases.

Finally, I would like to add that the courts seem 'to make a special point of' the radical and special protection of the principle of equal treatment less than the Equal Treatment Authority does since the guarantee of the existence of the latter is the enforcement of the legal guarantees of the fight against discrimination at the highest possible level concentrating on victim protection as much as possible. Though the courts seem to be responsible for the lack of this concept it would be an exaggeration to say that special attention should be paid to the cases of infringement of the principle of equal treatment for some curious

69 Boda, pp. 31-32.

reason in litigations. However, this problem could be solved if the Curia would make a conceptual statement supporting the radical interpretation of the Equal Treatment Act in the support of victims of discrimination.

To make *de lege ferenda* proposals we would like to stress that the implementation of the directive's provisions in Hungary is appropriate, and we think that the Hungarian legal practice should follow this EU-conforming regulation. Although some corrections could be made – for example in connection with the proving of causality or the lack thereof – the regulation seems to be lawful and reasonable. Furthermore, the legal interpretation of the Equal Treatment Authority and the previously analysed Position of the Equal Treatment Advisory Board – which clearly states and justifies that the proving of the lack of causality is part of the employer's burden of proof – should lead to a more radical approach and application of Section 19 of the Equal Treatment Act, and we also believe that it could – and should – be the next step in victim protection in connection with discrimination at workplaces.

30.5 Closing Ideas – The Real Burden of Burden of Proof

In our opinion, on the part of the courts, some special unseen 'tendency in the background', or a kind of natural motivation can be observed: this kind of derogation from the general rules of proving cannot be applied exclusively and consistently. This contradiction is very difficult to explain and even more difficult to justify, even if it is true that it is rather difficult to prove – even theoretically – that discrimination did not take place. However, a thorough examination of European case law shows us that there may be a problem with the starting point, since – in those judgments – the application of the directive's provisions seems to be less unnatural and contradictory. The reason for this may be that the priority of protection of the principle of equal treatment as a basic requirement is missing in Hungarian judicial practice; consequently, the rules of proving are interpreted and applied as stereotypes and not according to the logic and the idea of the directives.