



**Legal Seminar 4 October 2011**  
**Approaches to Equality and Non-discrimination Legislation**  
**inside and outside the EU**

**DISCUSSION PAPER - WORKSHOP 4**

*Burden of Proof*

Under EU non-discrimination law, a number of procedural guarantees have been developed to ensure effective access to justice. Directives 2000/43/EC (the Racial Equality Directive), 2000/78/EC (the Employment Equality Directive) and 2006/54/EC (the Gender Equality Directive) establish reversal of the burden of proof as a key element in discrimination cases throughout the European Union.

As a result of the past difficulties inherent in proving discrimination, Article 8 of the Racial Equality Directive, Article 10 of the Employment Equality Directive and Article 19 of the Gender Equality Directive lay down that persons who consider that they have been discriminated against must only establish, before a court or other competent authority, facts from which it may be presumed that discrimination has occurred. The burden of proof will then shift to the respondent who must prove that there has been no breach of the principle of equal treatment.

Although all EU Member States have to comply with the requirements set out in the Directives, a minority of states have failed to transpose the burden of proof provision in a fully compliant way. Whereas all states (except Turkey)<sup>1</sup> now provide for a shift in the burden of proof in discrimination cases, there inconsistencies are suspected with the provisions of the Directives in a number of states.

As a matter of fact, practical implementation of the reversed burden of proof is not always consistent as the facts from which it may be presumed that there has been a *prima facie* case of discrimination are not always clear and may be subject to conflicting interpretations. The provision on the burden of proof in the Austrian Federal Equal Treatment Act lowers the burden of proof for the plaintiff but in a way that does not seem adequate to comply with the Directives, as it requires the defendant to prove the probability of non-discriminatory reasons for a decision. However, the Austrian Supreme Court has provided an interpretation in line with the Directives by ruling that 'if the establishment of discriminatory infringements is successful, it is for the respondent to prove that he or she did not discriminate.'

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<sup>1</sup>When joining the EU, all states have to comply with EU law. Candidate countries (Croatia, the Former Yugoslav Republic of Macedonia, Iceland and Turkey) must therefore adjust their legislation to assume all the obligations flowing from EU membership from the date of their effective accession.

In Romania it may be argued that the provisions on the burden of proof are not in full compliance with the Directives, as the 2006 amendments to the 2000 Act<sup>2</sup> introduced the concept of 'sharing the burden of proof' meaning that 'the person interested has the obligation to prove the existence of facts which allow presumption of direct or indirect discrimination and the person against whom the complaint was filed has the duty to prove that the facts do not amount to discrimination.'<sup>3</sup> Proposed amendments in 2010 dilute even more the sharing of the burden of proof and maintain as mandatory the duty of the plaintiff to provide information regarding the discrimination while making optional the correlative duty of the defendant. While the interpretation by the national equality body of this provision tends to result in compliance with the Directives, judicial interpretation has varied and some courts have interpreted it in such a manner as to place an unreasonable burden on the victim, thus conflicting with the provisions of the Directives that relate to burden of proof. In a 2009 decision,<sup>4</sup> the National Commission for Combating Discrimination (NCCD) extensively discussed the theoretical aspects of the burden of proof, referring to prior leading cases in which the NCCD stated that 'the defined procedure for the shift in the burden of proof is more nuanced than the wording would suggest (...) and, in practice, the principle implies dividing the onus of the evidence and a transfer to the defendant of those elements related to him/her, in relation to the facts of the case.'<sup>5</sup> The NCCD added that 'it cannot be interpreted that this is an absolute exemption from the procedural rules of *onus probandi incumbit actori*, reversing the burden of proof completely, as the very legal provision from Article 20 (6) specifies the duties of the parties by sharing the burden of proof between the plaintiff and the defendant'.

National case law is therefore starting to reveal a varied approach to what may be taken to constitute 'facts from which it may be presumed that there has been direct or indirect discrimination.' The meaning of this phrase is one of several questions on the burden of proof put before the European Court of Justice in the case of C-54/07 *Centrum voor gelijkheid van kansen en voor racismebestrijding v NV Firma Feryn*, which was decided by the Court on 1 July 2008. Nevertheless, the multiplicity of interpretations may create serious difficulties in access to justice and lead to a two-tiered system within the EU.

For instance, cases before the Equal Treatment Commission in the Netherlands (which applies the reversal of burden of proof on a voluntary basis) have taken a broad approach by asking the employer to prove that the applicant was totally able to perform the main tasks required for the job so as to rebut allegations of discriminatory recruitment behaviour.<sup>6</sup>

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<sup>2</sup>Legea nr. 324/2006 pentru modificarea și completarea Ordonanței Guvernului nr. 137/2000 privind prevenirea și sancționarea tuturor formelor de discriminare [Law 324/2006 for the amendment of Government Ordinance 137/2000 regarding prevention of and punishment for of all forms of discrimination, (20.07.2006).]

<sup>3</sup>Article 20(6) of the Governmental Ordinance 137/2000.

<sup>4</sup>NCCD, Decision 77 from 03.02.2009.

<sup>5</sup>NCCD, *RomaniCRISS v. C.P.T.*, Decision 180 from 17.07.2007.

<sup>6</sup>Equal Treatment Commission Opinion of 13 May 2011 (ECT 2011-78).

In addition, there is a lack of awareness among judges, lawyers and legal practitioners of the reversal and its concrete application. For instance, in Greece the EU rules on the burden of proof have been transposed, though only by special legislation implementing the Directives. They have not been included in the Codes of Civil and Administrative Procedure which means that the rules are, in practical terms, almost unknown. Similarly in Latvia and Lithuania, conflicting norms undermine the effectiveness of the reversal of the burden of proof. Under the Latvian Civil Procedural Law, the burden of proof is equally imposed on both parties. The Lithuanian Ombudsperson is not bound by the Civil Procedural Code, which nonetheless stipulates as a general rule that the burden of proof falls upon the applicant.<sup>7</sup> The Government is aware that amendments should be adopted in order to bring more legal certainty, and has initiated an amendment to introduce the shift in the burden of proof in discrimination cases.

Another point of concern is that during proceedings the judge or specialised body's opinion or judgment routinely addresses the establishment of the *prima facie* case and the shift together, which in practice places the burden on the applicant to prove the case fully rather than simply *prima facie*. Meanwhile, other cases show that the claimant must sometimes establish a significant number of elements before the shift occurs. Evidence may be oral, and hence difficult to establish in court. Evidence based on situation testing may be useful in certain cases, and is accepted in several countries such as Belgium, but may also show limits.

The current regime for shift in burden of proof introduced by EU anti-discrimination law and subsequent discrepancies throughout the EU is not satisfactory. A legitimate question that one could ask is whether the *prima facie* rule should be redesigned in such a way that it would no longer constitute an obstacle to victims and their representatives bringing cases to court. Countries outside the EU, such as Australia, have traditionally looked at EU practice but are there valid models or alternatives for the EU to get its own inspiration from?

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<sup>7</sup>Lithuania/Lietuvos Respublikos Civilinio proceso kodekso patvirtinimo, įsigaliojimo ir įgyvendinimo įstatymas. Civilinio proceso Kodeksas. Official publication *Valstybės Žinios*, 2002, Nr. 36-13640. Available in Lithuanian at: [http://www3.lrs.lt/pls/inter3/dokpaieska.showdoc\\_l?p\\_id=332205](http://www3.lrs.lt/pls/inter3/dokpaieska.showdoc_l?p_id=332205).