



# Burden of proof in discrimination cases

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Funded under the 'Rights, Equality and Citizenship Programme 2014-2020' of the European Commission

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## The principle of burden of proof in EU law

### Transposition of the principle into Romanian law

### Relevant aspects in European case law

### Key points in the case law of the High Court of Review and Justice

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## We discuss

THE PRINCIPLE OF BURDEN OF PROOF IN DISCRIMINATION CASES

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# Which elements concern the principle of burden of proof?

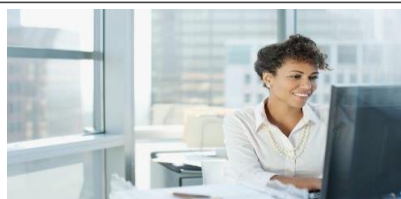
**I. Facts on the basis of which discrimination may be presumed to exist**

**II. Demonstration that there has been no breach of the principle of equal treatment**

Applies in cases of direct and indirect discrimination

Not applicable in criminal law

It does not apply in procedures involving investigative bodies.



THE PRINCIPLE OF BURDEN OF PROOF IN DISCRIMINATION CASES

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## The principle of burden of proof in EU law

Cases of discrimination

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Directive 97/80 Burden of Proof  
 Directive  
 Directive 2000/43 Racial Directive  
 Directive 2000/78 Framework  
 Directive  
 Directive 2004/113 Services  
 Directive  
 Directive 2006/54 Reform  
 Directive

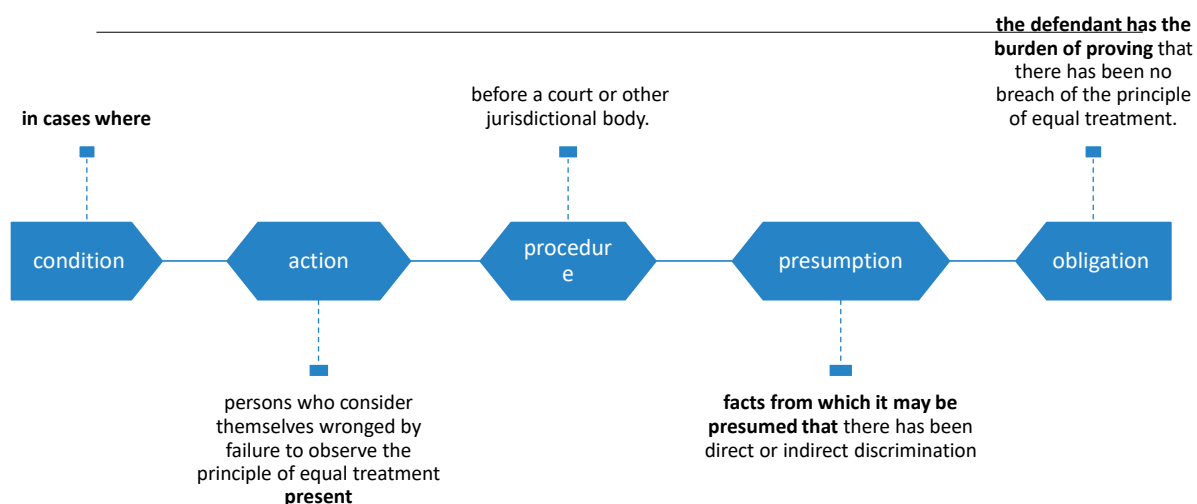
The principle in EU law

THE PRINCIPLE OF BURDEN OF PROOF IN DISCRIMINATION CASES

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## The principle of burden of proof in discrimination cases



DIRECTIVE 2000/43 DIRECTIVE 2000/78 DIRECTIVE 2004/114 DIRECTIVE 2006/54

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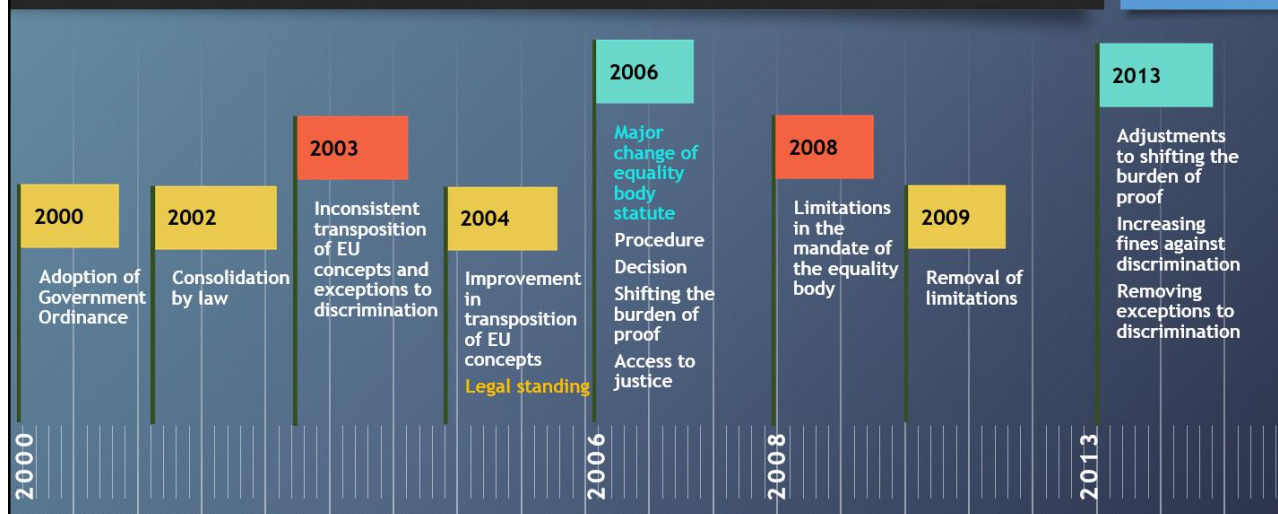


## The principle of burden of proof in Romania

Anti-discrimination law

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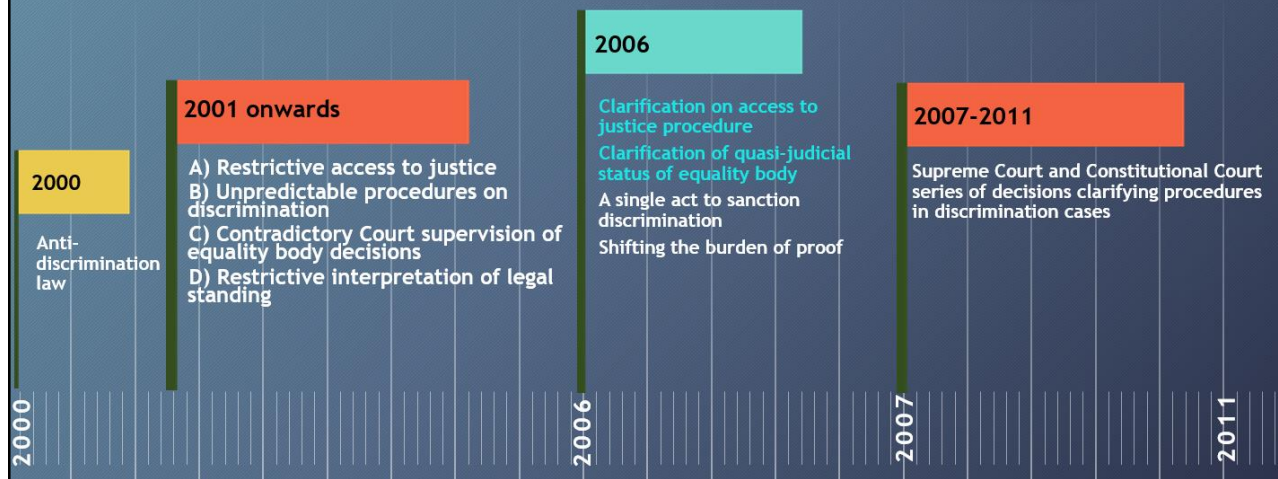
## Progressive alignment with EU standards of the anti-discrimination law in Romania



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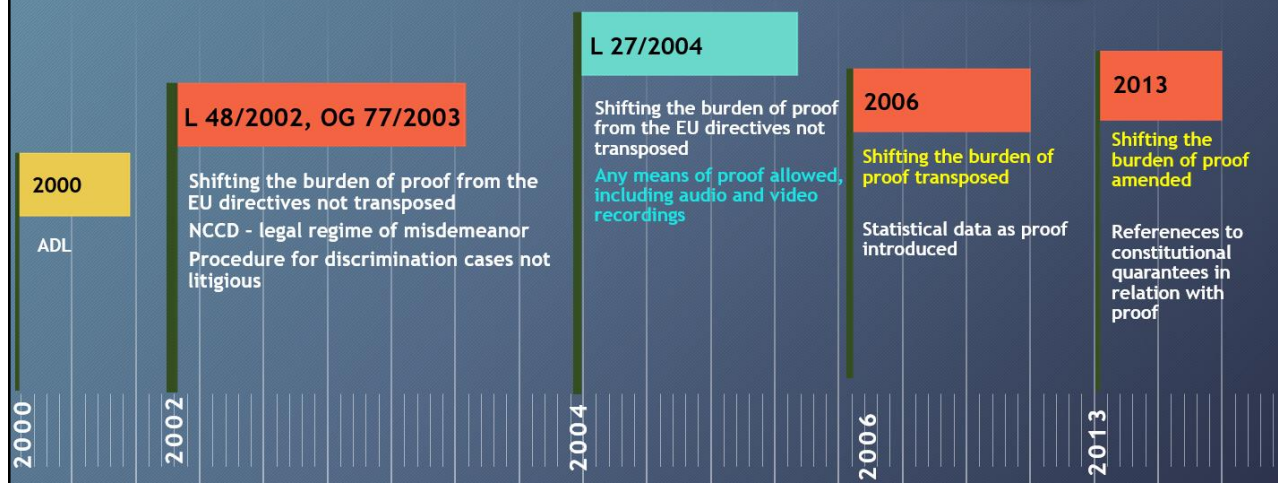


## Procedural challenges in litigating discrimination



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## Burden of proof in RO anti-discrimination law



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## Burden of proof in discrimination cases

Law 324/2006	Law 61/2013
The person concerned	The person concerned
has the obligation to <b>prove the existence of facts from which it</b> may be <b>presumed that</b> there has been direct or indirect discrimination	<b>present facts</b> on the basis of which direct or indirect discrimination <b>may be presumed</b> ,
The person against whom the complaint has been lodged	The person against whom the complaint has been lodged
bears the burden of proving that <b>the facts do not constitute</b> discrimination.	bears the burden of proving that there has been <b>no breach of the principle</b> of equal treatment.

THE PRINCIPLE OF BURDEN OF PROOF IN DISCRIMINATION CASES

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## Evidence in cases of discrimination

Law No 27/2004	Law 324/2006	Law no. 61/2013
Proof of discrimination may be provided by <b>any means of evidence, including audio and video recordings</b>	Any evidence, including audio and video recordings or <b>statistical data</b> , may be invoked before the <b>NCCD/court</b> .	<b>Any evidence may be invoked</b> before the <b>NCCD/court, in compliance with the constitutional regime of fundamental rights</b> , including audio and video recordings or statistical data.

THE PRINCIPLE OF BURDEN OF PROOF IN DISCRIMINATION CASES

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## Relevant aspects of the principle of burden of proof

Case law

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## Relevant aspects in the case law of the Court of Justice



### ECJ CASES

- **Danfoss, 09/88**
- **Enderby, C-127/92**
- **Royal Copenhagen, C-400/93**
- **Brunnhöfer, C-381/99**

### PRIMA FACIE

- The presumption of discrimination may arise from circumstances such as:
- **Lack of transparent criteria**
- **Existence of statistical data**
- **A clear situation of comparability**

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## Burden of proof: presumption of direct discrimination

### DIRECT DISCRIMINATION

- Different treatment
- Comparable situations (analogous situations)
- Prohibited criterion (causality)

Statistical data shows a differentiation (Danfoss)

Public statements (Feryn, Associazione Avvocatura per i diritti LGBT)

Public statements and lack of dissociation from discriminatory shareholder statements (ACCEPT)

Assertions suggesting stereotypes or prejudices, claims without factual basis (CHEZ)

Refusal to provide information (Kelly, Maister)

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## Burden of proof: presumption of indirect discrimination

### INDIRECT DISCRIMINATION

- Identical treatment (provision, criterion, apparently neutral practice)
- Different situations
- Effect - disadvantage for a group of people (criterion)
- Objective justification (legitimate purpose, appropriate and necessary measures)

Statistical data may be sufficient to show that a practice exists which particularly disadvantages people with a protected characteristic

In order to establish a prima facie case of discrimination, precise statistical data are not required if the party claiming to be discriminated against does not have access to these statistics or has difficulty accessing them (Schuch-Ghannadan)

It is sufficient that a measure is intrinsically likely to affect a certain category of persons and that there is a risk of disadvantage. It is not necessary for such a measure to actually produce such an effect, it is sufficient that it is likely to produce such an effect. (O Flynn)

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## Burden of proof: party accused of discrimination

### DEFENDANT

- It demonstrates that there has been no breach of the principle of equal treatment
- Does not demonstrate a negative fact

Factors that have an objective justification and are not related to discrimination (Danfoss, Coleman, Accept, CHEZ)

Evidence that in fact the shares do not correspond to the discriminatory statements (Feryn), distancing from the shareholder's discriminatory statements (ACCEPT),

Situations invoked by the person who considers himself/herself discriminated against are not comparable, lack of causal link, lack of negative effect, elements of justification in the case of indirect discrimination (objective justification, legitimate aim, proportionality of the means used to achieve the aim pursued)

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## Relevant aspects regarding the principle of burden of proof in Romania

Case law of the High Court of Review and Justice

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# High Court of Review and Justice

## HCCJ, CIVIL DECISION 1837/2014 AND 4662/2014

The **burden of proof in this matter is shared** between the person claiming discrimination and the person accused of discrimination under Article 20(2). (6) of the Ordinance.

Art. 20 para. (6) **divides the burden of proof between the person concerned** who shall submit facts from which it may be presumed that there has been direct or indirect discrimination and the **person against whom the complaint has been made** who shall prove that there has been no breach of the principle of equal treatment.

## HCCJ, CIVIL DECISION 629/2015

in this matter there is **no total shifting** of the burden of proof, only a **division of the burden of proof**.

Moreover, as has been shown and qualified in the doctrine developed in this area, under Article 20 para. (6) of G.O. 137/2000, the **shifting of the burden of proof does not operate automatically nor does it constitute a total shifting** of the obligation of proof.

It does not operate automatically as the **person concerned must prove the existence of facts** which demonstrate that there is a presumption of direct or indirect discrimination, and **only on the basis of such evidence** can the court or competent authority **order a shifting of the burden of proof**.

# High Court of Review and Justice

## DECISION 1551/2015

As regards the misapplication by the court of the provisions of Article 20 para. (6) of G. O. 137/2000, regarding the burden of proof before the National Council for Combating Discrimination, this criticism is unfounded, since the court held, in essence, that the **petitioner did not present conclusive facts on the basis of which to presume harassment on the basis of a criterion laid down by law**, and the **presentation of these facts was the burden of the petitioner** according to the aforementioned text of the law.

## DISCRIMINATION CRITERION?

In the present case, the court of first instance correctly held that ... the facts of harassment alleged by the applicant had not been proved, meaning ... **one of the criteria** laid down by law **had not been proved**.

## High Court of Review and Justice

### DECISIONS 722/2018, 5000/2019

- The provisions of Article 20 of the G. O. 137/2000, which governs the burden of proof in this matter, **do not remove the obligation of the petitioner or the respondent council** to provide the necessary and useful evidence in order to establish the existence of **discriminatory treatment which is influenced by a specific or determinable criterion**, the purpose or effect of which is to restrict or eliminate the recognition, use or exercise of a right.

### DIFFERENT TREATMENT, IS IT A CRITERION?

- Only **finding that the three conditions are met gives rise to a presumption** that the difference in treatment is **not objectively justified** by a legitimate aim, **and the burden of proving otherwise lies with the perpetrator of the treatment.**
- In other words, **evidence of differential treatment does not exonerate from probation and does not raise a presumption that there is a criterion** according to which two persons are treated differently.

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## High Court of Review and Justice

### DECISION 1749/2018

In disagreement with the conclusion reached by the court of first instance, the reviewing court holds that the evidence advanced before the CNCD and that advanced before the court of first instance is such as to lead to the conclusion that C. was subjected to discriminatory treatment.

Thus, it is undeniable that C. was stopped at the entrance to the Club "D."..., when together with several friends they wanted to enter the premises, motivated by the fact that a private party was being organised. Subsequently, his friends entered the club without any difficulty, although they had no connection with the party.

### CRITERION AND PLAUSIBLE EXPLANATION

Defendant C. was the only Roma person present, as is clear from the documents on file, so **it can be assumed that he was refused access to the club on the basis of his ethnicity**, whereas his friends were allowed into the club.

Finally, such conduct by the applicant's representatives obviously infringed upon his right to dignity, causing him to have an inferiority complex in relation to others on the basis of his ethnicity.

**The fact that the applicant did not provide any plausible explanation** for some other reason justifying the conduct towards the defendant leads to the conclusion that there was discrimination within the meaning of Article 2 para.1, Article 10(f) and Article 14 of G. O. 137/2000 republished.

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# High Court of Review and Justice

## CIVIL DECISION 6177/2019

**There can be no question of differential treatment through the combined use of rules on the burden of proof specific to different branches of law.**

The court of first instance, validating the arguments of the defendant National Council on Discrimination, held that the plaintiff, as employer of defendant B, had the burden of proof as to the legality of the decision to terminate her employment contract under Article 172 of the Labour Code, and as that proof had not been provided, it created a presumption of discrimination on the grounds of pregnancy.

Once the discriminatory treatment of the defendant had been established, the applicant again had the burden of proof, this time under Article 20 para. (6) of G. O. 137/2000 in order to prove that there had been no breach of the principle of equal treatment in the termination of the employment contract.

## THE BURDEN OF PROOF

- In doing so, the court of first instance raised the burden of proof to a level not envisaged by the legislature.
- It should be noted that the present dispute is an administrative dispute and not a labour dispute.
- Therefore, the provisions of Article 172 of the Labour Code, relating to the burden of proof in labour disputes, are not applicable in this case; in that respect only the provisions of Article 20 of the G. O. 137/2000, which regulates the burden of proof in the procedure for sanctioning all acts of discrimination, are applicable.

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# High Court of Review and Justice

## CIVIL DECISION 3644/2020

From the interpretation of Art. 20 para. (6) of G. O. 137/2000, it can be seen that they regulate two closely related situations, namely:

- **the existence of a simple presumption of discrimination**, arising from the **submission of a petition** by the person concerned,
- and, respectively, **the obligation on the respondent to prove**, by any means of evidence, that the matters set out in the petition **do not amount to discrimination or that they are objectively justified**.

## PROVEN MATERIAL FACTS

It is undisputed that in order for discrimination to be found to exist it is necessary that,

- **at least the facts, in their materiality, be proved,**
- the **respondent must prove** that these acts are not discriminatory.

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## Relevant aspects

HCCJ - burden of proof is shared

Shifting does not operate automatically

The causal link between treatment and criterion is essential

The party accused of discrimination must provide a plausible explanation that excludes causation.

It is not possible to combine the principle of burden of proof from different branches of law



## Thank you!

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