

Position No. 10.007/1/2006 TT
of the Advisory Board of Equal Treatment
on the division of the burden of proof
January 13, 2006

The purpose of proving the exemption is to provide an advantage compared to the general rules of proof for the benefit of the demand claimant. The burden of proving the relation of cause and effect cannot be required to be borne by the claimant, in addition to proving the two conditions that are prescribed in the legal provision (Points a) and b) of Paragraph (1) of Article 19 of the Equal Treatment Act), because if it would be so, then the rules facilitating proof included in Article 19 of the Equal Treatment Act (hereinafter called: the Equal Treatment Act) would become void, and instead of them the general rules of proof would prevail, and by this, the purpose of proving the exemption would fail.

Act CXXV of 2003 on equal treatment and the promotion of equal opportunities (Equal Treatment Act), which took effect on the day of January 27, 2003, introduced different rules of proof in the procedures that belong under its effect compared to the previous ones.

Keeping in mind the matching of legal practice to the legal rules of the community and the case-law of the European Court, and the facilitation of the stabilisation of domestic law application, the Equal Treatment Advisory Board issues the following position:

In community law, the division of the burden of proof is a right that was established by judges. It appeared first in the verdicts of the European Court that referred to indirect sexual discrimination (see e.g. *Enderby v Frenchay Health Authority*, C-127/92 ECJ) with the purpose of facilitating the enforcement of the right to equal treatment at court. It was taken over from the case-law by Directive 97/80/EC of the European Council on the burden of proof in cases of discrimination based on sex. Subsequently, it became a part of Directive 2000/43/EC on implementing the principle of equal treatment between persons irrespective of racial or ethnic origin (Article 8) and also of Directive 2000/78/EC on establishing a general framework for equal treatment in employment and occupation (Article 10). Adopting these community legal materials required the introduction of divided burden of proof in the domestic law.

According to Paragraph (1) of Article 50 of Act CXL of 2004 on the general rules of public administration procedures and services (hereinafter called: the Ket), the Equal Treatment Authority (ETA) is obliged to clarify those facts of the case that are needed for bringing its decision. If the data available are not sufficient for this, then ex officio or upon a request, it is to conduct a proving procedure. According to Paragraph (3), it is not necessary to prove facts that are officially known to ETA and facts that are known to the public.

According to Point b) of Paragraph (2) of Article 3 of the Ket, ETA, ex officio, is to establish the facts of the case and to determine the method and scope of proving, and in the course of this, it is not tied to the proving initiatives of the clients, and at the same time, in the course of clarifying the facts of the case, it has to take into consideration all the circumstances that are relevant from the aspect of the case.

Article 19 of Act CXXV of 2003 on equal treatment and the promotion of equal opportunities (Equal Treatment Act) prescribes special rules of proof for procedures that are instigated because the requirement of equal treatment was violated. These rules have to be applied in the case of the procedures of the ETA as well.

According to the argument of the minister, the act prescribes that either the injured party or the party entitled to *actio popularis* is to prove that the injured person or group has suffered a disadvantage, and the injured person or group has some protected characteristics determined in Article 8 of the act. In the course of proving this latter condition, that right of the injured person or group has to be observed, which is connected to the free choice and declaration of their self-identity.

If the injured person provided a successful proof, then the person drawn under procedure may conduct an exemption proving: it is exempted from the establishment of violation of the right, if it can prove that it observed the requirement of equal treatment or in respect of the given legal relationship it was not obliged to observe it.

Article 19 of the Equal Treatment Act phrases categorically: the injured party has to prove only the mentioned two facts, and with this it already meets the part of burden of proof that is its obligation, in the subsequent phase of the procedure the burden of proof reverses.

Dividing the burden of proof in this regard means that if the claimant can prove the disadvantage and that it has some protected characteristics, but cannot prove the relation of cause and effect between the protected characteristics and the disadvantage, then the burden that this latter one is not proved shall not be borne by claimant, because of the reversing of the burden of proof. The person drawn under procedure may be exempted from under the responsibility – that is it may exempt itself – if it proves that there is no relation of cause and effect between the two facts: in this case, the person drawn under procedure is to successfully prove that it had observed the requirement of equal treatment. At the same time, the person drawn under procedure also has the opportunity, with acknowledging the relationship of cause and effect, to prove that it was not obliged to observe the requirement of equal treatment. The person drawn under procedure may meet its latter obligation by pointing out the specific legal provision which allows for differentiation, or by certifying that it has a rational reason for applying differentiation according to objective assessment related directly to the given legal relationship.

The purpose of the exemption proving is to provide an advantage for the benefit of the claimant compared to the general rules of proof. The burden of proving the relation of cause and effect cannot be required to be borne by the claimant, in addition to proving the two conditions that are prescribed in the legal provision, because if it would be so, then the rules facilitating the proving included in Article 19 of the Equal Treatment Act would become void, and instead of them the general proving rules would prevail, and by this, the purpose of exemption proving would fail.

According to Paragraph (2) of Article 7 of the Equal Treatment Act, in general, that behaviour, measure, condition, negligence, instruction or practice (disposition), which is based on the protected characteristics does not injure the requirement of equal treatment, which according to objective assessment has a rational reason related to the given legal relationship.

Moreover, a general reason of exemption is the positive discrimination as regulated in Article 11 of the Equal Treatment Act. This may be such a provision, which is aimed at the elimination of inequality of opportunities based on an objective assessment of an expressly identified social group, provided it meets the conditions that are included in the quoted provision.

The Equal Treatment Act determines also such special exemption reasons, which are sector specific, and which further narrow the exemption opportunities that are defined in the general rules. Such sector specific exemption reasons – which extremely narrow down the general exemption reasons – are phrased in the area of employment by Articles 22 and 23 of the Equal Treatment Act. According to Point a) of Article 22 of the Equal Treatment Act, in an employment relationship it is only possible to be exempt from under the responsibility of equal treatment by proving the existence of an employment condition that essentially determines the characteristics of the organisation, which is defined in

community law as a real and determining employment condition, and according to Point b) which is based on religious belief or ethnic origin.

Article 23 of the Equal Treatment Act allows positive discrimination for a certain range of employees as a possible reason of exemption in the area of employment. Paragraph (2) of Article 25 based on the protected characteristics allows for some groups of the society extra benefits within the frameworks of the social and health care system.

In the area of education and training, according to Paragraph (1) of Article 28 of the Equal Treatment Act, voluntarily organised "non co-educated" education may be a reason of exemption, in case due to this the participants of the education do not suffer any disadvantage. In case there are segregated classes or groups it may be also an exemption reason according to Paragraph (2) of Article 28 if there is a voluntarily organised religious or other ideological conviction based education, and if there is a minority or nationality education, provided that due to this, the participants do not suffer any disadvantage and the education meets the prescriptions of the state.

A legal provision may allow exemption when determining the admission conditions of education or the evaluation of the admission applications, on the basis of Paragraph (3) of Article 28 of the Equal Treatment Act, in respect of education institutions that are for preserving linguistic or cultural self-identity, and which are clerical, minority or nationality education institutions. And finally, according to Article 29 of the Equal Treatment Act, an advantage may be provided for a certain class of people participating in education within the school system and outside the school system.

As regards positive discrimination, as an exemption reason, it is important that it may be only based on an Act, a Government Decree that is issued on the basis of the authorisation of an Act, or in the case of employment on the provisions of the collective contract. It is important to examine whether these norms do actually refer to the group that is determined in the relevant provision of the Equal Treatment Act.

The rules of allocating the burden of proof phrased in Article 19 of the Equal Treatment Act do not refer to criminal procedures and procedures of minor offences.

The rules of dividing the burden of proof, as a special rule in the cases that belong under the effect of the Equal Treatment Act, are also enforced in the public administration authority procedure. Although the ETA, ex officio, has to establish the facts of the case and it is obliged to clarify the facts of the case, however, when obtaining the proofs, it is the obligation of the clients in co-operation with the ETA to allow it to meet its obligations concerning the clarification of the facts of the case.

In the scope of co-operating with the clients it is important that, although the ETA is not tied to the proving initiatives of the clients, nevertheless, it is able to take into consideration all the circumstances relevant from the aspect of the case, if they are presented to the clients.

From the phrasing of Article 19 of the Equal Treatment Act it is unambiguous that from the aspect of proving the disadvantage and the protected property the co-operation obligation of the injured client is of special significance, while from the aspect of the scope of exemption – that is in the course of proving that the person drawn under procedure had observed or, in respect of the given legal relationship, was not obliged to observe the requirement of equal treatment – the co-operation of the person drawn under procedure is important.

In the scope of proving exemption it is of special significance for the party involved in the procedure to draw the attention of the ETA to the circumstances that are considered by it important from the aspect of the case and to present its proving initiatives in time. Determining the method of proving and its scope is the task of the ETA ex officio, however, since the documents and internal registrations related to the operation of the parties involved in the procedure may be significantly different by individuals, the parties involved

in the procedure have to act as actively as possible within the frameworks of co-operation in the course of determining the proofs exactly. In order to allow the parties involved to meet these obligation of theirs, it seems to be needed for ETA to inform them about the range of facts that are to be proven and the rules of dividing the burden of proof.

The Ket determines the consequences of breaching the co-operation obligation of the clients concerning the particular proofs. Thus for example, if client does not make a statement upon being summoned to do so, then the ETA, according to Paragraph (1) of Article 51, may bring its decision on the basis of the available proofs.

The injured party does not have to prove the occurrence of some kind of legal disadvantage, it has to only prove the occurrence of a disadvantage in the everyday sense. Therefore, the injured party does not have to prove that a treatment applied in respect of the injured party had violated a specific legal regulation, it has to only prove that it suffered a disadvantage from any of the aspects.

In the course of evaluating the proofs, the applicable case-law of the Supreme Court (verdicts BH. 2004. 255 and Mfv.I.10.642/2004/3) has to be taken into consideration. According to the latter decision "in order to appropriately enforce the specific rules of proving, due to the often contradicting statements and proofs, the judgement of all the proofs one by one and jointly with comparing them to each other, with taking into consideration the aspects of rationality, correspondence to reality and logics, has a special significance, and in the course of this, considering the indirect proofs cannot be omitted either."

Budapest, January 13, 2006

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